

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roscoe G. Hornbeck, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

KANSAS CITY TERMINAL RAILWAY COMPANY

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

(a) Mail Handler Bert E. Hopkins was not advised of the precise charge against him as required by Rule 20 of the agreement between the parties, and;

(b) The investigation and decision resulting therefrom dismissing him from service was null and void, and;

(c) Bert E. Hopkins be reinstated in the service of the Carrier, his record cleared of the charge and that he be paid for all time lost as provided in ¹Rule 24 of the agreement between the parties retroactive to March 8, 1958.

OPINION OF BOARD: The charges against the employe Bert E. Hopkins, a Mail Handler of the Carrier, were set out in a letter addressed to him wherein it was stated that he was notified to appear at designated office, on date set out "for formal investigation to determine facts and place responsibility for your alleged violation between March 14, 1956 and March 8, 1958, of the following listed rules of the Kansas City Terminal Railway Company General Rules for Guidance of Employees—1952." Then follows:

"GENERAL NOTICE.

"Safety is of the first importance in the discharge of duty. In case of doubt the safe course must be taken.

¹ RULE 24—EXONERATION. If the final decision decrees that charges against the employe were not sustained, the record shall be cleared of the charges; if suspended or dismissed, the employe shall be reinstated and paid for all time lost, less amount earned elsewhere during suspension or dismissal.

"To enter or remain in the service is an assurance of willingness to obey the rules.

"The service demands the faithful, intelligent and courteous discharge of duty.

"GENERAL RULES.

"Numbers 4, 12, 13, 15, 23 and 35."

At the outset we may observe that this notice is not a charge of an express violation of the rules set out and to which reference is made by number, but is an expression of purpose by investigation to determine whether or not there had been a violation of any of the rules in any particular. Manifestly, this is not the office of a charge of an infraction of a rule, as is contemplated by Rule 20, of the controlling agreement. However, this irregularity would not materially affect the rights of the parties if all other requirements of the rule were met.

We learn from the briefs that General Rule No. 4 is to the effect that persons employed in any service of the Carrier are subject to the rules and special instructions.

Rule 12.—Recites that employes must use due care to avoid injuries to themselves and others, etc.:

"No officer of the company is required to request or require any employe to use defective tracks, cars, machinery, tools or appliances of any kind."

"The company does not require its employes to incur risks and directs them to exercise proper care and judgment in the use of tools and equipment * * *."

"Employes must inform themselves as to locations of structures or obstructions where clearances are close and use due care to avoid injury therefrom."

"They must expect the movement of trains in either direction."

Rule 13.—"Boisterous, profane or vulgar language, and gambling is forbidden. Civil, mannerly deportment while on duty or on company property is required of all employes in their dealings with the public, with their superordinates and each other. Courtesy and attention to patrons is demanded. Employes must not enter into altercations with any person, no matter what provocation may be given, but will make note of the facts and report to their immediate superiors. Employes who are insubordinate, dishonest, immoral or quarrelsome or who do not conduct themselves in such a manner and handle their personal obligations in such a way that the Company will not be subjected to suits, criticism or loss of goodwill, will not be retained in the service."

Rule 15.—"Constant presence of mind to insure safety to themselves and others is the primary duty of all employes, and they must exercise care to avoid injury to themselves and others.

"Foremen or other persons, in charge of work shall be responsible for the safety instructions of all men under them including men temporarily under them or borrowed from other departments or gangs."

Rule 23.—"Employees must obey instructions from the proper authority in matters pertaining to their respective branches of the service. They must not absent themselves from duty, exchange duties, or substitute other persons in their places without proper authority. They must report for duty as required and those subject to call for duty will be at their usual calling place or in event of emergency are absent from that calling place, leave information as to where they may be located."

Rule 35.—"Employees changing marital status, change of address, change of telephone number, etc., will promptly see that all interested parties within the department involved receive written notice of such change."

