



Award No. 18150
Docket No. CL-18772

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

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

THE INDIANAPOLIS UNION RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6822) that:

1. The Carrier violated the Clerks' Agreement when on October 30, 1969, it summarily dismissed Ralph Kekar, Indianapolis, Indiana, from service effective October 31, 1969.

2. Island Foreman, Ralph Kekar, shall now be reinstated to service of the Carrier with seniority and all other rights unimpaired.

3. Mr. Kekar shall now be compensated for all wages and other losses sustained account this summary dismissal.

4. Mr. Kekar's record shall be cleared of all alleged charges or allegations which are not proven and may have been recorded thereon as the result of the alleged notation named herein.

OPINION OF BOARD: Claimant was employed by Carrier on December 14, 1966. On October 22, 1969, he was verbally instructed by the Trainmaster: (1) to vacate his position and leave the property; (2) he was being withheld from service pending an investigation.

By letter dated October 24, 1969, Claimant was instructed to report on October 27, 1969, for a formal investigation, the charge reading:

"You have been charged with insubordination and failure to properly perform your duties as Island Foreman on October 22, 1969, position No. 53, thus causing a disruption in the mail unloading schedule."

The investigation was held on the appointed date. No record (transcript) of the proceedings was made. Following the hearing Carrier, by letter dated October 30, 1969, informed Claimant:

"You have been found guilty as charged and as of October 31, 1969, you are being discharged from the services of The Indianapolis Union Railway Company."

On November 3, 1969, the Local Chairman made demand on Carrier:

"The Local Protective Committee of BRAC does not agree with your decision; please comply with Rule 28 of our current rules and working agreement, so we may progress this matter further, per our current rules and working agreement." (Emphasis ours.)

The cited Rule reads:

"RULE 28.

RECORDS AT INVESTIGATIONS AND HEARINGS

A copy of all statements made a matter of record at the investigation or hearing will be furnished to the Local Chairman." (Emphasis ours.)

Carrier, by its nonfeasance — failure to make "all statements made a matter of record at the investigation or hearing" — could not comply with the demand. As a result, it prevented Claimant from perfecting his contractual right of appeal to Carrier's initial findings of guilt as charged and assessment of the penalty: "discharged". Consequently, we find that Claimant was denied due process.

Because in a discipline case: (1) an indispensable element is that the charged employe be afforded due process; and (2) the Carrier has the burden of proof — neither of which factors were satisfied in this case — we will sustain the Claim.

Carrier in its Submission has argued past practice on the property as a defense — 17 years of not transcribing discipline proceedings. Evidence of past practice is material in the interpretation and application of a rule only when the rule as agreed to is ambiguous. Rule 28 is not ambiguous. The proffered defense is without merit.

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

That the parties waived oral hearing;

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 Carrier did not afford Claimant due process.

That Carrier failed to satisfy its burden of proof.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of October 1970.

Keenan Printing Co., Chicago, Ill.

Printed in U.S.A.