

Award No. 8376

Docket No. 13697

FIRST DIVISION
NATIONAL RAILROAD ADJUSTMENT BOARD

39 S. LaSalle St., Chicago 3, Illinois

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

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

THE TEXAS AND PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of Engineer J. M. Simmons for reinstatement, with seniority unimpaired and pay for time lost, account being dismissed for alleged responsibility in connection with damage to boiler of Engine 300, near Mile Post 491, May 29, 1941.

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 only rule cited seems to be that in the correspondence of 1924 that engineers "will be held strictly accountable for failure to maintain required amount of water in boilers, etc." The carrier does not appear to contend that this makes the engineer an insurer, but rather seems to accept carelessness or negligence of the engineer as the basis of the liability.

There is not much question here but that this explosion occurred because of low water in the engine. The question then is was the engineer negligent in the performance of his duties so that this negligence was the cause of the water being low?

The M. D.-2 Bulletin effective January 1, 1941, provides: "To prevent damage to locomotives, required water level must be maintained to protect highest point of crown sheet and boiler." The test to be applied by the engineer is in the same bulletin as follows: "Observing of water glasses, together with frequent testing of gauge cocks is necessary as an assurance that water in boiler covers highest point of crown sheet under all service conditions." The evidence, taken at the investigation, of the engineer, fireman and pilot conductor shows, without contradiction, that those observations and tests were repeatedly made and proper indications shown. It also shows that the injectors were being used, watched and were apparently working. The carrier by calculations, undertakes to prove that this evidence is not true. Its figures, however, presuppose the proper functioning of the water plasses, gauge cocks, and injectors. The calculations could be just as well used to prove that the equipment was not properly functioning. The carrier bases its position that the equipment was in condition to function properly upon testimony as to the

engine's condition before the accident, and tests made after the accident, without the representatives of the employes being present to check the tests. That evidence is likewise the evidence of individuals.

If we reject the evidence of the three men in the cab, as the carrier members seem to think we should, then we have no evidence as to the handling of the engine immediately before the accident. Accept the evidence as to tests made of the equipment and we would then have proof that an engine, with equipment in proper condition, exploded because of low water. But we cannot say from that and no more that the engineer was negligent and that his negligence caused the accident.

There is also some basis for holding that the gauge cocks as installed on this engine would not properly indicate the water level. There is also some evidence that this accident might have occurred as a result of "foaming" water, even though that condition might not have been apparent to those operating the engine. The carrier submits an analysis of the water in the tank after the accident. To that it seems sufficient to observe that the tank did not explode.

No matter what theory we accept as the probable cause of this accident there still remains an entire lack of evidence as to what this engineer failed to do that he should have done or what he did that he should not have done.

Finally, in argument in the Division, it is urged that the carrier, by the rules, is the trial tribunal, that it has the duty to consider conflicting testimony to determine the credibility of witnesses, to consider their attitude and demeanor and to determine the ultimate facts, and when that is done its conclusions should not be set aside.

That is a rule often followed by appellate tribunals in reviewing fact matters in law actions. It will not be followed in the instant case for this very clear reason. Under date of June 10, 1941, the master mechanic, his assistant and two others joined in a report concluding "that the engineman in charge of this locomotive at the time of crown sheet failure, in allowing the water to become low in this boiler, are responsible for the failure of the crown sheet and damage to the locomotive." So far as his report is of evidentiary value it is the report of an expert witness. On July 6, 1941, an investigation was held "to develop facts and place responsibility in connection with" the accident. The same master mechanic presided over the investigation and largely conducted the examination of witnesses. This record shows that the master mechanic had already prejudged the facts which he was investigating. Under these circumstances a reviewing tribunal should not be called upon to accept findings of fact so made, but rather should itself search the record and determine those facts without regard to the previous finding.

In Award 8259 we said: "While not required by the exact language of the rule it may be added that where an official expects to be used as a witness for the carrier in one of these investigations he should limit his activities to testifying. He should not participate in the investigation either as an examiner or in passing upon the question of fact under investigation. The position of witness with examiner and judge are not compatible. Likewise if an official unexpectedly is required as a witness for the carrier he should thereafter not further participate in the investigation, save as a witness."

