

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee William H. McPherson when award was rendered.

**PARTIES TO DISPUTE:**

**SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Machinists)**

**NORFOLK AND WESTERN RAILWAY COMPANY**

**DISPUTE: CLAIM OF EMPLOYES:**

1. That the Norfolk and Western Railway Company violated the controlling Agreement when it improperly discharged Machinist E. E. Harvey, Decatur, Illinois, on October 30, 1968 as a result of investigation held on October 29, 1968.

2. That accordingly the Norfolk and Western Railway Company be ordered to restore Machinist Harvey to service with all seniority, vacation, insurance and all other rights and benefits unimpaired and to properly compensate him for all wage loss retroactive to date of discharge.

**EMPLOYES' STATEMENT OF FACTS:** Mr. E. E. Harvey, hereinafter referred to as the claimant, entered the service of the Norfolk and Western Railway Company, hereinafter referred to as the carrier, as a machinist at the carrier's locomotive shops in Decatur, Illinois on February 22, 1968.

In a letter dated October 23, 1968 and signed by General Foreman J. R. Brewer, claimant was ordered to appear in the assistant to the master mechanic's office in Decatur, Illinois at 9:30 A.M. for formal investigation account of making accusations against a foreman on October 16, 1968, at approximately 11:00 P.M. at Decatur Diesel Mileage Shop.

In a letter dated October 30, 1968 and signed by Foreman J. M. Kepler, claimant was advised that he was dismissed from the service of the carrier as a result of investigation held on October 29, 1968.

Claim was filed with the proper officer of the carrier requesting that the claimant be restored to service under the conditions set forth in employes' claim No. 2 above. Claim was handled up to and including the highest officer of the carrier designated to handle such claims, all of whom declined to make satisfactory adjustment.

The agreement effective June 1, 1939, as subsequently amended, is controlling.

**POSITION OF EMPLOYEES:** It is respectfully submitted that the carrier violated the controlling agreement, particularly Rule 33, when it dismissed claimant from its service in that the charge placed against claimant was vague, ambiguous and misleading, and that the investigation held on October 29, 1968 was improperly conducted. Rule 33 of the controlling agreement states as follows:

**"RULE 33.**

No employe shall be disciplined without a fair hearing by designated officer of the Railroad. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employe and his duly authorized representative will be apprised of the **precise** charge and given reasonable opportunity to secure the presence of necessary witnesses. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal." (Emphasis ours.)

The charge placed against claimant by the carrier is contained in its letter dated October 23, 1968. This charge appears to consist solely of "making accusations against a foreman" with no reference being made as to what statements may have been made by claimant or any attempt being made to establish the identity of the foreman. It behooves us to examine the vague generalization of making accusations. According to Webster's New Collegiate Dictionary, by the G. and C. Merriam Company, Copyright 1956, the word "accusation" is defined as follows:

"accusation, n. 1. Act of accusing; arraignment. 2. That of which one is accused; charge; allegation."

Other reference sources define the word so consistently that quotations from them would be superfluous here.

In respect to the charge placed against claimant, it is submitted that the Carrier stands in violation of Rule 33 quoted above by failing to be precise.

Investigation was held with claimant on October 29, 1968. As will be shown, the charge against claimant was not sustained, and the investigation was not conducted in a fair manner as required by aforementioned Rule 33.

In an effort to sustain the vague and ambiguous charge it had placed against claimant, the carrier produced three witnesses during the investigation, none of whom was able to state that claimant had made any accusations. In actual fact, these witnesses denied that they had heard any accusations made by the claimant. In support of this, your attention is respectfully directed to the following interchange with witness Brewer:

"(CHASE) I would like to direct a question to Mr. Brewer. What did Mr. Harvey accuse Mr. Boyd of, Mr. Brewer?"

(BREWER) Nothing. He accused him of nothing. Just threatened him."

The questioning of witness Schnetzler produced the following:

"(CHASE) Mr. Schnetzler, what accusation did Mr. Harvey make about Mr. Boyd?

(SCHNETZLER) He said he had looked for him all day.

(CHASE) What did he accuse Mr. Boyd of doing?

(SCHNETZLER) I never heard anything."

There appears the following questioning of witness Boyd:

"(CHASE) Mr. Boyd, you overheard this conversation. What accusation did you hear Mr. Harvey make?

(BOYD) While I was in the General Foreman's office looking at some oil records for the units coming down the line, I heard in low voices, which I strained my ears to hear, that he had been looking for him all day and was going to get him.

(CHASE) Mr. Boyd, was anybody accused?

(BOYD) No, not to me, no, sir."

