

FIRST DIVISION
NATIONAL RAILROAD ADJUSTMENT BOARD

39 S. LaSalle St., Chicago 3, Illinois

The First Division consisted of the regular members and in addition Referee Robt. G. Simmons when award was rendered.

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS

BROTHERHOOD OF RAILROAD TRAINMEN

THE TENNESSEE CENTRAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of Conductor H. O. Simons for reinstatement with seniority rights unimpaired and pay for all time lost, discharged April 30, 1940.

FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The rule here involved, Article 31, is one that protects the substantive rights of the employes under their agreements with the carrier. It must be complied with substantially and in good faith before the penalties it provides may be exacted of the employe. The employe here was discharged from the service of the carrier in violation of his rights under the rule in several particulars.

The conductor appears to have been, in the mind of the management, charged and found guilty of three offenses. First, delay in making remittance of cash fare collections. Second, with carrying a passenger past his destination. Third, unbecoming conduct with reference to a lady passenger.

The rule provides certain requirements that must be met in the conduct of the investigation.

First "the accused shall be duly apprised within ten days after knowledge of the occurrence, the nature of the charge or charges that are to be brought against him." This calls for a clear statement of the charges that are to be investigated to be made to the employe so that he may know what he and his representative (provided for in the rule) must be prepared to admit, deny or explain. It should be so worded that the employe may know that an investigation **under the rule** is to be had. A notice to "see me in regard to remittances of cash fares," a "talk" with the employe (see first question by Mr. Waddell to Mr. Simon in examination of April 27, 1940) or a request over the telephone that the employe "come to the office in connection" with a

complaint is not a substantial compliance with a material element of the rule. The requirement of the rule as to apprising the employe of the nature of the charge or charges to be investigated was not met in any of the three matters investigated.

The rule also requires that this notice shall be given to the employe "within 10 days after knowledge of the occurrence" has been had by the carrier. In this instance the investigation as to delay in making cash fare remittances covered the period from November 1939 to and including March 1940. Clearly the carrier had knowledge of this matter (with the exception of the remittance due and not made on March 31st) more than 10 days prior to the "please see me" notice of April 2, 1940.

The situation with reference to the charges of the lady passenger appear to be a more flagrant violation of the "within ten days after knowledge of the occurrence" provision. The affidavit of the passenger was received by the carrier not later than April 12th (see Mr. Waddell's statement at beginning of investigation on April 27, 1940) and was apparently not called to the attention of the accused employe until 15 days thereafter.

The rule further provides that at the investigation "all the evidence in the case will be submitted." That, as this Division has held, means evidence favorable to as well as against the accused employe will be submitted. In this instance the accused named employes of the carrier and others who were present in the train at the time the lady passenger alleged misconduct occurred. These should have been, but were not called.

The rule calls for the record to be "authenticated by both parties." Compliance was not had with this provision of the rule.

The rule further provides that the accused will be permitted to hear all the evidence submitted. This provision was violated in a number of particulars. The statement of Flagman Duff was taken on April 5, 1940, without the presence of the accused, and without the opportunity being given to the accused to examine him as to statements made. The ex parte affidavit of the lady passenger is subject to the same criticism. The investigating officer also indicated that he was considering as evidence against the accused, "reports," hearsay, rumors. None of these matters should have been received or considered by the investigating officer.

The rule provides that the accused employe may be represented by a fellow employe to be selected by the accused. The rule contemplates that there will be time for the accused to select the representative and prepare for trial. Here the investigating officer proceeded without permitting the accused to either ask for time or select a representative. He was given neither time nor opportunity to secure witnesses for his defense.

Without discussing the proceeding further we find that Conductor Simon was not accorded the investigation contemplated by the rule. The failure of the carrier to comply with the requirements of the rule nullifies the action taken and the penalty imposed.

The claim is allowed, the employe to be reinstated with full pay for all time lost from the date he was suspended down to June 12, 1940, when his full annuity under the Railroad Retirement Act became effective.

AWARD

Claim sustained per Findings.

BY ORDER OF FIRST DIVISION
NATIONAL RAILROAD ADJUSTMENT BOARD

ATTEST: (Sgd.) T. S. McFarland
Secretary

Dated at Chicago, Illinois, this 19th day of July, 1943.