

NATIONAL RAILROAD ADJUSTMENT BOARD**THIRD DIVISION**

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:**TRANSPORTATION-COMMUNICATION EMPLOYES UNION
(Formerly The Order of Railroad Telegraphers)****SOUTHERN RAILWAY COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union (formerly The Order of Railroad Telegraphers) on the Southern Railway, that:

1. Carrier violated the terms of the Telegraphers' Agreement when on January 3, 1964, Mr. M. G. Calvert, Claimant, was held out of service of the Carrier, and continued that violation on January 29, 1964, when he was dismissed from the service of the Carrier, without just cause.

2. For that violation, Carrier shall restore Mr. Calvert to the service of the Company, with all rights and seniority unimpaired and shall compensate him with payment for all time lost, commencing with Saturday, January 4, 1964.

OPINION OF BOARD: This is a disciplinary case involving the dismissal from Carrier's service of M. G. Calvert, relief clerk-telegrapher for allegedly selling certain tickets at Gainesville, Georgia, and Gastonia, North Carolina, during the period of July 17 through November 23, 1963, and not die dating them and for failure to report such tickets.

The investigation was held on January 3, 1964 and resumed on two subsequent dates, January 11 and January 25, 1964. Following the investigation, Carrier advised Claimant, January 29, 1964 of his dismissal from service "... for selling tickets (listed in investigation notice and dismissal letter) and not die dating them, and for your failure to report the tickets, as required by Southern Railway Company."

The issues presented to the Board are:

- 1) Sufficiency of the charge dated December 31, 1963.
- 2) Was Claimant afforded a fair and impartial hearing in accordance with Rule 29(a) of the effective agreement and;
- 3) If evidence introduced at investigation was sufficient probative value to find the Claimant guilty of the offense with which charged.

The pertinent portions of the Agreement with which we are concerned are:

"Rule 29—Investigations and Discipline

"(a) Employees will not be disciplined without first being given a fair and impartial investigation or hearing, which shall be held within ten days if practicable; provided, however, that this rule shall not be construed to prevent the suspension of an employee in instances considered by the management of a nature requiring immediate action pending formal investigation or hearing.

"(b) An employee notified to attend an investigation or hearing in which he is involved shall be advised in writing the nature of the charges against him and shall be given a reasonable time in which to secure witnesses in his behalf and arrange for the presence of his representatives.

* * * * *

"(g) At the hearing or on an appeal, the employee may be assisted by one or more duly accredited representatives. The term 'duly accredited representative' is understood to mean the General Chairman, the Local Chairman, or an employee designated by the General Chairman."

Considering the first issue we note that Claimant was sent and acknowledged receipt of the following letter, dated December 31, 1963, as follows:

"Please arrange to report to my office for formal investigation 9:30 A. M., Friday, January 3, 1964, to develop the facts concerning your selling tickets and not die dating them, also for your failure to report these tickets, as listed below:

Form 121—86070, Gainesville to Washington, Wed., July 17, 1963,
Form 121—860618, Gainesville to Washington, Wed., Sept. 11, 1963,
Form 121—860642, Gainesville to Washington, Wed., Oct. 9, 1963,
Form 121—919896, Gainesville to Washington, Wed. Nov. 6, 1963.
Form 221—377860, Gastonia to Charlottesville, Va., Sun., Oct. 6, 1963,
Form 221—377861, Gastonia to Charlottesville, Va., Sun., Oct. 6, 1963,
Form 142—312740, Gastonia to Atlanta, and return, Sun., Oct. 13, 1963,
Form 122—327476, Gastonia to Baltimore, Sat., Nov. 23, 1963.

Please arrange to bring any qualified witnesses and/or representatives to this investigation you so desire."

We believe the record clearly indicates that the notice of charge, dated December 31, 1963, was sufficiently precise to apprise him and his representative of the nature of offense, occurring on specific dates, so as to enable Claimant to prepare his defense. Prior to notice of investigation he had been interviewed on December 18, 1963, by Carrier's Auditors in regards to missing tickets being sold, not reported or die dated, resulting in a cash shortage both at Gainesville and Gastonia. This interview, plus the notice of specific dates apprised him of the charge he was being investigated and gave him ample opportunity to prepare his defense. Argument is advanced that said notice did not specify or allege a violation of a specific rule within the Agreement that Claimant violated, but this omission standing alone, was not prejudicial error. Absent a special rule requirement, notice so worded as in this case, meets the requirements as set forth in Rule 29(b) of the effective agreement. See Award 11170 (Coburn). By not raising a timely objection to the sufficiency of Carrier's notice at the outset of the hearings, would constitute a waiver of such right, therefore, the Employees may not be heard to complain now.

The second issue—was Claimant afforded a fair and impartial hearing in accordance with Rule 29(a) of the effective Agreement? We so find. The Board has reviewed the Record and Transcript of the hearing and find that said hearing was conducted with due regard of Claimant's procedural rights. The hearing was conducted by the Carrier's Representative in a fair and impartial manner. It is discretionary with the Carrier's Representative who conducts a hearing whether or not he will "invoke the rule" (to have witnesses without the hearing of a witness testifying) when requested by the Claimant or his representative, therefore, no reversible error was committed by the Carrier by its failure to "invoke the rule." There is no such language or terms in the Agreement of Rule 29 that requires the exclusion of witnesses from the hearing room during the testimony of other witnesses. Claimant was accorded due process.

As to the third issue—if evidence introduced at investigation was sufficient probative value to find the Claimant guilty of the offense with which charged? The Board finds that the argument advanced by the Employee has no merit that Claimant was "Pre-judged" or made a "fall guy" from the evidence presented at the hearings. It is true that the transcript of the hearing reflects many conflicts and discrepancies in this case, but it is not the Board's function, when a case of this kind is here on appeal, to weigh the evidence, appraise the credibility of witnesses, nor substitute its judgment for that of the Carrier in the absence of a clear showing that Carrier's disciplinary action was motivated by bad faith, arbitrary, capricious, or discriminatory. If sufficient evidence of probative value, though, as in the case before us, is strictly circumstantial, such circumstantial evidence may be considered by this Board. See Awards 7657 (Carey) and 14066 (Rohman). It is not questioned that Claimant was dismissed from service upon circumstantial evidence, however, it was shown from testimony that Claimant was responsible for and had in his control certain numerical tickets, which he was accountable for plus the cash from the sale of said tickets to the Carrier; that on two of the seven days specifically alleged by the Carrier, Claimant, by his own admission, was the only ticket seller on duty and in control of both tickets and monies from the sale of certain numerical tickets, as alleged in the notice. It has never been necessary to catch one "in the act." Sufficient evidence, though circumstantial, if believed is evidence of sufficient probative value to find one guilty as charged.

Additional arguments were advanced that Carrier failed to sustain its Burden of Proof by not calling additional witnesses, such as, the conductor, at the hearing. We disagree. Rule 29(b) grants Claimant "reasonable time" in which to "secure witnesses" in his behalf. Nothing in the Agreement prevents or keeps Claimant from bolstering his own defense, either by interviewing Carrier's witnesses or securing his own to appear in his behalf at the hearing. As previously shown, Claimant had ample time prior to the hearing and was again offered this opportunity at the start of the proceedings, but he refused to act.

We find that the Claimant had a full, fair and impartial hearing, and although the evidence was circumstantial, it was of sufficient probative value to sustain the Carrier's dismissal of Claimant from service with just cause, and that its action was not motivated by bad faith, or was arbitrary, capricious or discriminatory.

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 Employes involved in this dispute are respectively Carrier and Employes 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: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 8th day of December, 1966.