From the testimony of the carrier's three witnesses there can be no other conclusion than claimant was not guilty of the charge placed against him.

During the investigation, an attempt was made by the carrier's witnesses to imply that claimant had been threatening in allegedly having stated that he had been looking for him all day and was going to get him. It is respectfully submitted that the carrier, through its investigating officer, clearly did not share this feeling in view of this officer's statement:

"(ROWLAND) Mr. Chase, stick to the word accusation. There is no other word."

It is further submitted that the carrier did not conduct a fair hearing as required by Rule 33 by restricting the right of claimant's representatives to freely and thoroughly question the carrier's witnesses.

Repeatedly during the investigation Investigating Officer Rowland prevented questions being asked and/or answers given though, in effect, Mr. Rowland's restrictive actions actually support the employes' position that the carrier was interested only in pursuing alleged accusations made by claimant, and was not concerned with any other implications. In support of this, your attention is respectfully directed to the following statements by Mr. Rowland:

"Mr. Chase, isn't that away from the charges against this man? Let's stick to the charges against Mr. Harvey."

"We will have to stick to the charges here. This doesn't have anything to do with Mr. Brewer's being disturbed."

"Mr. Chabak, let's stick to the charges as presented here."

"Mr. Yancey, this has nothing to do with the charges against Mr. Harvey. Stick to the charges as presented."

"Mr. Chase, facts only, not opinions will be accepted here."

"No answer to that. It will be noted in the record."

"No questions."

"I am the interrogator. I am questioning the witnesses."

"Mr. Chase, stick to the word accusation. There is no other word."

During the handling of this case on the property, the carrier officers with whom appeals were handled attempted to inject the idea that claimant had been threatening in obvious disregard of the facts developed by the investigation as evidenced by the record of handling on the property. The employes submit that this was actually nothing but subterfuge in view of the fact that the carrier allowed claimant to work from the date of the alleged offense, October 16, 1968, and the date he was dismissed, October 30, 1968, these dates of employment being: October 21, 22, 23 and 29, 1968. Serious doubts must be raised concerning the carrier's responsibility toward its other employes if it seriously considered claimant to be a threat and yet allowed him to work. The only obvious conclusion is that the carrier did not consider him to be a threat, and he should not be so considered by your Honorable Board.

From all of the foregoing it becomes obvious that the carrier violated the rules of the controlling agreement and the claimant is entitled to a sustaining award from your Honorable Board.

**CARRIER'S STATEMENT OF FACTS:** On October 16, 1968, claimant E. E. Harvey was employed as a machinist at the carrier's Decatur, Illinois facilities.

At approximately 11:00 P. M., October 16, 1968, the claimant made accusations against Foreman Boyd and threatened him physical harm, in the presence of witnesses including General Foreman Brewer and his own committeeman.

On October 23, 1968, the claimant was advised of the investigation to be held on October 29, 1968, to determine his responsibilities, if any, in connection with the charge of "\* \* \* making accusations against a foreman on October 16, 1968, at approximately 11:00 P. M. at Decatur Diesel Mileage Shop."

Investigation was held on October 29, 1968, and claimant's guilt was established to the carrier's satisfaction, independent of his prior service record, by the sufficiency of believable evidence adduced at this investigation. Thereafter, and only after a finding of guilt, the carrier, as is its right, considered claimant's service record to determine the severity of discipline to be assessed, i.e., the fact that after only eight months of service he had now been found guilty of a second major and serious offense. The carrier dismissed the claimant from service on October 30, 1968.

There is an agreement in effect between the carrier and the employes of the mechanical department represented by the System Federation No. 13 of the Employes' Department, which includes the International Association of Machinists, bearing an effective date of June 1, 1939, and is on file with your board, and by reference is made part hereof and will hereinafter be referred to as the current agreement.

The employes base their argument on Rule No. 33:

"No employe shall be disciplined without a fair hearing by designated officer of the Railroad. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employe and his duly authorized representative will be apprised of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."

The appeal of claimant's dismissal and the carrier's decisions thereon were handled in the usual manner up to and including Vice President-Personnel E. A. Manetta, the highest official designated to handle claims and grievances in the mechanical department.

The carrier received a copy of letter dated January 14, 1970, signed by Mr. James E. Yost, President of the Railway Employes' Department, addressed to Executive Secretary, National Railroad Adjustment Board, Second Division, containing notification of intention to file ex parte submission involving this case.

**POSITION OF CARRIER:** At Decatur, the area in which the claimant was employed, there are two large operations which are under a common roof — The Diesel Mileage Shop and The Decatur Locomotive Shop. These two operations are responsible for maintaining approximately 280 locomotives, which include preventative maintenance work, scheduled overhauls, and truck changes, as well as dispatching approximately 3,400 units per month.

