Award 20426
Docket 32478

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

39 South La Salle Street, Chicago 3, Illinois

With Referee Carroll R. Daugherty

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

ATLANTA AND WEST POINT RAIL ROAD — THE WESTERN RAILWAY OF ALABAMA

STATEMENT OF CLAIM: "Protest that the Carriers' action in dismissing Fireman W. H. Wilson from service on February 5, 1954, was highly improper. Claim that Fireman Wilson's personal record in this case be cleared, and that he be paid for all time lost from the carriers' service, between January 5 and April 22, 1954."

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.

In this case claimant, having been dismissed on February 5, 1954, for insubordination, i.e., for not appearing at an investigation scheduled by carrier for January 18, 1954, in respect to a collision that had occurred on January 12, 1954, and having been reinstated on a leniency basis on April 22, 1954, is asking for removal of the suspension from his record and for the pay he lost during said period. An investigation on the insubordination charge was held by carrier on February 1, 1954, and claimant appeared and testified thereat.

The general issue here is whether, under the relevant governing rules of the parties' agreement(s) and under the principles long applied by this Division in discipline cases, carrier had just and proper cause for dismissing claimant. Among said rules are those set forth in the January 18, 1949, Memorandum of Understanding, which require a fair and impartial investigation and a written notice apprising an accused employe of the charge(s) brought against him. Among said principles are those which require that (1) carrier's operating rules and supervisory orders must have been understand-

ably transmitted to employes and must be reasonably related to the safe and efficient operation of carrier's business; (2) the transcript of carrier's investigation must contain at least substantial evidence of guilt as charged; and (3) the penalty administered by carrier for proven guilt must be reasonably related to the seriousness of the offense and to the employe's record.

This Division's determination of whether carrier properly adhered to these requirements in its actions beginning January 15, 1954, and through February 5, 1954, must, as always, rest on the facts derived from a study of the transcript of carrier's investigation and of admissible evidence in respect thereto — in this case the investigation of February 1, 1954. Unfortunately, it must be reported that carrier, on whom the burden of proof must be said to rest in such cases, has submitted to the Division not the full text of said transcript but only one or two short excerpts therefrom. (Petitioner has also contented itself only with presenting three excerpts. But petitioner's burden here was the lesser one.) Under these circumstances the Division finds itself unable to reach firm conclusions that carrier sustained its obligation to establish that its actions in all respects complied with (1) the agreement's requirements and (2) the Division's criteria for determining discipline cases. In short, the Division is unable fully to satisfy itself that just cause existed.

Given this fatal procedural defect, the Division must uphold the claim herein.

AWARD: Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 7th day of April 1964.

DISSENT OF CARRIER MEMBERS

With the first five paragraphs of the Findings there is little to which to take exception. The penultimate and last paragraphs, reading as follows, are the ones to parts of which vigorous exception must be taken.

> "This Division's determination of whether carrier properly adhered to these requirements in its actions beginning January 15, 1954, and through February 5, 1954, must, as always, rest on the facts derived from a study of the transcript of carrier's investigation and of admissible evidence in respect thereto — in this case the investigation of February 1, 1954. Unfortunately, it must be reported that carrier, on whom the burden of proof must be said to rest in such cases, has submitted to the Division not the full text of said transcript but only one or two short excerpts therefrom. (Petitioner has also contented itself only with presenting three excerpts. But petitioner's burden here was the lesser one.) Under these circumstances the Division finds itself unable to reach firm conclusions that carrier sustained its obligation to establish that its actions in all respects complied with (1) the agreement's requirements and (2) the Division's criteria for determining discipline cases. In short, the Division is unable fully to satisfy itself that just cause existed.

"Given this fatal procedural defect, the Division must uphold the claim herein."

This Referee apparently harbors the belief that the carrier is wrong until its action is vindicated. This is contrary to established rule. It is universally accepted that the contrary is true; that is, that the burden of proof is upon the petitioner to establish the error of the carrier's action.

In the instant case Petitioner asked that the claimant's personal record be cleared and that he be paid for all time lost from the Carrier's service between January 5 (sic — should be February 5) and April 22, 1954, based upon protest that the Carrier's action in dismissing Fireman Wilson from the service was highly improper. The basic issue presented to the Division was whether the Carrier had given proper notice under paragraph 2 of the joint understanding of January 18, 1949, between the Carrier, Engineers, Firemen, Conductors and Trainmen, requiring that the Carrier will "Duly apprise accused employe by written notice of the charges that are to be brought against him". The Referee concocted an issue not raised by either party and upon this he based a sustaining award.

