

Award No. 14469

Docket No. 24627

**FIRST DIVISION
NATIONAL RAILROAD ADJUSTMENT BOARD**

39 South La Salle St., Chicago 3, Illinois

The First Division consisted of Engineers' and Firemen's Supplemental Board members and in addition Referee Robert G. Simmons when award was rendered.

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

**BROTHERHOOD OF LOCOMOTIVE FIREMEN
AND ENGINEMEN**

NORTHERN PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of Engineer T. G. Lunder, St. Paul Division, for removal of discipline and pay for time lost resulting from investigation held December 14, 1947, in connection with collision at Fargo December 11, 1947, based on Rule 131, Engineers' Schedule, effective February 16, 1925, as amended August 1, 1947.

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.

In this case the claimant was jointly notified along with seven other employes "in accordance with the rules of your respective schedules to report * * * for investigation on the following matter: To ascertain facts and place responsibility for collision * * *. Your attention is called to your right under Scheduled Rules to be represented at this investigation by an employe of your choice."

Rule 131 provides: "Engineers charged with offenses involving either memorandum against their personal record, a suspension or dismissal, will be advised in writing of the nature of the offense charged and no memorandum will be made against their personal record until they have been given an opportunity to be heard. All cases will have full investigation * * *. All parties interested will be notified to be present."

The first contention advanced here is that the notice was insufficient. The claimant relies upon Award 11929, an award in a claim between these same parties.

The carrier contends that the notice was sufficient; that it is not required to notify the employe of specific charges before the investigation but is permitted to do so in the letter imposing discipline, and that it did that here; that Award 11929 is erroneous and should be overruled; that the employe waived the benefits of the rule and in any event was not prejudiced.

The notice in Award 11929 was to the employe to appear "for formal investigation" at which time the matter involved "will be investigated," and that he had a right of representation. This Division held that the notice did not charge the claimant with any offense as required by Rule 131, and referred to it as "a fundamental requirement" and relied on Award 5197.

We think a mere reading of the rule establishes that Award 11929 is correct. The first clause of the first sentence of the rule requires that an engineer be charged with offenses. The remainder of the rule rests on that requirement. The "opportunity to be heard" and the "full investigation" relate to offenses charged. We do not here determine the specific manner or extent required in setting out the "nature of the offense charged" for here the notice charges the claimant with no offense, either directly or by implication. As an interested party, he was notified to be present. It indicates nothing more than he may be a witness helpful in determining the facts and fixing responsibility. It leaves the claimant without any notice that he is then charged with any responsibility or rule violation.

There is a distinct difference in the position of a witness and one accused of an offense. A witness is there to tell the truth. That is the prime purpose. One accused is also there to tell the truth, but he is also concerned with other witnesses telling the truth and with the "full investigation" the rule provides. He has the right as a party (as distinguished from a witness) to cross-examine witnesses, to develop additional facts and to test credibility; he has the right to direct the investigation to his particular responsibility, and to produce witnesses in his own behalf, etc. The procedure which the carrier asks us to approve would run around all of these rights under the rule which a full investigation of offenses charged accords an accused employe.

The carrier says Award 5197 does not sustain Award 11929. Award 5197 recites, "In the present case, claimant was dismissed before charges were preferred, notice given or the semblance of a trial had." That, in essence, is what occurred to the claimant in Award 11929 and to the claimant here.

The carrier submits a series of awards of this Division on other carriers which it asserts are contra to Award 11929. An investigation of the dockets in these awards discloses material differences.

In Award 5183, the charge was, "the charge has been made * * * that Brakeman E. A. Murray failed to perform his duties * * *. The purpose of this investigation is to inquire into the merit of this charge and determine whether Mr. Murray is guilty * * *."

In Award 5251, the notice was "to attend an investigation * * * for the purpose of developing your responsibility for * * * by reason of intoxication * * *."

In Award 5253, the notice was, "You are requested to attend investigation * * * in connection with the violation of Rule 846." The sufficiency of the charge was not questioned insofar as it related to Rule 846.

In Award 12096, the notice was "to ascertain the facts and determine responsibility" and with this added, "Your presence as principals * * * is requested."

In Award 13139, the notice was "for hearing and investigation * * * regarding which you are charged with responsibility."

In Award 13207, the notice was "to develop the facts and place the responsibility in connection with your actions * * * in connection with which occurrence you are charged with the responsibility * * *."

In Award 13603, the notice was, "You are hereby instructed to report * * * for hearing in connection with the following charges. Insubordination and violation of rules * * *."

In Award 13663, it was, "You are charged with failure to stop * * *".

In the light of these apparent distinctions further discussion of those awards is unnecessary.

Award 11929 is a sound precedent and requires the sustaining of this claim, unless there is merit to the other two contentions of the carrier.

The carrier contends the claimant waived the requirements of the rule. Here claimant was asked at the beginning of the investigation if he had received proper notice to appear and was ready to proceed with the investigation. He replied that he had and was. At the conclusion he was asked if he considered that the investigation had been held in a fair and impartial manner and in accordance with the rules. He answered in the affirmative. Similar questions were asked of the other employes. This contention is answered in Award 11929, where similar questions were asked at the beginning and close of the investigation. It was there held that such replies cannot be construed to be a waiver of specific and positive requirements of the investigation rule. The questions relate to the investigation being held, not to the absence of charges against the claimant. At the time the questions were asked and answered, claimant had not been advised as provided by the rule that he was being or was to be charged with an offense. He cannot be held to have waived charges when none were then made, for it is the carrier's position here that he is not to be notified of the offense charged until the letter of discipline issues. We agree with Award 11929 on the matter of waiver.

The carrier contends further that the claimant in any event was not prejudiced. As pointed out herein, he was not granted a fundamental requirement of the rule; because he was not charged, he was not in a position to take advantage of the rights that flow to an accused employe; and he has had discipline imposed in violation of the rule. Those things constitute prejudice.

These rules providing for charges, full investigations, opportunity to be heard, sustaining charges by proof, etc., before discipline is imposed are for the benefit of the employe. Without them and without compliance with their requirements, the employe is subject to the arbitrary action of the carrier. They are designed to prevent such action. The failure of the carrier to comply with the requirement of the rule as herein discussed nullifies the action taken and the penalty imposed.

AWARD

Claim sustained.

BY ORDER OF FIRST DIVISION
NATIONAL RAILROAD ADJUSTMENT BOARD

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

Dated at Chicago, Illinois, this 27th day of April, 1951.