At the time in question, the claimant was working the third shift at the Diesel Mileage Shop. There are approximately 22 men and two supervisors assigned to this shift of which Supervisor Boyd was in charge of 14 employes. The claimant's duties pertained to any and all machinist work such as changing brake shoes, slack adjusters, cylinder heads and liners, and inspection of the diesel locomotive.

Prior to the incident which led to the instant dispute, Foreman Boyd had to contact the claimant on numerous occasions in regard to his general conduct and his attitude toward safety. The claimant's replies were generally abusive, and on several occasions he stated, "To the hell with you and the safety. I am not going to be here very long. I am going to quit anyway."

The claimant made the threatening accusation toward Foreman Boyd at approximately 11 P. M. on the night of October 16, 1968. This was approx-

imately 18 hours after Foreman Boyd had sent the claimant home account of not doing work that had been assigned. It was the carrier's opinion that the 18-hour lapse from the first encounter between Foreman Boyd and the claimant should have been a sufficient cooling-off period, and the carrier had no doubt that the claimant intended to do bodily harm. As a result of his action, the claimant was notified to report to the office of assistant to master mechanic on October 29, 1968, for a formal investigation.

As presented in the carrier's statement of facts and in the investigation, the charges preferred against the claimant were as follows:

"\* \* \* formal investigation account of making accusations against a foreman on October 16, 1968, at approximately 11:00 P. M. at Decatur Diesel Mileage Shop."

A review of the transcript of the investigation will disclose the fact that the charge preferred against the claimant was fully supported and the responsibility of the claimant in connection with the charge preferred against him was fully developed.

The claimant made the threats not only in front of three foremen, but also in front of his Committeeman Patrick, who tried to stop him in the middle of his threats and told the claimant to be quiet. This, among other reasons, establishes the seriousness of his statement and the guilt of the claimant.

In this regard, may we direct this board's attention to the following portions of the transcript:

"(ROWLAND) Mr. Brewer, I will let you look at this letter. Is it the letter you presented for the charges to be placed against Mr. Harvey?

(BREWER) Yes.

(ROWLAND) At this time I will excuse witnesses Schnetzler and Boyd to be called later.

I will read the statement from Mr. Brewer dated October 20, 1968.

"The following in reference to statements made by E. E. Harvey, Machinist, October 16, 1968, at approximately 11:15 P. M.

Prior to 11:00 P. M., October 16, 1968, I instructed Foremen B. J. Schnetzler and J. O. Boyd that Machinist E. E. Harvey would not be allowed to work that night. This was because he had left early that morning at 5:00 A. M. at his own choice rather than performing assigned duties, that he had made the statement, "I will not work a shift where Jim Boyd is Foreman again", and that he had not called back in to mark up for work.

Shortly after 11:00 P. M., October 16, 1968, Machinists E. E. Harvey and Carl Patrick appeared in my office wanting to know why Machinist Harvey would not be allowed

to work. In the course of the conversation Machinist Harvey stated that "I have been looking for Jim Boyd all day and couldn't find him, but I am going to get him sometime." Machinist Harvey also made the statement, "If I am not allowed to work tonight, I won't ever be back." (Emphasis ours.)

This for your information. Signed J. R. Brewer, General Foreman'

(CHASE) Mr. Rowland, would it be possible for us to have a couple of copies at this table to refer to during the course of this investigation?

[Let the Record show the letter was given to the Committee.]

(ROWLAND) Mr. Brewer, your statement has been read. Have you anything to add to it in your own words at this time?

(BREWER) Well, that statement pretty well covers everything. I instructed the Foremen not to let him work if he showed up. Then, a few minutes after 11:00 P. M., Harvey and Patrick, both Machinists, came into my office wanting to know why I wouldn't let him work that night. I told them that I had been left a message not to let him work and he had also made the statement he would not work that night. While we were discussing this, Machinist Patrick had called Chabak, and Harvey said he had been looking for Jim Boyd all day and couldn't find him.

(ROWLAND) Mr. Brewer, your opinion of Mr. Harvey's statement that he would get Foreman Boyd—did this mean to you to do bodily harm?

(BREWER) I think I can best answer that by what I told Mr. Harvey. I said I didn't think he would want to do that because it would just get him in trouble and he said he didn't give a damn if he did get in trouble. He was going to get him anyway. From those statements, I would say he was talking about doing bodily harm to Mr. Boyd. (Emphasis ours.)

