

**Award 18878**

**Docket 34496**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**FIRST DIVISION**

**39 South La Salle Street, Chicago 3, Illinois**

**With Referee Mortimer Stone**

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF LOCOMOTIVE ENGINEERS**

**HUDSON AND MANHATTAN RAILROAD COMPANY**

**STATEMENT OF CLAIM:** "Appeal to the First Division, National Railroad Adjustment Board, by Roger W. Burnell, Claimant herein, that he be restored to the service of the Hudson & Manhattan Railroad Company (Herman T. Stichman Trustee), as a Motorman, with his seniority and vacation rights unimpaired, and, that he be paid for all time lost from December 5, 1955 until the date that he is restored to the service of said railroad as a Motorman."

**FINDINGS:** The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was held.

Claimant was motorman of a two-car train running between Jersey City and 33rd Street, New York City, which collided with the train ahead of it, and he was dismissed from service on grounds of failure to comply with certain signal indications and operate the train properly, contributing thereby to an accident.

Following the accident a preliminary Informal Investigation was held before the Superintendent of Transportation, attended by carrier officials, Public Utility Commission members, Interstate Commerce Commission inspectors, and the General Chairman and attorneys of petitioner Brotherhood.

Before completion of that investigation claimant was given notice by registered mail of investigation pursuant to the schedule agreement on the charges for which he was afterward dismissed. At the time set, claimant's representatives appeared and objected to the investigation on the ground that the mailed notice had not been received by him three days before the date of the investigation as required by the agreement. There was received also letter saying that claimant was unable to attend the investigation due to his in-

juries. Thereupon the investigation was adjourned to such time as claimant should be able to appear.

Instead of reconvening the disciplinary investigation the petitioner through its Assistant Grand Chief Engineer and General Chairman stipulated with carrier that the disciplinary charges against claimant should be determined on the record consisting of the transcript of the adjourned investigation at which no evidence was received except that as to receipt of notice, and the transcript and exhibits received as specified at the preliminary Informal Investigation with the Interstate Commerce and Utility Commissions.

Upon that record the charges against claimant were sustained, he was dismissed from service, and upon appeal this decision was affirmed.

After considering the several matters urged by petitioner we hold and find:

As to the merits of claimant's dismissal:

Much evidence as to the merits has been submitted to us by both parties and on the basis of such submissions we find that there was substantial evidence to support the charges against claimant and his dismissal. But by agreement of the parties the decision as to the charges against claimant and his discipline resulting therefrom was to be determined upon an agreed record and that record has not been submitted to this Board.

The Railway Labor Act provides that disputes may be referred to this Board by petition with a full statement of the facts and all supporting data bearing upon the dispute. Under that requirement, as well as the usual rules of orderly procedure, petitioner was required to submit the agreed record if it presented the case for our determination of the merits. This was not done.

As to notice of investigation set for hearing charges against claimant:

That investigation never took place; it was adjourned without hearing any evidence other than that pertaining to receipt of notice, until such time as claimant would be able to appear. Then instead of reconvening such investigation of charges against claimant the parties agreed that those charges should be determined on the record and exhibits of the investigation already held, so the question of notice of the investigation became moot.

As to the officer making decision:

It appears that the Superintendent of Transportation was the proper officer under the agreement to hear and decide disciplinary matters in the first instance, and it was known to petitioner at the time of the stipulation for accepting the record of the preliminary investigation that he had presided at that investigation and also had answered questions as an expert witness thereat but no prejudice against claimant is shown and we find no ground for objection to his hearing and determining the charges against claimant. Further, no objection was made thereto until decision had been made and appeal reversal denied. If valid, the objection was then too late. A party

may not so play fast and loose and delay challenge until after decision so that it may accept if favorable or reject if adverse.

As to the appeal officer:

Apparently the appeal would normally have been heard by the General Superintendent, but he was ill so that he never returned to work and Sterling, the Superintendent of Transportation, from whose decision the appeal was made, had become acting General Superintendent. In such case we think the appeal was properly referred to the Trustee as the highest carrier official in authority. Moreover, petitioner requested and obtained several continuances from him and appeared and presented and argued the claim before him without objection to his acting until after his decision against claimant. Again, if valid, the objection was too late.

As to the hearing and transcript on appeal:

Petitioner had stipulated that the charges be determined on the basis of an agreed record which was before the Trustee; it made no offer of further evidence at the hearing on appeal although invited so to do, and it made no request for reporting the proceedings. We find no rule violation or prejudice in failure to provide a record of the proceedings on appeal when no additional record was made.

We find no basis for sustaining the claim.

**AWARD:** Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of FIRST DIVISION

ATTEST: J. M. MacLeod  
Executive Secretary

Dated at Chicago, Illinois, this 1st day of October, 1958.