At the very beginning of the investigation hearing, and many times during its progress objections were noted, exceptions taken and finally, election not to testify was made by Mr. Hopkins because of the lack of precise charges and because they had not been given to him in writing before the hearing. Notwithstanding, the investigation was carried on in the face of the protests of Mr. Hopkins that his rights were being denied.

It should be noted that the whole case against Mr. Hopkins was made by the introduction of company records by an officer of the Carrier and upon interrogation of Mr. Hopkins.

The hearing developed that Mr. Hopkins had been off duty in the years 1956, 1957 and 1958, more than a hundred times, some whole days and some parts of days, some of which were reported and others, numbering 32, it was claimed, were not reported. The Carrier developed from the record that Mr. Hopkins had been involved in five accidents while in the service of the company from which he had suffered injuries, the purpose of which, no doubt, was to prove that he had violated General Safety rules and General Rules 12 and 15. Next, the inquiry was related to the marital status of the employe, that he was divorced, why it was that his children were brought to his home by his former wife, whether or not he had contributed to the support of his children and if he had violated a court support order and particularly that he did not report his true marital status to his employer. Also, that he had not properly reported the number of exemptions to which he should be entitled on his income tax. No effort was made to prove a violation of Rule 13.

The charge covered a period of almost two years. The proof developed many and manifold claims of infraction of general rules, defense to some of them would in their very nature require extended evidence and possibly expert testimony. The only way in which Mr. Hopkins could from the charges determine the specific acts involved would be to conjure up every conceivable situation in which he had been engaged in the period covered by the charge and prepare to defend himself against each and all such. He stated that he had a defense to each and all of the violations sought to be developed in the hearing.

It seems self evident that Rule 20, which provides: "At reasonable time prior to the investigation the employe shall be advised of the precise charge against him and given reasonable opportunity to secure the presence of necessary witnesses" was not observed in the presentation and handling of the charges against Mr. Hopkins.

It is not necessary to labor the questions of the precision of the charges or the failure to present them to Mr. Hopkins prior to investigation.

Rules adopted by the parties prescribing and controlling procedure formally adopted by the parties must be observed alike by them. The Carrier in the charge violated the plain and mandatory provisions of Rule 20 in the two particulars heretofore stated. That the employe knew and understood the rules invoked did not reflect at all on the question he raised as to the sufficiency of the charge or the timeliness of the notice.

The Carrier urges that, if the charge may be said not to conform to the controlling rule, Mr. Hopkins was not prejudiced because it made an offer at the hearing that he be given time to prepare and offer his defense to the charges developed. But the rule provides that the notice of the charge shall be given at a reasonable time before the investigation, not during or after and it is the intentment that the employe charged shall have ample time before the hearing to prepare his defense to the specific acts which it is claimed constitute a violation of the rule.

It would be difficult to conceive a more general charge than found here. The safety rules could be violated in hundreds of ways. The particular manner in which they were claimed to have been violated were known to the Carrier but not to Mr. Hopkins before the hearing. Whether or not the safety rules were infringed in the accidents wherein Mr. Hopkins was injured, in that he did not use due care for his own safety, in their very nature would take on a wide and detailed range of testimony, if defense was developed.

It clearly appears that the controlling rule was violated by the Carrier in the particulars set up in the claim of The Organization to the prejudice of Mr. Hopkins and that, inasmuch as there was no proper charge lodged against or served upon him before the investigation, to which he saved timely objection, the whole proceeding wherein he was found to be chargeable with certain violations of rules was invalid and his discharge from the service of the Carrier unauthorized.

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 Employe involved in this dispute are respectively Carrier and Employe 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 between the parties was violated,

AWARD

In favor of the System Committee in all three branches of its claim. Mr. Hopkins will be restored to his position with the Carrier which he held prior to the charges preferred against him, with seniority rights unimpaired and

reimbursed for the net loss he has suffered in earnings by reason of his improper dismissal from the service of the Carrier.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: F. P. Morse
Acting Secretary

Dated at Chicago, Illinois, this 29th day of September, 1959.