AWARD

Claim sustained.

BY ORDER OF FIRST DIVISION
NATIONAL RAILROAD ADJUSTMENT BOARD

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

Dated at Chicago, Illinois, this 23rd day of August, 1943.

DISSENT TO AWARD 8376—DOCKET 13697

The Award herein is based upon the assumption that there is no evidence of negligence on the part of Engineer Simmons. If this had been a suit for damages based solely on a charge of negligence of Engineer Simmons no appellate tribunal would, on the record before the Division in this case, set aside a judgment on the ground there was no evidence of the negligence charged. A different rule should not be applied here.

The fact that the "explosion occurred because of low water" is accepted in the Findings. In the fact of this conclusion, there is accepted as true Engineer Simmons' testimony that the gauge cocks, water glass and injectors were tested and found to be in good condition and functioning properly, and that he properly used the injectors and he "didn't have any trouble keeping the water in the boiler." If Simmons' testimony is true, the accepted fact that the explosion was caused by low water cannot be true. If the explosion was caused by low water, Simmons' testimony cannot be true.

The testimony of the engineer is in conflict with the physical facts as disclosed by the records. This being true it has no value as evidence.

Graham v. C&N.W.R.Co., 143 Ia. 604, 119 NW 708.

Samulski v. Paper Co., 147 Wis. 285, 133 NW 142.

Bank v. Schuerbrock, 195 Wis. 203, 217 NW 416.

MK&T.R.Co. v. Collier, 157 Fed. 347, certiorari denied,
209 U.S. 545.

Sexton v. M.S.R.Co. 245 Mo. 254, 149 SW 21.

L&N.R.Co. v. Chambers, 165 Ky. 703, 178 SW 1041.

Hughes v. Hughes, 109 Me. 564, 84 Atl. 647.

Foundry Co. v. Kinderman, 216 Fed. 499.

Quock Ting v. U.S., 140 U.S. 417, 35 L. Ed. 501.

In **S.A.L.R.Co. v. Davignon**, 153 S.E. 96, a case arising under the boiler inspection act, it is said:

"It has never been held, and never can be held, that it is not within the power of a jury, after considering testimony of a particular witness, to disbelieve it, although it may be uncontradicted, either from his appearance, his demeanor or manner upon the stand, or from the inherent nature of the facts testified to by him." (Emphasis added.)

In the Findings, it is said that "proof that an engine, with equipment in proper condition, exploded because of low water" cannot be said to prove the engineer was negligent. We cannot agree. In **C.&O.R.Co. v. Wells**, 49 Fed. 2d 251, an engineer sued for damages for injuries sustained as a result of the explosion of the boiler of his engine. The engineer claimed the explosion was caused by defects in the engine. The Railroad claimed it was due to negligence of the engineer in failing to keep the boiler supplied with water. In support of the engineer's contention there was evidence tending to show that the water glass falsely indicated the level of the water; that the lowest of three gauge cocks when open emitted water when the water in the boiler was below the gauge cock; that the tell-tale device attached to the injectors failed to warn the engineer that they were not functioning, and the theory was advanced that the boiler was dirty, causing the water to foam and to indicate a supply in excess of the actual amount being used.

The Railroad offered evidence to show the injectors were working at the beginning of the trip; that one injector was capable of delivering ample water to the boiler; that after the explosion the injectors, supply valves and feed lines were wide open; that while the lower connection of the water glass was "somewhat limed" it had three-sixteenths of an inch of unobstructed passage for the flow of water; that the gauge cock pipes were clear, and the boiler was currently washed as required by law. There was also evidence the water could not foam, and marks indicated the water had been 4½ inches below the crown sheet.

The trial court directed a verdict for the engineer. The Circuit Court of Appeals reversed the judgment, holding the defendant's evidence was sufficient to warrant a finding that the engineer's negligence caused the explosion. The Supreme Court refused to review this decision of the Circuit Court of Appeals. 52 S.Ct. 22, 284 U.S. 641, 76 L.Ed. 545.

If in a case where there was evidence of defects such as shown in that case, and which might have accounted for the low water and the explosion, a jury would be warranted in finding the low water was due to negligence of the engineer, in this case where there was not only no evidence of defects, but testimony of the engineer himself that there were no defects, clearly a finding that the explosion was due to negligence of the engineer was justified and could not properly be set aside.

