

Award No. 12379

Docket No. 22438

**FIRST DIVISION
NATIONAL RAILROAD ADJUSTMENT BOARD**

39 South La Salle St., Chicago 3, Illinois.

The First Division consisted of the regular members and in addition Referee Wm. H. Spencer when award was rendered.

PARTIES TO DISPUTE:

**BROTHERHOOD OF LOCOMOTIVE FIREMEN
AND ENGINEMEN**

ATLANTA AND WEST POINT RAILROAD COMPANY

STATEMENT OF CLAIM: Reinstatement of R. T. New to service as a fireman account dismissed without a fair and impartial investigation and also compensated for all time lost subsequent his removal from service as of October 17, 1945.

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 waived hearing thereon.

The Division is of the opinion that in the circumstances of this docket, claimant New was not accorded "a fair and impartial investigation" within the meaning of Article 50 of the Firemen's Agreement as a basis of his dismissal from service on November 7, 1945.

The evidence indicates that as early as October 17, 1945, the carrier had determined to dismiss Fireman New and that subsequent proceedings were mere perfunctory compliance with the provisions of Article 50 of the Agreement.

On the morning of October 17, the carrier received (a) a complaint from one of its shippers about the manner in which its shipping had been performed on the preceding day, and (b) a report that on the same day one of its brakemen, while off duty, had been injured in altercation with Fireman R. T. New of Work Extra 230.

The carrier stated in its submission that "investigation was immediately started, and in questioning the crew on the ground, Romines at his home, Agency employes at Ormewood, and various employes of the Kraft Cheese Company, the following was developed" with respect to Claimant New's conduct on the day involved:

(a) That Fireman R. T. New was intoxicated.

(b) That during the day, the Conductor and Fireman had had an altercation, resulting in the Fireman drawing a knife on the Conductor and running him off the engine.

(c) That the Fireman engaged in an altercation with the Engineer, threatening him with a knife, taking the engine from him and operating it; and that at one time during the day, the Fireman forced the Engineer to climb cars and tie brakes.

(d) That Fireman New engaged in a fight with visiting Brakeman J. D. Romines, throwing him off the engine.

The things thus "developed" with respect to the conduct of the Claimant on October 16, 1945, were stated by the Carrier as conclusions, not as suspicions, accusations, or charges. Certainly it is of the essence of a "fair and impartial investigation" that a person shall be heard before he is condemned.

The Carrier required all employes involved in the events of October 16, 1945 to appear at what it described as a "preliminary inquiry". On this occasion, the Carrier required each employe separately to make and sign a written statement as to what happened on the date in question. The Division does not deny that the Carrier has the privilege of conducting a "preliminary inquiry" to determine whether there are facts which justify it in preferring charges against an employe or employes. The Division, however, does point out (a) that the Carrier in its submission conceded that it had already conducted an inquiry and had "developed" certain things with respect to claimant's conduct which it stated as conclusions; (b) that there is nothing in Article 50 which authorizes the Carrier to require employes to make signed statements as a part of a preliminary inquiry; and (c) that there is something unusual, if not treacherous, in requiring employes in discipline cases to make separate, written statements, without knowledge of what fellow-employes have said.

The Carrier, following the "preliminary inquiry" of October 22, scheduled a hearing for October 29, 1945. Although Article 50 contemplates, but does not require, that an investigation will be conducted within ten days from the time of the alleged misconduct, the Carrier offered no explanation why it was not "convenient" to have held the investigation on October 22 when all employes were present instead of scheduling it for October 29, after the expiration of the ten-day period. In any event, Claimant New did not appear on October 29, because through no fault of his own, he did not receive notice of the scheduled hearing. On October 30, 1945, the Carrier for the first time, so far as the evidence of record indicates, formally preferred charges against Fireman New and notified him that a hearing would be held on the charges on November 5, 1945. New appeared at the time and place designated with a representative.

It is difficult to describe what happened on November 5 as a "fair and impartial investigation". It is true as stated by the Carrier, that the Claimant did not bring witnesses to testify to his innocence, and that the Claimant and his representative insisted that the so-called "preliminary inquiry" of October 22, was the real investigation, and that they refused to answer questions of the Carrier as to what transpired on October 16, 1945. But it must be remembered that the Carrier preferred serious charges against the Claimant and was under the duty of proving these charges by a preponderance of the evidence. The Carrier did not produce any witnesses to testify to the guilt of the Claimant. Instead, the Carrier, at the conclusion of this proceeding, handed to the Claimant and his representative copies of the written statements taken, October 22, 1945, from other employes involved in the happening of October 16, 1945. It will, however, be remembered that these statements were taken in writing and signed by the other employes separately, that the Claimant was not given the opportunity to be confronted by wit-

nesses making prejudicial statements against him or to cross-examine these witnesses. Assuming, therefore, that the proceeding of November 5, 1945, was an investigation, the Division finds that the Claimant was not given a "fair and impartial investigation" within the meaning of Article 50 of the Firemen's Agreement.

The Division, in the rendition of this Award, passes no judgment on the merits of the controversy presented in this docket. It merely finds that on the evidence of record, the Carrier did not accord the Claimant "a fair and impartial investigation" as required by Article 50 of the Firemen's Agreement.

AWARD

Claim sustained.

BY ORDER OF FIRST DIVISION
NATIONAL RAILROAD ADJUSTMENT BOARD

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

Dated at Chicago, Illinois, this 8th day of September, 1948.