Award 19119

Docket 32358

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

39 South La Salle Street, Chicago 3, Illinois

With Referee John Sembower

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS

FORT WORTH AND DENVER RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim is made in favor of Conductor W. B. Hill for difference in earnings as brakeman and what he would have earned as conductor, from August 21, 1953, until reinstated as conductor, with all prior rights and privileges."

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Claimant conductor asks reinstatement with payment for the difference in earnings he would have made as a conductor, over what he was paid as a brakeman, since his demotion following an investigation into the derailment of two cars pushed over a derail.

It is contended on behalf of claimant that he did not receive proper notice of the hearing; that he was not properly apprised of the discipline assessed, and that the discipline was "excessive, unreasonable, and an abuse of discretion."

At the opening of the hearing, claimant answered affirmatively that he was "ready for investigation"; had received a "copy of the notice of investigation"; had "heard (the) purpose of the investigation", and was "ready for investigation", but at its close, his representative objected that he was "protesting Conductor Hill's being charged with any rule violations, because in his notice he is not charged with rule violations, but with his responsibility in connection with the derailment."

The time to have made objection as to the form of notice was at the start of the hearing, since it then would constitute, in a sense, a "special appear-

ance". Nevertheless, in Award 19043, the Division has said that "failure on the part of the carrier to give proper notice nullifies the proceedings", and accordingly we have weighed the objection carefully.

Claimant cites Awards 11879, 11880, and 11909, all arising on this same property and all rendered with the aid of Referee Leverett Edwards, wherein claims were sustained, but in those instances no written notice of investigation had been given, although the rules required such. Again, the Division in Award 10871, involving a claim arising on this property, ordered reinstatement without back pay, because no written notice had been given. In the instant case, however, written notice was given.

In Award 16266, Referee E. B. Chappell assisting, the Division denied a claim involving a notice in language virtually identical with that of the notice given in this instance, citing Award 5253, saying that: "The charges preferred informed the employe of the acts and conduct complained of, and the time and place of their occurrence. This is all that is required." Since the form of notice then was a highlighted issue on this property and that award was made April 20, 1953, it seems probable that when the notice in the instant case was written on August 9, 1953, or thereabouts, the carrier may have expressly followed the Division's approved language, and it would indeed be disconcerting if at this date, six years later, the Division were to say that the language was insufficient. Also, in our recent Award 18803, Referee Mortimer Stone assisting, we sustained a notice in the same form.

However, the Division's latest expression on this highly important subject—important because the vice of defendants' being prosecuted on so-called "open charges" is so soundly recognized in the courts—is in Award 19043, the Division saying through Referee Edward M. Sharpe that, "We note that the notice sent to claimants fails to apprise them of any specific violation of duty. Such notice was to the effect that an investigation would be had 'to determine facts and place responsibility.' The above notice fails to charge claimants with any violation of duty in connection with the collision. It follows that the failure on the part of the carrier to give a proper notice nullifies the proceedings. The claims should be sustained."

In addition to the fact that the Division interprets each applicable rule as it relates to the particular parties to the agreement on specific properties and must endeavor to keep these consistent as regards those same parties in later similar situations, it will be noted that the form of the notice figuring in the instant case, also that in Award 16266, and also that in Award 18803, stated that the investigation would be held "for the purpose of ascertaining the facts and determining **your** responsibility" (emphasis added), leaving no room for doubt on the employe's part that he would have to defend himself on the facts set out, whereas in Award 19043, the notice simply read that the investigation was "to determine facts and place responsibility", from which it might be inferred that only an abstract or academic inquiry was in view. So in the light of the foregoing, we must say that the form of the notice in this instance, and on this property, was sufficient.

Now, as to the rule requiring that "the result of the investigation shall be made known within ten days." The record shows that on August 21, 1953, nine days after the hearing, claimant received a letter from the Superintendent saying that, "Effective this date you are being demoted . . . copy of formal entry to cover will be provided you later." Then on August 24, 1953, claimant received a further written communication, this time from the General Manager, saying that the employment entry was to be made as of August 21, 1953.

Although claimant insists that the decision rested with the General Manager and not the Superintendent, there can be no doubt that acts of the Superintendent would be imputed to the carrier. Besides the rule merely says "shall be made known", and since the August 24, 1953 letter refers to the action having been taken as of August 21, 1953, this appears to conform with the rule.

It was proper to consider claimant's personnel record in connection solely with fixing the degree of discipline. That it is a good record up to August 21, 1953, when two entries were made, cannot be denied, with a single infraction, arising from two box cars getting away and derailing an empty tank car on September 24, 1940, as the only blemish shown thereon since initial employment May 14, 1923. Carrier insists, however, that beginning with August 5, 1953, a rash of infractions developed which destroyed its confidence in employe's ability to continue to act as a conductor, including a censure for a car derailed when a switch was thrown under it while it was in motion on August 5, 1953; the incident occurring August 8, 1953 which gave rise to this claim; and then, close on its heels, another censure administered for claimant's failure on August 9, 1953 to give proper protection to a train stopped on the main line.

We cannot, of course, consider the last-named incident, because it arose after the assessment of the discipline. The fact remains, however, that in the record, the claimant admitted violation of Rule 908, his only explanation being that he did not order the brakeman to ride the leading car into the track because he thought the track would hold the cars. Allowing for the fact that there may be conscientious differences of opinion as to the measure of discipline to be inflicted in a given instance, and lacking the opportunity which carrier had to observe the demeanor of witnesses at the investigation, including that of claimant, we must not merely substitute our judgment for the carrier's without the record showing a lack of substantial evidence to support the discipline, and therefore the claim must be denied.

AWARD: Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of April 1959.