There is some conflict of fact in the submissions as to the manner in which this notice was served. For the purpose of this dissent it will not be necessary to go into details thereof as the Referee apparently sloughed off any consideration of the basic issue and reached his decision solely because the Carrier had not submitted to this Division a copy of the formal transcript of investigation of February 1. The Referee states, as quoted above, "Unfortunately, it must be reported that carrier, on whom the burden of proof must be said to rest in such cases, has submitted to the Division not the full text of said transcript but only one or two short excerpts therefrom. (Petitioner also contented itself only with presenting three excerpts. But Petitioner's burden here was the lesser one.)"

Article 50 of the applicable schedule reads in part as follows:

"DISCIPLINE

* * * If stenographic report of investigation is made, copy will be furnished to the employee involved, or his representative, upon request."

There can be no question that the purpose of this provision is that if the employes elect to contest an application of discipline they can request and obtain the supporting record to put before the Adjustment Board. In the instant case an investigation was held, testimony was received, recorded and transcribed, and a complete copy furnished by the Carrier to the Petitioner. Yet the Petitioner deliberately omitted it from his petition.

The record is clear that the Carrier furnished a copy of the transcript of investigation to the Petitioner. Under these circumstances, as emphatically and repeatedly argued to the Referee, if a transcript was to be furnished to the Division it was the Petitioner's primary obligation to do so. It was the Petitioner who presented the case here and it was Petitioner's obligation to prove to the Division that the discipline assessed by the Carrier was unduly harsh, arbitrary and capricious. There is nothing in the Findings to indicate that the Referee found that the discipline should be so characterized upon the merits and facts of the case. If such unduly harsh, arbitrary and capricious discipline is proved by the Petitioner by means of its submission and

supporting data, then it becomes the obligation of the Carrier to refute such allegations by whatever means are at its command. But here the Referee sustains a claim because the Carrier, the Respondent, the defendant, does not attach a copy of the transcript, notwithstanding that it was the Petitioner's obligation to furnish this transcript and his was the first obligation to prove that the discipline administered was unwarranted.

Sec. 3. First. (i), of the Railway Labor Act, provides:

> "* * * the disputes may be referred by petition of the parties or by either party to the appropriate Division of the Adjustment Board **with a full statement of the facts and all supporting data bearing upon the disputes.**" (Emphasis ours)

The Railway Labor Act requires the petitioning party to submit "all supporting data bearing upon the dispute". The working agreement requires that employes be furnished on request the transcript of an investigation to enable them to document any claim they may make and transcript was furnished them by the carrier in compliance with the agreement.

We do not question that in an investigation on the property the Carrier has the burden of proving cause for discipline, but it is equally certain that in a proceeding before this Adjustment Board the claimant as the moving party has the burden of proving basis for a claim. Determination of guilt or innocence and the application of discipline is in the first instance the prerogative of management (see for example Awards 9542, 12592, 15171, 16265 and 18291) and not of the Adjustment Board which functions only as an appellate tribunal reviewing the action taken by the Carrier. (Awards 6797, 12626, 14582, 14689 and 16106.) The Board must presume discipline administered is proper unless and until the claimant proves to the contrary. A mere protest, totally unsupported, as in this case, that discipline was unwarranted does not require a carrier to set about to disprove the assertion.

First Division Award 13051 with Referee Yeager showed that in discipline cases, as in all others, the claimant petitioning the Adjustment Board has the burden of proving his claim. Note the following from the Findings:

> "In an action such as this wherein the question of the propriety or right of the Carrier to assess or impose discipline is involved, **it is incumbent upon the claimant to demonstrate to the satisfaction of the Division that the action of the Carrier was erroneous in order to obtain relief.**" (Emphasis ours)

Other Findings to the same effect are contained in Awards 13053, 14403, 14573 and many others. The Division has denied scores of claims without Referee assistance in discipline cases where the claimant did not prove his claim, in a volume too great to enumerate.

Where a record has been made of testimony at an investigation, as in this case, and discipline based upon that investigation is contested, the transcript is the very essence of data bearing upon the dispute. As a matter of fact, the transcript is so fundamental to a claim seeking reversal of discipline that when it is omitted the claim must fail. In Award 14072, Referee Gallagher, the Division stated:

> "* * * without a transcript of the testimony taken at the investigation this referee cannot determine whether or not the discipline

entry made against the personal record of claimant was justified. * * * In the absence of a transcript of the testimony taken at the investigation, the claim must be denied."

