

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**THE DELAWARE AND HUDSON RAILROAD
CORPORATION**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That the Carrier violated Rule 35 (a) of Agreement in effect by removing from the service Wilford J. Gosselin, trackman, Section K-I, Champlain Division, on August 2, 1944 without according him a hearing;

(2) That Wilford J. Gosselin shall be returned to the service as a trackman of Section K-I, Champlain Division, with seniority date of July 17, 1944 and that he be allowed pay at trackman's rate for all the time improperly held out of the service since August 2, 1944.

EMPLOYES' STATEMENT OF FACTS: On July 17, 1944 Wilford J. Gosselin started to work as a trackman on Section K-I, Champlain Division, and continued working in that capacity until August 2, 1944 when he was dismissed from the service without being accorded a hearing in conformity with Schedule Rule 35 (a).

The Agreement in effect between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Rule 35 (a) of Agreement in effect between the Delaware and Hudson Railroad Corporation and the Brotherhood of Maintenance of Way Employees reads:

"Rule 35 (a). An employe will not be disciplined or dismissed without a hearing before the proper official, at which hearing he may be accompanied by a representative of his choice. He may, however, be held out of the service pending such hearing. The hearing will be held within ten (10) days and a decision will be rendered within ten (10) days after the hearing. Stenographic report of investigation and hearing, when one is made, will be furnished upon request."

As will be observed, Schedule Rule 35 (a) specifically provides that an employe will not be disciplined or dismissed without a hearing. That is a positive and unmistakable declaration agreed upon between the Carrier and its Employees. Under the application of that rule the Carrier does not have the right to dismiss any employe coming within the scope of the Maintenance of Way Agreement without according him a hearing to develop the reason or

charges that may be lodged against such an employe. That we submit as the meaning and intent of Rule 35 (a).

As stated in Employes' Statement of Facts, on August 2, 1944 the Carrier dismissed from the service Trackman Wilfred J. Gosselin without according him a hearing to which he was entitled, as prescribed in Schedule Rule 35 (a). By thus dismissing Trackman Gosselin from the service without according him a hearing, the Carrier violated Schedule Rule 35 (a). We therefore maintain that in conformity with the claim, Wilfred J. Gosselin shall be restored to the service and paid for time lost. We maintain that this claim is just and reasonable and should be allowed.

CARRIER'S STATEMENT OF FACTS: Trackman Wilfred J. Gosselin, Jr. entered the service July 17, 1944 and was relieved August 2, 1944, account application not approved.

POSITION OF CARRIER: Under date of July 17, 1944 Wilfred J. Gosselin, Jr. applied for position as Trackman and completed standard Application Form 1968, copy submitted marked Exhibit "A". Following completion of application for employment, Mr. Gosselin was allowed to go to work on the same date as a probationary employe, pending approval or disapproval of his application. His application was not approved and he was relieved from the service August 2, 1944.

It is desired to call particular attention to the following language which is quoted from application form signed by Mr. Gosselin:

"I understand if employed, pending investigation of my application that such employment is probationary until said application is approved or rejected; that the written approval of the Assistant to the General Manager for Personnel must be obtained before I can be considered an accepted employe and further that the assignment or garnishment of wages is prohibited."

In signing Application Form 1968, Wilfred J. Gosselin, Jr. accepted employment as a probationary employe in accordance with the above quoted language. He was never a regular employe and therefore Rule 35 (a) of the Agreement covering Maintenance of Way Employes, under which claim is presented, would not be applicable.

Rule 35 (a) of Agreement covering Maintenance of Way Employes reads as follows:

"Rule 35 (a). An employe will not be disciplined or dismissed without a hearing before the proper official, at which hearing he may be accompanied by a representative of his choice. He may, however, be held out of the service pending such hearing. The hearing will be held within ten (10) days and a decision will be rendered within ten (10) days after the hearing. Stenographic report of investigation and hearing, when one is made, will be furnished upon request."

It will be noted that application of Trackman Gosselin was disapproved and he was relieved from service approximately 2 weeks after he completed his application. There can be no violation of Rule 35 (a) of Agreement covering Maintenance of Way Employes as this rule would not cover an employe whose application had not been approved and who was only working as a probationary employe, under conditions accepted when such employe completed and signed Application Form 1968.

OPINION OF BOARD: On July 17, 1944, Claimant filed his written application for a position as Trackman with the Carrier. He was permitted to go to work on the same day as a probationary employe during the pendency of the application. His application was not approved and he was relieved of his work on August 2, 1944. It is the contention of the Organization that Claimant became an employe and a party to the current Agreement when he was assigned to work on July 17, 1944. The Carrier contends that as Claim-

ant's application for employment was rejected, he never was an employee within the meaning of the current Agreement.

Claimant signed an application for employment containing the following provisions:

"I understand if employed, pending investigation of my application that such employment is probationary until said application is approved or rejected; that the written approval of the Assistant to the General Manager for Personnel must be obtained before I can be considered an accepted employee and further that the assignment or garnishment of wages is prohibited."

After the rejection of his application for employment, Claimant was summarily relieved from service without any attempt being made to comply with Rule 35 (a) of the current Agreement, which provides:

"An employee will not be disciplined or dismissed without a hearing before the proper official, at which hearing he may be accompanied by a representative of his choice. He may, however, be held out of the service pending such hearing. The hearing will be held within ten (10) days and a decision will be rendered within ten (10) days after the hearing. Stenographic report of investigation and hearing, when one is made, will be furnished upon request."

The claim resolves itself into the question whether Claimant was an employee within the scope of the current Agreement when he was relieved from service on August 2, 1944.

In our opinion Rule 35 (a) relates to discipline for some act of the employee after entering the service of the Carrier. It does not purport to extend to an investigation of the qualifications of an applicant for employment. The taking of written application for employment is a common practice of all carriers. The practice is in no wise restricted by the Agreement in the present case. Where the necessities of either the applicant or the carrier require the immediate service of such applicant, the carrier should not be deprived of its right to make the investigation that it otherwise would have made. While the Agreement provides that seniority commences with the induction of the applicant into service, it is conditional upon the approval of the application. The Organization urges that such a rule without limitation as to time for approval or rejection, would do the utmost harm in the maintenance of the collective agreement. The rule is, however, that in the absence of any time requirement for the disapproval of an application for employment, it will be construed as meaning that such action must be taken within a reasonable time or the employee will be deemed to have been accepted. In the present case, the Carrier rejected the application at the end of 17 days elapsed time. This is clearly within a reasonable time. We do not think this interpretation conflicts with the current Agreement and seems to be in line with Awards of other Divisions of the Board. See First Division Awards 3099, 6699 and 10,196. Also, Second Division Awards 866 and 956. Awards involving commitments made in the application which are in direct conflict with the collective agreement are, of course, unenforceable on the basis contended for by the Organization in the present case, but they have no application to the situation before us. No basis for a sustaining award exists.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 28th day of March, 1946.