(ROWLAND) Mr. Chase, do you have any questions for Mr. Brewer?

(CHASE) Yes. Mr. Brewer, you said you interpreted Mr. Harvey's statement to mean that he intended to do bodily harm to Foreman Boyd. You took it that way?

(BREWER) By the statement and his tone of voice, that is what it meant to me.

(CHASE) Mr. Brewer, was the comment made directly to you?

(BREWER) Yes, it was."

\* \* \* \* \*

"(ROWLAND) Mr. Brewer, the reason you were disturbed is because Mr. Harvey had made statements to the effect that he was going to get Boyd. Is that right?

(YANCEY) I would like to object to Mr. Rowland's putting words into the witness's mouth.

(BREWER) By what Mr. Harvey said, the tone of voice, it was said in, the committeeman seemed disturbed and tried to stop him in the middle of his comment and told him to be quiet — on these factors listed, he left no impression otherwise." (Emphasis ours.)

\* \* \* \* \*

"(CHASE) Mr. Brewer, you say this statement was made directly to you?

(BREWER) Yes.

(CHASE) What was your reply, Mr. Brewer?

(BREWER) I told him that I didn't think that he would want to do anything like that 'cause it might get him into trouble."

\* \* \* \* \*

"(ROWLAND) Mr. Brewer, you are excused for the moment. Please call in Mr. Schnetzler.

Mr. Schnetzler, please state your occupation and how long you have worked for the Norfolk & Western Railway Company.

(SCHNETZLER) Foreman for approximately four years, twelve years' service.

(ROWLAND) Mr. Schnetzler, will you look at this and tell me if it is your statement presented to General Foreman Brewer?

(SCHNETZLER) It is.

(ROWLAND) Mr. Schnetzler, who did you write this to?

(SCHNETZLER) W. K. Ramsey.

(ROWLAND) I will read this statement.

'On October 16, 1968, at approximately 11:15 P. M., Machinist E. E. Harvey came in the Diesel Shop office and talked to Mr. J. R. Brewer, General Foreman.

I overheard Mr. Harvey say he had looked for Mr. Boyd all day, and he was going to get him. (Emphasis ours.)

Signed B. J. Schnetzler, Foreman.'

Let the record show this affidavit was passed for inspection.

Mr. Case, do you have any questions for this witness?

(CHASE) Yes. Mr. Schnetzler, you overheard Mr. Harvey make this alleged remark that you have described in your statement. The remark was not made to you?



(SCHNETZLER) No, sir.

(CHASE) Mr. Schnetzler, where were you when it was made?

(SCHNETZLER) In the doorway, between the two offices.

(CHASE) Rather close, Mr. Schnetzler?

(SCHNETZLER) I would say close, yes.

(CHASE) Mr. Schnetzler, were you a part of a general conversation?

(SCHNETZLER) No, just an observer.

(CHASE) Mr. Schnetzler, did you make any comment when you heard this remark?

(SCHNETZLER) No.

(CHASE) Mr. Schnetzler, were you apprehensive or disturbed by the remark?

(SCHNETZLER) Somewhat, yes."

\* \* \* \* \*

"(ROWLAND) Mr. Schnetzler, I read your statement into the record. You said you heard Mr. Harvey say to Mr. Brewer, 'I have been looking for him all day and am going to get him.' Is that right?

(SCHNETZLER) Right."

"(ROWLAND) Let the record show Mr. Schnetzler was released, to be called if necessary later. Mr. Boyd called as a witness.

Mr. Boyd, would you state your position and how long you have worked for the Norfolk & Western Railway Company?

(BOYD) Relief Foreman, approximately 18½ years.

(ROWLAND) Mr. Boyd, I have a statement here from you addressed to W. K. Ramsey. Is this your statement, signed by you?

(BOYD) Yes, sir.

(ROWLAND) I will read this statement.

'Mr. W. K. Ramsey, on October 16, about 11:15 P. M., Mr. E. E. Harvey came in the office talking to Mr. J. Brewer, General Foreman. I heard Mr. Harvey say to Mr. Brewer, I have been looking for him all day and I am going to get him.' Signed J. O. Boyd, Foreman." (Emphasis ours.)

No employer can condone such insolence from its employes, for to do so would destroy the very basic management-worker relationship. Foreman Boyd

and other witnesses have testified of hearing the claimant's abusive and threatening accusations that were directed at Mr. Boyd. These men and the claimant's own committeeman observed the claimant's behavior while in the foreman's office, which was belligerent and deliberately insulting to those present. It is obvious from the testimony that no reprimand from the carrier or even action of his own committeeman will keep the claimant in order, and that to retain him in service would only lead to similar future disturbances. Therefore, there was no logical course left to the carrier but to discharge the claimant, inasmuch as he had proved to be completely unmanageable.

