Award 19394
Docket 35529

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

39 South La Salle Street, Chicago 3, Illinois

With Referee William H. Coburn

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: "Request for the reinstatement of Fireman W. C. Duke, Jr., with seniority unimpaired and pay for all time lost from his assignment on the basis of what he would have earned had he not been dismissed from service February 15, 1956 for alleged violation of Rule 107, Paragraph 6, and Rules 282, 283, Train No. 7, February 9, 1956."

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 waived.

Claimant was dismissed from service on February 15, 1956, for alleged violation of Operating Rule 107, in connection with rough handling of Train No. 7 on February 9, 1956. On the latter date, claimant was working as fireman on the train when it was operated through a lateral turnout at a speed in excess of the maximum speed restriction applicable to that type of turnout.

The same day the incident occurred, claimant received the following notice which was jointly addressed to all crew members of Train No. 7:

> "You will each report to this office 1:30 P. M. tomorrow, Friday, Feb. 10th with representative and necessary witnesses desired for formal investigation to determine facts and to place responsibility in connection with alleged rough handling of train No. 7 Feb. 9th at AA Junction which resulted in alleged rough handling of train and personal injuries to passengers on that train. K-2-9
>
> E. W. Stanley, 10:30 am"

On February 15, 1956, claimant was served with official notice of dismissal from service effective that date.

Petitioner charges that the foregoing notice lacks specificity and fails to set forth charges of rule violations; that claimant, therefore, was denied the due process to which he is entitled under Article 50, paragraph (a), of the effective agreement.

Paragraph (a) of Article 50 is quoted in full in the parties' submissions and, therefore, need not be restated here. From an examination of the rule, it will be noted that there is no express requirement that the accused be furnished notice of the charges against him. The sole requirement in respect of charges is that when a fireman is **subject** to a charge which, if sustained, would result in his discharge, he must be given "a thorough investigation" within a specified time. The only requirement in respect of notice is that he must be notified in advance "for what purpose he is called".

It is clear that the notice served on claimant in this case met the foregoing requirements of the rule. It was specific in terms of time, place, and purpose. It advised claimant of his right to representation and the production of favorable witnesses. The nature of the matter to be investigated was made clear to the point of needless repetition. Neither claimant nor his representative made any objection at the investigation of improper or insufficient notice, despite having been given ample opportunity to do so.

We agree with petitioner that a carrier may not, with impunity, disregard the procedural rights of an accused under the agreement and that any substantial impairment of these rights will ordinarily vitiate the discipline imposed. (Awards 2370, 5197, 19043 and many others.) But each of these disputes must be decided upon the basis of the particular facts of record and the language of the rule applicable to those facts. In the case before us, the rule is silent as to what shall consitute proper notice. That the Division is without authority to supply what the parties have failed to include in the agreement is too well recognized and established to require citation of authority. Moreover, under the facts of record here, the notice given claimant should have compelled but one conclusion — that **his** responsibility for the incident would be investigated and that **he** necessarily would have to prepare to defend himself against such charges as might arise therefrom.

Accordingly, we find no merit in the allegation that the notice given claimant was defective.

Having disposed of the procedural question, the Division proceeds to a consideration of the merits of this case.

Claimant's dismissal was predicated upon his alleged violation of Rule 107 of the carrier's "Uniform Code of Operating Rules", effective May 1, 1950, and, more particularly, the last subparagraph of paragraph (6) thereof, which reads as follows:

> "When the conductor or engineer fails to take action to stop the train, and an emergency requires, brakemen and firemen must take immediate action to stop the train."

In assessing discipline imposed as the result of a trial or investigation, the scope of our review is necessarily confined to the transcript of record.

(Awards 15319, 15745.) The reason behind this principle is that the evidence adduced at the trial or investigation is the sole basis for the discipline imposed.

The record of the investigation here strongly suggests that the admitted negligence of the engineer was imputed to claimant. Dismissal from service based on an imputation of negligence arising from the conduct of a fellow servant obviously constitutes an arbitrary and capricious act.

Here, however, it is not necessary for this Division to make a finding on the question of imputation of negligence. Applying the literal language of the rule to the facts of record, there is insufficient evidence to support the charge of rule violation. It is true, as respondent contends, that paragraph (6) does require a fireman to stop the train when an emergency develops but only when "the conductor or engineer **fails to take action** to stop the train . . ." (Underscoring for emphasis.) The facts show that at the time of the occurrence the engineer was taking action to stop the train. He had responded to claimant's warning of signals and to his repeated demands for heavier brake applications, including an emergency application. There is no showing that the engineer was either physically or mentally incapacitated at the time of the incident. To insist that claimant should have physically taken over the engine controls from the engineer under these circumstances is manifestly unreasonable and unsound.

The uncontroverted testimony of claimant, fully corroborated by the engineer, establishes conclusively that he took timely action, short of actually taking over the controls, to stop this train. Under the circumstances of this particular case, that is all the rule required him to do. As was said in Award 13598, with Referee Adolph E. Wenke participating, ". . . there is nothing in the record to indicate he (claimant) was derelict or negligent in performing his duties by doing what he did . . ."

In view of the foregoing, the Division finds that the evidence is insufficient to support the charge of rule violation. The claim, therefore, must be sustained.

AWARD: Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois, this 20th day of January 1960.