In the spirit of Award 13051, referred to above, it is difficult to visualize that a petitioner can be so indifferent to his claim as to omit the only record which could possibly support his case and which is indispensable in a dispute of this kind before the Division. Referee Carey made very appropriate Findings in Award 17520 in such a case as this one and it underscores the point emphasized here.

"As we have noted, a copy of the transcript of the hearing was furnished the General Chairman, but for some unexplained reason it was not included in his submission to this Division. Since claimant has failed to furnish supporting data an affirmative award is not warranted."

For the same reason the Division, with Referee Harold M. Gilden, denied the claim dealt with in Award 17308, with the following Findings:

"Neither is it contended that claimant was blameless, nor is this Division, lacking the receipt of a copy of the transcript of the investigation, enabled to make its own determination of that matter.

"Article 12(b) specifically hinges the recovery of lost earnings resulting from a disciplinary suspension, on proof that claimant is free from fault. Since claimant's innocence, in this instance, has not been established, the discipline assessed should not be voided."

Referee Stone in Award 18878 assigned failure of petitioner to submit the record as one ground for denial, supporting by the following finding the necessity for that decision:

"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 on the merits. This was not done.**" (Emphasis ours)

Award No. 19448, Referee William H. Coburn, held:

"* * * We have not been furnished a copy of the transcript of the testimony taken at the hearings held on the property. There is nothing in the record here except bare assertions completely lacking in evidentiary value. Excerpts taken out of context from the hearing record by petitioner to substantiate its position are of no probative value.

"* * *

"From the foregoing it should be clear that petitioner has failed to establish an affirmative basis for sustaining the claim. Accordingly, it must be denied."

As shown by the foregoing, prior awards of this Division have not established any principle that it is fatal to Carrier's discipline when the

Carrer does not send in a complete transcript of the investigation on which discipline was based. The Labor Members have not heretofore held any such notion as that enunciated by this award. Evidence of that fact is Award No. 18538 and numerous others wherein the Labor Members joined with the Carrier Members in denying a claim for removal of discipline without the aid of a referee. No transcript of investigation was submitted by either party.

In the event the carrier had made no response whatsoever in the present docket the Division would first have had to determine whether the Petitioner gave factual support to the accusation of unwarranted discipline and, if not, dismiss it forthwith. Discipline is presumed proper until shown otherwise by competent evidence. Carrier on the property sustained the burden of proving that there was good cause for discipline and furnished that proof to the Petitioner; the Petitioner thereupon has the burden of proving any assertion to the contrary.

The Petitioner here omitted what he must, or should have, known (although the Referee apparently did not) was an essential part of his own petition. He thereby disregarded the requirements of the Railway Labor Act, of the First Division's Circular No. 1 and the clear significance of the governing agreement between the parties. The Petitioner brought this claim to the Division and thereby assumed the burden of supporting it. The Carrier is here merely as a respondent.

The premise upon which this award was based is wrong; thus the award is wrong; hence this dissent.

H. W. Burtness

We concur:

E. T. Horsley

H. V. Bordwell

H. J. Reeser

J. E. Carlisle

SUPPORTING OPINION

Carefully analyzed, the dissent confirms with complete finality the correctness of the findings and award herein rendered.

The disenter asserts: **"We do not question that in an investigation on the property the Carrier has the burden of proving cause for discipline . . ."** (Emphasis ours.) Accepting that basic guiding light, which party to a disciplinary dispute before this Divison **must** fulfill the oblgation of furnishing "all supporting data" (the investigation transcript) under Section 3, First, (i) of the amended Railway Labor Act and the National Railroad Adjustment Board's Circular No. 1? There can be but one answer: the **carrier**. Not the petitioner (which may or may not be the employes) nor the respondent (which may or may not be the carrier) but always the carrier. The relationship between the carrier and its employes simply cannot be switched around by use of the nebulous terms "petitioner," "respondent," "defendant," etc. (In passing, it will be noted that under the dissenter's

theory the obligation of furnishing the supporting data could always be reshifted to the carrier by the employes going through the futile process of threatening to strike.)

How, then, does the dissenter in fact quarrel with the findings and award? In short, through a series of non sequiturs the dissenter argues that the **agreed** (by all the Members of the Division as pointed out supra) **full** weight of burden of proof upon the carrier to prove the guilt of the employe in a discipline case on the property has, by some mysterious process, been shifted from the carrier to the employe to prove his innocence by the time the dispute reaches a decisionary stage before the Adjustment Board. For example, the dissenter asserts "it was Petitioner's obligation to prove to the Division that the discipline assessed by the Carrier was unduly harsh, arbitrary and capricious." Having agreed that beyond question "on the property the Carrier has the burden of proving cause for discipline," we submit that it is so hopelessly illogical as to challenge sanity for the dissenter to likewise assert that the employe must prove his innocence "to the Division."