It is also said:

"The carrier submits an analysis of the water in the tank after the accident. To that it seems sufficient to observe that the tank did not explode." (Emphasis added.)

The disdainful observation aforementioned is facetiously adopted from the submission of the Petitioner. Standing alone, it treats with scorn the purpose of the Carrier in submitting the water analysis to show that the water in the tank at the time of the explosion and prior thereto was of good quality, and if supplied to the boiler in sufficient quantity the explosion would not have occurred. Submission of the water analysis corroborated the testimony of Engineer Simmons given at the investigation, as follows:

"Q. Did the engine show any indication of raising its water or foaming at any time?

A. No sir."

The foregoing also discredits the Findings of the majority that:

"There is also some evidence that this accident might have occurred as a result of 'foaming' water, even though that condition might not have been apparent to those operating the engine."

The majority has ignored the fact that the sole contention presented by Petitioner in support of the claim asserted was an allegation of complete absence of any proof of failure on the part of Engineer Simmons to keep the boiler supplied with water. Ignoring that fact, the majority indulges in a discussion of the method of conducting the investigation, the personal ideas of the author of the Findings being set down. The first answer is the claim should have been disposed of on the ground on which it was presented, and not on any hypothesis of the referee. This Division has no jurisdiction to pass upon a dispute not submitted to the Carrier and handled in accordance with the Railway Labor Act. No question as to the manner in which the investigation was conducted was ever presented to the Carrier, no hearing thereon has been had, and any position of the Carrier thereon has not been considered. To decide a case on an issue as to which there has been no hearing is contrary to the decision of the Supreme Court of the United States in *Morgan v. United States*, 304 U.S. 1.

In Award 5251, Referee Carter, it is said:

"* * * he made no objection to the procedure adopted and consequently acquiesced in it; and his representative was present at all times and voiced no objection to the method of conducting the investigation. An accused employe will not be permitted to participate in a trial without objection as to the manner in which it is conducted and, after an unfavorable result, complain as to its fairness. It must affirmatively appear from the record that such procedural rights were denied him after request or over objection."

Appellate tribunals do not decide cases upon issues not presented either in the trial tribunals or on appeal. The author of the Findings here, at another time, correctly said:

“This is an appellate tribunal. It can decide matters only upon the facts contained in the record.” (Award 6794.)

The facts are that the investigation in this case was conducted according to the strict letter of the contract between the parties to the dispute and no one ever raised any question about it until the referee saw fit to inject his notions in a labored effort to justify the Award.

In a further labored effort to justify the Award, the following statement is made in the Findings:

“That is a rule often followed by appellate tribunals in reviewing fact matters in law actions. It will not be followed in the instant case for this very clear reason. Under date of June 10, 1941, the master mechanic, his assistant and two others joined in a report concluding ‘that the engineman in charge of this locomotive at the time of crown sheet failure, in allowing the water to become low in this boiler, are responsible for the failure of the crown sheet and damage to the locomotive.’ So far as his report is of evidentiary value it is the report of an expert witness. On July 6, 1941, an investigation was held ‘to develop facts and place responsibility in connection with’ the accident. The same master mechanic presided over the investigation and largely conducted the examination of witnesses. This record shows that the master mechanic had already prejudged the facts which he was investigating. Under these circumstances a reviewing tribunal should not be called upon to accept findings of fact so made, but rather should itself search the record and determine those facts without regard to the previous finding.”

The statement quoted is inaccurate and misleading. Just what is meant by the statement that “so far as his report is of evidentiary value it is the report of an expert witness” we do not know. The report sets out many facts determined by investigation and actual observation. Insofar as an expert opinion is expressed, the opinion is that of trained and experienced men skilled in mechanical matters and certainly, therefore, entitled to greater weight than the conclusion of one without either skill or experience in such matters. Again, as to the master mechanic conducting the investigation, the contract so provides. With him were two other officers who had not joined in the report. The facts set forth in the report are largely proved by other evidence. It could be eliminated altogether without changing the result. As a matter of fact, when we accept the proposition that the explosion was caused by low water, as the Findings here set out, the case might well be disposed of on the testimony of Engineer Simmons alone.

