

Award No. 5301

Docket No. 10218

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

The First Division consisted of the regular members and in addition Referee Robert G. Simmons when award was rendered.

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS

**KENTUCKY AND INDIANA TERMINAL RAILROAD
COMPANY**

STATEMENT OF CLAIM: Claim of Emergency Yard Conductor J. W. Stone, K. & I. T. R. R. Co., for reinstatement with seniority rights unimpaired and pay for each day lost since February 7, 1940, account of dismissal in violation of Yardmen's Agreement.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The Order of Railway Conductors, having been requested to represent the employe, have the right to do so.

This employe was charged with putting his engine "on spot" and causing unusual delay in switching. That the engine was "on spot" and unusual delay in switching followed was admitted. The employe's defense was that he was not physically fit to work; that he so advised his superior; that he asked leave of absence; that it was refused; that he was told to do the best he could; that he consulted a dentist who prescribed a medicine which was taken. The official who preferred the charge conducted the investigation. That he had a right to do. He restricted the evidence largely to that which sustained his charges. He refused to accept or consider a dentist's statement as to the physical condition of the employe. He refused to consult a dentist whose later statement shows that he prescribed a pain killing drug an overdose of which would cause "a sleepy, groggy condition, thus causing misconduct in a person so affected." The evidence shows that the employe on the night in question appeared "groggy" and "not normal." No effort was made by the investigating official to find out the cause of the employe's conduct. That official refused to accept evidence and to make the investigation that would have established the cause and a valid reason for the employe's conduct.

Article 19 provides that at the investigation "all evidence in the case will be submitted." That means that the evidence will be received and considered by the investigating official. Similar language was further construed in Award No. 5248.

The employe contends that he was discriminated against because all fellow employes were charged and all were in the room and heard each other testify. The rule does not require a segregation of witnesses. In the absence of a request it may be considered waived. The carrier has not certified to this Division all the evidence taken at the investigation. It should have been submitted. The employe waived a representative at the hearing. That he had a right to do. The absence of a representative for the employe should have caused the official conducting the hearing to have used care that facts favorable to the employe were developed to the same extent as those unfavorable. That he did not do. Neither did he offer to the employe an opportunity to examine the witnesses. That he should have done.

It is clear from this record that the employe has not had the fair and impartial investigation that the article contemplates.

The claim is allowed, the employe shall be reinstated with seniority rights unimpaired and pay for each day lost subsequent to his discharge beginning with the date that he can show he was physically fit to perform his duty in compliance with the operating rules of the carrier.

AWARD

Claim sustained per Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

ATTEST: (Sgd.) T. S. McFarland
Secretary

Dated at Chicago, Illinois, this 12th day of December, 1940.