The dissenter speaks of the Adjustment Board functioning "only as an appellate tribunal reviewing the action taken by the Carrier," and would thereby invoke the analogy of legal procedure wherein an appellate court passed upon cases appealed from a lower **impartial** court. That is a perfect non sequitur and is hopelessly erroneous. Patently, the Adjustment Board is not a court. Section 3, First, (i) of the amended Railway Labor Act does not name the Adjustment Board as an "appellate tribunal." The Adjustment Board is a Congressionally-created frankly bi-**partisan** administrative agency. Furthermore, it seems ridiculously superfluous to point out that the carrier is anything but an **impartial** lower court.

It has long been specifically, consistently, and repeatedly held that the Division is not required to accept the facts as stated by the carrier but must take the entire trial record into consideration before **deciding** whether the guilt of the accused has been established. This is well stated in the sustaining opinion in:

Award 8376 (E vs T&P) Referee Robert G. Simmons

> "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 divison. **The Ralway Labor Act contemplates that this division shall make its own findings of fact.** 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' . . .**" (Emphasis ours.)

The reference to the requirement that "all supporting data" be furnished this Division in discipline cases has specific reference to the submission **by the carrier** of an accurate, complete, copy of the transcript of the investigation.

The following awards are **directly in point** covering cases where **the carrier** did not submit a complete copy of the investigation transcript and it was held (in substance) that the same constituted direct failure to present "all supporting data" necessary to establish the guilt or responsibility of the employe:

Award 5555 (T vs A&StAB) Referee Robert G. Simmons

In which the Division, in sustaining claim for reinstatement and pay for time lost, held in part:

". . . This rule requires that the evidence so submitted be that which tends to prove, disprove, or explain the acts allegedly done by the employe. The rule further requires that ALL the evidence to be considered by the official conducting the hearing shall be submitted at the investigation, before the close thereof, and be incorporated in the record of the hearing. This precludes the official conducting the hearing, **and reviewing agencies** from considering, for the purpose of determining guilt or innocence of the offense charged, 'evidence' developed subsequent to the investigation and the authentication of the record. Without detailing the matters in the record this provision prevents the consideration of a part of the material contained in the carrier's submission herein. **The authentication of the record is required for the obvious purpose of assuring reviewing agencies that they have before them the evidence submitted at the trial and considered by the investigating officials in reaching a decision . . .**" (Emphasis ours.)

Award 11364 (T vs CStPM&O) Referee John W. Yeager

In which it was held in pertinent part:

"In this connection, it may well be said that the carrier's is not the last word on the question of suspension. The last word under the processes of the Railway Labor Act is the word of this Division. **The Division has the right to review the action of the carrier for at least the purpose of determining the question of whether or not the Carrier acted without warrant, or unreasonably or arbitrarily. This Division could not determine this question intelligently in the absence of a record of full investigation.**" (Emphasis ours.)

Award 12140 (F vs MBLR-T) Referee Sidney L. Cahn

In which the Division, in reinstating claimant with pay for all time lost, held in pertinent part:

> **"This docket fails to disclose any legal proof by way of a transcript of testimony concerning the propriety of claimant's discharge. The Carrier thus failed to sustain the burden of proving the truth of its charges and the claimant cannot properly be subjected to discipline . . ."** (Emphasis ours.)

Award 12424 (C vs KCS) No referee

In which the Division, **without the aid of a referee,** in sustaining claim for time lost account wrongful suspension, held:

> **"The record does not contain a transcript of this investigation, nor does it show upon what charge discipline was assessed. It does not show that Conductor Lowery was negligent in the performance of his duties."** (Emphasis ours.)

Award 14351 (F vs Penn-W) Referee Paul N. Guthrie

In which the Division, in sustaining claim for time lost account wrongful suspension and attending investigation, held in pertinent part:

> "It goes without saying that one of the purposes of such a trial is to develop the facts so that the proper penalty, if any, may be invoked. **In the absence of such a record this Division is in no position to determine whether a particular penalty is justified or arbitrary and capricious."** (Emphasis ours.)