In connection with the Findings hereinabove quoted, the Referee ignores the fact that for the very purpose of assuring to the employe every precaution against any possible error by the investigating officer, appeals may be had. Here there was an appeal to B. C. James, Assistant Vice President. Mr. James, in a conference with the representative of Mr. Simmons, “went into the case very thoroughly,” and reached the conclusion that Simmons was responsible. Then an appeal was taken to A. J. Chester, Vice President. He granted a conference and reviewed the record, his conclusion being stated as follows:

“After thoroughly going over all of the circumstances in connection with this accident as we did at the conference of the 10th, I do not feel that anyone could reach a conclusion other than Engineer Simmons was guilty as charged and I therefore sustain decision as given you by Assistant Vice President James in his letter of August 27th.”

Thus we have two thoroughly skilled and experienced "reviewing tribunals" who were "not called upon to accept findings of fact" made by the officer conducting the investigation and who independently "searched the record" and determined the facts. The record contains an abundance of evidence to support the decisions of the reviewing officers cited hereinabove, and no person experienced in such matters could properly have reached a contrary conclusion. The fact that one inexperienced in such matters does not agree, is not ground for setting aside the Carrier's action.

For the reasons stated we dissent to the Findings and Award herein.

T. K. Faherty
R. A. Knoff
E. W. Fowler
L. O. Murdock
L. L. McDonald

Chicago, Illinois,
August 31, 1943.

SUSTAINING OPINION

In the findings in this claim, written by me and accepted by the majority, is the statement that the carrier accepts "carelessness or negligence of the engineer as the basis of the liability." That statement is not questioned in the dissent. The conclusion that there was an entire lack of evidence of negligence on the part of Engineer Simmons was not based upon an "assumption" but upon an analysis of the facts appearing in over 100 pages of this record and numerous exhibits. To this record we applied the established test of the courts to wit: "Actionable negligence is the failure of one owing a duty to another to do what a reasonable and prudent person would ordinarily have done under the circumstances, or doing what such a person would not have done, which omission or commission is the proximate cause of injury to the other." 38 Am. Jur. 643. See, also 45 C.J. 628.

The dissenting members state, "If this had been a suit for damages based solely on a charge of negligence of Engineer Simmons no appellate tribunal would, on the record before the division in this case, set aside a judgment on the ground there was no evidence of the negligence charged." Good and able lawyers wish that that might predict, with that certainty, the decisions of the appellate tribunal of their own state. But here we have five men, four of whom are not trained in the law, who confidently state that they know the unprovable as to what "no appellate tribunal" would do. Really now—!

The dissent states that "the finding accepts as true Engineer Simmons' testimony that the gauge cocks, water glass and injectors were tested and found to be in good condition and functioning properly, and that he properly used the injectors and he 'didn't have any trouble keeping water in the boiler.'" No such finding was made. The finding quotes the **test, prescribed by the carrier**, to be applied by the engineer to determine whether or not the proper water level was being maintained. The finding was that it was shown by the uncontradicted evidence of three witnesses (**the credibility of two witnesses not being questioned**), that "those observations and tests were repeatedly made and proper indications shown" and that the evidence showed that "the injectors were being used, watched and were apparently working." This is not a finding that the water glass and injectors were "functioning properly." The argument of the dissenting members, based upon a finding not made, need not be answered here. The testimony of these three witnesses, upon which the above finding is based, is not "in conflict with the physical facts."

The dissenting members then lift a part of the following sentence that is underscored, to wit: "Accept the evidence as to tests made of the equipment and we would then have proof that an engine with equipment in proper con-

dition, exploded because of low water," and using that part of a qualified sentence argue that that proves negligence. Their reason for not quoting the entire sentence is obvious.

The case of C. & O. R. Co. v. Wells, 49 Fed. 2d 251, relied upon in the dissent, presents a somewhat similar factual situation but a distinctly different issue. Here the carrier based its claimed right to discharge the engineer upon his alleged negligence and the burden was upon the **carrier** to prove that fact. In the Wells case the action was brought under the Boiler Inspection Act where the burden was upon the **engineer** to prove not only that the carrier had violated the act but also that the carrier's "failure to obey the law was the proximate cause of appellee's (Wells) injury." Negligence was not an issue. Although the opinion recites the carrier's contention that the engineer allowed "the water to become too low and neglected to start the injectors until it was too late," the court did not discuss the evidence from the standpoint of whether or not negligence was shown. The court held the evidence was sufficient to take the case to the jury on the issue of, was the explosion caused by the "improper and unsafe condition" of the equipment, and was likewise sufficient to justify a jury in holding that the explosion "occurred because the engineer allowed the water to get too low and **turned on the injectors** instead of stopping the train and drawing the fire." The court's analysis of the evidence must be considered in the light of the issue presented, and, may I repeat, the issue presented was not negligence. In addition to the clear cut distinction in issues presented there are certain factual differences worth mentioning.

In the Wells case the opinion states the undisputed evidence was that the injectors were "operating at the time of the explosion." There is no recital of evidence that they were on for any particular time prior thereto and the concluding paragraph of the opinion indicates that the injectors were not turned on until just before the accident. Here the undisputed evidence is that one injector was on during the entire trip and the second one for several minutes and miles before the accident. In the Wells case it is said that the engineer **could have** discovered the low water "by looking at the water glass or turning the gauge cock." Here there is evidence by three witnesses that that was repeatedly done and proper water levels shown. In the Wells case there was no showing of requirements as to what should be done by the engineer. Here the carrier presented the Master Mechanics Bulletin that "Observing of water glasses, together with frequent testing of gauge cocks is necessary as an assurance that water in boiler covers highest point of crown sheet under all service conditions." The undisputed evidence is that Engineer Simmons performed his duty in that regard. The evidence shows that he was justified in relying upon those tests. The report of the Chief Inspector, Bureau of Locomotive Inspection to the Interstate Commerce Commission for the fiscal year ending June 30, 1920, says: "Practically all enginemen and others having to do with the operation of the locomotive, true to tradition, believe that the correct height of water over the crown sheet is always indicated by the gauge cocks, and that the level indicated by the water glasses is unreliable and not to be depended upon; therefore, it is reasonable to believe that enginemen have frequently depended on gauge cocks as being correct, when in fact the true level was much lower, and, as a consequence, damaged crown sheets have resulted."

"Gauge cocks and water glasses are now practically the universal method of gauging the water level in the boiler and since the two devices located on the same boiler do not show a corresponding level under operating conditions, it is clear that one or the other must be incorrect, therefore misleading.

"Investigations made by this bureau and a line of reasoning clearly establish the fact that gauge cocks when applied directly in the boiler register incorrectly. It is very important that at least two devices, attached separately

to the boiler, be employed for this purpose so as to form a double check and so as to have one appliance in case of failure of the other while on the road and away from points where repairs can be made."

In the succeeding annual report it is said that new engines were being constructed with proper water columns, but although not applied to old locomotives that "the necessity for such appliances * * * is practically unquestioned." The record here indicates that the exploded engine was not equipped with the recommended devices; that its stay bolts were leaking causing it to use an excessive amount of water and in the face of the record the dissenting members state that there was "no evidence of defects." In the Wells case it was pointed out that a chemical test of the water **in the boiler** disclosed that it did not and could not foam. Here no such test was made, or if made, was not offered. I do not consider the Wells case as controlling because of the difference both of facts and issues.

The dissent then states that the finding recites that the carrier submitted an analysis of the water **in the tank** after the accident and that I facetiously said that the tank "did not explode." That statement was not facetiously made. The contention was advanced that the water in the boiler was not of proper quality. Obviously proof that water in the tank was of proper quality did not prove the quality of the water in the boiler. Such proof was offered in the Wells case upon which the dissent relies. The dissenting members now argue that had the "good quality" water been put into the boiler "in sufficient quantity the explosion would not have occurred." Certainly that does not negative but tends to establish the employe's contention that the water in the boiler was not of good quality. Obviously the test that should have been made was that of the water in the boiler. This evidence is of no value for another reason. The issue was not whether more water in the boiler would have prevented the explosion, but whether the engineer was negligent in not having more water in the boiler.