Award 16952 (T vs WM) Referee Donald F. McMahon

In which the Division, in sustaining claim for pay for time lost and record cleared, held:

> "From a careful review of the record submitted to this Division, it is clear that **a full and complete copy of the investigation held by carrier has been omitted.** We are unable to determine from the record whether or not this claim has been properly progressed to this Division. The only testimony furnished us is evidently only that which in carrier's judgment is most favorable to its position, and whch might justify the decision reached by it.
>
> **"The burden of proof is on the carrier to justify its action** in suspending the employe from service, and to show that such action was justified and was not an arbitrary or capricious act on its part. **Carrier having failed to properly sustain its action, the claim should be allowed.**
>
> "In support of our position above taken, we also refer to Section 3, (i) of the Railway Labor Act, as amended, where, among other requirements, it is provided the Adjustment Board, referred to, **will be furnished** WITH A FULL STATEMENT OF THE FACTS AND ALL SUPPORTING DATA BEARING UPON THE DISPUTES." (Emphasis ours.)

Award 16955 (S vs Milw-E) Referee Emmett Ferguson

In which the Division, in sustaining the claim for time lost account suspension, held in pertinent part:

"From the record, we are unable to determine whether the insubordination, if any, occurred January 20th or later. There must have been some action in addition to the discharge, which occurred January 24, 1950. Whether it was an investigation, or merely a delayed decision **cannot be determined in the absence of a transcript** . . .

"In the light of these facts, we are of the opinion that the discharge of the claimant was not properly performed **in line with the schedule requirements and was arbitrarily decided by the carrier.**" (Emphasis ours.)

Generally speaking, the general theory of burden of proof has no place before this special congressionally-instituted administrative tribunal dealing with labor-management relationships. However, under schedule discipline rules by which the carrier s have contracted to refrain from applying discipline except on just cause **shown** by a fair and impartial trial, it is fundamental that the **full** weight of burden of proof upon the carrier must be applied in accordance with that which is so basic and well nigh sacred to any Anglo-Saxon jurisdiction. Stated another way, the foregoing must be true, for to construe otherwise would be to read into the minds of the parties to the contract by implication the utter absurdity of having agreed upon he totalitarian concept of a fair trial requirement that the accused must prove himself innocent.

The Division, being a **referral** tribunal charged with the duty of reviewing the **entire trial record** to determine whether the carrier has sustained its burden of proof against the accused, can only uphold the carrier's disciplinary action where **the carrier** submits the complete transcript of the investigation upon which **it** relies as containing the evidence justifying it in imposing discipline.. We cannot accept selected excerpts in lieu of the entire transcript as this would obviously give the carrier, as Referee Simmons so ably put it, and unconscionable advantage in such matters. Where the carrier does not submit the complete transcript, **it has not met its burden of proof** and we can only find that the carrier's decision of guilt is not supported **by the record presented.**

In these matters, the burden **is on the carrier** to sustain its position in imposing discipline **in the first instance.** The **only** support for its action can be found (if it actually exists) **in the evidence produced at the trial.** Thus to uphold its discipline, the **carrier** must show that the evidence supports the charge and that the discipline was justified. This burden cannot be transferred to the employes — they do not have the task of proving anything. They may allege or contend that the discipline was unjustly administered but **the transcript** must be examined to determine the question of fact thus arising — does the transcript of the investigation contain evidence establishing the guilt or the responsibility of the accused as the carrier has said it does? The answer to that question can be reached only by an impartial consideration of the entire transcript and when the carrier does not present that evidence, it has failed in its burden of proving its case. It would be absurd in the extreme to hold that when the carrier does not present the evidence on which it bases its position that the man is guilty, that the employes have not proved their contention that he is not. **The man is never guilty until he is, by competent evidence, proved so.** The trial conducted by the carrier is aimed (if properly held in a fair and impartial manner) at developing all of the facts, both for and against the employe and he is **never** in the situation of **being guilty unless he proves himself innocent**

To the contrary, he is innocent **until** proved guilty. **The position of the employes is always based on that fundamental principle.**

We agree with the dissenter the case was "emphatically and repeatedly argued to the Referee" throughout prolonged proceedings before this Division, in which the lengthy docket files on the authorities cited pro and con were exhaustively treated. For example, Referee Yeager's Award 13051 (cited in the dissent) and 11364 (cited herein) were painstakingly analyzed to show no real conflict on the issue herein determined. If this Adjustment Board is to serve any useful purpose, that issue has now been laid to rest with complete finality and anything said in the dissent cannot detract — but, to the contrary, if anything, only enhances the basic and eminent soundness and correctness of the well-reasoned findings and award herein rendered.

Don A. Miller

G. L. Buuck

K. Levin

B. W. Fern

W. R. Meyers