Having first stated in the second paragraph of the dissent, that the engineer's "testimony cannot be true" the dissenting members now suggest that the water analysis was submitted by the carrier because it "corroborated the testimony of Engineer Simmons" and now turn to the same engineer's testimony to "discredit" the finding that "There is also some evidence that the accident might have occurred as a result of 'foaming' matter, **even though the condition might not have been apparent to those operating the engine.**" The engineer's statement which the dissent says "discredits" this statement is that the engine did not "show any indication of raising its water or foaming at any time." I take it that if the engine did not "show any indication of raising its water or foaming" that the condition "might not have been apparent to those operating the engine." I see no discrepancy but rather an affirmation of the finding in the engineer's statements. Having started the dissent out with the proposition that "if the explosion was caused by low water, Simmons' testimony cannot be true" and "has no value as evidence" the dissenting members in the fourth from the concluding paragraph say "as a matter of fact, when we accept the proposition (as they do) that the explosion was caused by low water * * * the case might well be disposed of on the testimony of Engineer Simmons alone." In other words they conclude this feature of the dissent with the statement that the case be disposed of on evidence that they say "cannot be true" and "has no value." I find some difficulty in following their position or their reasoning.

Further with reference to the statement in the finding that there was some evidence that the accident might have occurred as a result of "foaming" water. The record contains testimony of three employes of the carrier, who worked this engine within a week of the accident, that the engine showed evidence of foaming water. The water had not been changed but had boiled down, so as to increase its chemical content, before the explosion.

The dissenting members next charge that "The majority has ignored the fact that the sole contention presented by the petitioner in support of the claim asserted was an allegation of complete absence of any proof of failure on the part of Engineer Simmons to keep the boiler supplied with water." I do not find any such "sole contention presented by the petitioner" as that stated in the dissent. I do find in the opening statement of the "Position of Committee" this statement: "We do not agree with the carrier that Engineer Simmons is guilty as charged or that he has been proven guilty in any way. On the contrary we hold that the underlying cause for this crown sheet failure has not been developed" and in the succeeding paragraph "There must be a reason and a cause, other than the unproven negligence of the engineer."

In their written "Memorandum for Referee" the carrier members made a concluding appeal which was summarized in the findings as follows: "Finally, in argument in the division, it is urged that the carrier, by the rules, is the trial tribunal, that it has the duty to consider conflicting testimony, to determine the credibility of witnesses, to consider their attitude and demeanor and to determine the ultimate facts, and when that is done its conclusions should not be set aside." Specifically they said, "To do so is to destroy the ability of carriers to properly perform their duties as common carriers"!

The carrier members (omitting in their dissent any reference to their contention directed to me as referee) quote my answer to their contention and describe it as a "labored effort to justify the award" and "inaccurate and misleading." The statement was not made in the finding to "justify the award" but to explain why I refused to accept the carrier members' measure of my responsibility in the determination of this claim and why I refused to follow blindly the fact finding conclusion of the carrier.

I agree with the dissenting members that a claim should be "disposed of on the ground on which it was presented." That was done here. I agree with the dissenting members that the carrier members' argument was not advanced by the carrier. It made no such contention that its officials were possessed with infallible judgment.

The findings state that I was discussing a proposition urged "in argument in the Division." In their dissent to Award 8362 the carrier members criticise me for not passing upon a contention presented by them. Here they criticise me for having done so.

I agree with the dissenting members that "this division has no jurisdiction to pass upon a dispute not submitted to the carrier and handled in accordance with the Railway Labor Act." I humbly call this position to their attention in connection with their dissent to Award 8362. I further point out to them that this feature of the dissent deals not with a "dispute submitted to the carrier" but rather with a rule of thumb designed to prevent the referee from finding contra to the holding of the carrier.

The dissent states "No question as to the manner in which the investigation was conducted was ever presented to the carrier." That statement is in error. The employes in their submission directly challenged the fairness of the carrier in making "the examination of the boiler and its appurtenances," including the testing of appurtenances by placing them on another engine, without giving the representatives of the engineer an opportunity to be present when those tests were made. It is the report of this investigation, **made without the presence of the engineer**, that the dissenting members say is "that of trained and experienced men, skilled in mechanical matters * * * and entitled to greater weight than the conclusion of one without either skill or experience in such matters." The result of that examination is included in the facts considered by the carrier upon which it based its conclusion that "should not be set aside."

The report of the hearing, at which the testimony of the employes was taken, shows that one of the carrier's representatives undertook to examine the injured fireman as to statements made while he was in the hospital about the water and equipment, and that at the same time the carrier's representative put his own version of the hospital conversation into the record. The record further shows that the representative of the employes objected on the ground that the carrier had given assurances that such statements would not be taken "for the record," when employes were hospitalized. I find no denial of that "assurance" and yet the facts so put into the record, and so stated to be true by one of the carrier members conducting the investigation, go directly to support the "conclusion that should not be set aside" because the carrier members have considered the "credibility" of witnesses (including their own credibility) and determined what testimony is to be believed.

The proposition advanced by the carrier members that a finding of the carrier under these circumstances "should not be set aside" is an effort on their part to secure a holding, committing this division to the rule, that a determination of fact made by the carrier (in a matter in which it is a party litigant) is final and conclusive, and binding upon this division. The Railway Labor Act contemplates that this division shall make its own finding of facts. To follow such a rule would be to give the carrier an unconscionable advantage in the submission of "disputes" to this division; it would place the employes in the position of being compelled to accept the carrier's statements and conclusions of fact as final; it would render ineffective the rules that records of investigations be preserved for the use of reviewing bodies; it would enable the carrier to come before this division and say here are the facts, untouchable, find against the employes, stamp the form here. Such a contention is contrary to the letter and the spirit of the Railway Labor Act.

The dissenting members in the third from the last paragraph naively suggest that because there are reviewing officers on the carrier who "searched the record" and "determined the facts" that this division should accept their conclusion as final. This contention overlooks the clear intent of Section 3 (i) of the Railway Labor Act that after that review on the carrier (an adjustment not being reached) that this division shall determine the matter basing its conclusion upon a "full statement of the facts and all supporting data." Why should this division have those facts and data if it is to brush them all aside and in any event accept the conclusion of the carrier?

Now what is all this latter half of the dissent about? It is not about the matters discussed in the dissent. It arises because of this situation. Under date of June 10, 1941, four officers of the carrier, including its master mechanic, joined in an extended report of this accident concluding with the finding that, "From the thorough investigation and inspection which we have made of this boiler and its appurtenances, including test of the appurtenances on another engine of the same class without finding any contributory defects it is our conclusion that the **enginemen** in charge of this locomotive at time of crown sheet failure, in allowing the water to become low in this boiler, **are responsible** for the failure of the crown sheet and damage to the locomotive." This report is relied upon by the carrier and set out in full in its submission to this division; it was relied upon by James, the assistant to the Vice President, in his letter declining to reinstate the engineer. The investigation upon which the report was based was made without notice to the engineer or opportunity being given him or a representative to be present and check the tests.

Having on June 10th joined in a report determining that the enginemen were "responsible," the master mechanic four weeks later presided over the investigation conducted by himself and two other officers of the carrier, convened "to develop facts and place **responsibility** in connection with" the damage to the engine. The master mechanic called and largely conducted most of the examinations of the witnesses. The Road Foreman of Engines

was another member of the investigation board. He injected his own testimony into the record through the medium of questions directed to the fireman, and found himself in the position of having to disbelieve himself if he were to believe the fireman. It was a record so made and so approved by the reviewing officials, that was submitted to me as referee with the contention that the conclusion as to "the facts" so made by the officials of an interested party "should not be set aside." The question is not whether the investigation was conducted according to rule but whether or not I, as referee, was bound to accept decisions of "facts" so made.

The abuse that is heaped upon me in this dissent is prompted by the fact that I refused to accept such conclusions so made as final and binding upon me and upon this division.

Finally the dissent holds that I, as referee, am "inexperienced in such matters" and accordingly my judgment should not prevail over the conclusions of the "thoroughly skilled and experienced" officers of the carrier. The complaint, if it has merit, should be directed to the Congress. The Railway Labor Act does not require that a referee be "skilled and experienced" nor that he yield his judgment to those representatives of one of the parties to the dispute who claim those qualifications. The Railway Labor Act requires that the referee be "a neutral person."

(Signed) Robert G. Simmons.