Further, it cannot logically be argued that the claimant had any right to make threatening accusations toward his supervisor. If the claimant felt that the foreman was in error, he certainly should have discussed the matter reasonably and sanely, in which he had every chance when he was in the office. Claimant thus denied himself the opportunity to settle the disturbance by a reasonable and calm discussion as was desired by the officials. This self-denial did not give him the privilege of denouncing and threatening his foreman.

Carrier asserts that the claimant was afforded a fair and impartial hearing. The claimant made threatening accusations against a foreman as charged and no rebuttive evidence had been offered that he did not; carrier did not act in a capricious or arbitrary manner, and the discipline was entirely justified and not excessive.

The National Railroad Adjustment Board has ruled many times in similar, if not identical, situations where employes have made oral assault on fellow workers and supervisors that it will not attempt to substitute its judgment for that of the carrier's. In this connection, may we draw this board's attention to Second Division Award No. 2897, where Referee Harry Abrahams ruled:

"Sometime after this incident during the investigation, the Claimant, Vinson, repeated the said threats that he had made to his Gang Foreman, Frank L. Peak, before other supervisory employes of the Carrier, when he stated, again referring to his Gang Foreman, that 'I should have mashed his skull in, and if it ever happens again, I'll beat hell out of him.'

Such threats, actions and attitudes cannot be tolerated of employes if management expects to carry out its duties and obligations.

\* \* \* \* \*

In view of the above, this Board will not attempt to substitute its judgment for that of Carrier.

#### AWARD

Claim denied."

See also Second Division Awards 4302, 4136, 3642, 3539, 3215, 2552, 1253, 1483, 1542 and many others.

It has been established through numerous awards that the National Railroad Adjustment Board will not interfere with disciplinary action taken by the carrier when discretion has not been abused and when the action taken is not without cause. Excerpts from several such awards of the Second Division are cited below.

#### SECOND DIVISION AWARD 2066

“The subject of discipline should never be treated lightly. It is a subject which this Board must consider quite frequently. We recognize the need for discipline to maintain order, safeguard lives and to secure a pattern of general efficiency.

As we regard the subject of discipline, it should be considered from the standpoint of reasonable effectiveness. Punishment of the violator should be of a degree compatible with the seriousness of the violation.

The purpose of discipline is two-fold—to punish the violator and to point out to other employes the seriousness of violations.”

#### SECOND DIVISION AWARD 1323

“\* \* \* it has become axiomatic that it is not the function of the National Railroad Adjustment Board to substitute its judgment for that of the carrier’s in disciplinary matters, unless the carrier’s action be so arbitrary, capricious or fraught with bad faith as to amount to an abuse of discretion \* \* \*.”

Also see Second Division Awards 1575, 1809, 1979, 2207, 2925, 3081, 3430 and 1121; Third Division Awards 3125, 3149, 3112, 891 and 135; Fourth Division Awards 377, 375, 345 and 332.

The record in this case speaks for itself. There can be no question that the responsibility of the claimant in connection with the charges preferred against him were fully developed and this dismissal was warranted and the carrier respectfully requests that the Carrier’s actions not be disturbed and the claim denied.

The organization on the property based its entire case on several alleged discrepancies and offers no proof as to the claimant’s innocence or denial of his statement as brought out in the investigation held on October 29, 1968. Carrier has thus assumed that they agreed that the claimant is guilty of making said threatening accusations and are content to argue that discipline should be set aside on alleged procedural errors.

First, the organization alleged that no precise charges were placed against the claimant and the carrier failed to sustain the charges in violation of Rule 33.

Rule 33 simply states:

“At a reasonable time prior to the hearing, such employe and his duly authorized representative will be apprised of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses.”

As previously outlined, the charge placed against the claimant in a letter of October 23, 1968 was the following:

“\* \* \* for formal investigation account of making accusations against a foreman on October 16, 1968, at approximately 11:00 P. M., at Decatur Diesel Mileage Shop.”

As can be seen from the above and pointed out in the exhibits, the claimant was notified at a reasonable time prior to the hearing, a precise charge stated even to the date, time and place that the threats were made by the claimant. The claimant made the threats not only in front of three foremen, but also in front of his Committeeman Patrick, who tried to stop him in the middle of his comment and told the claimant to be quiet. Certainly, there could be no question by the organization as to the charges placed against the claimant which led to this investigation, and under these circumstances, claimant cannot be exonerated of his abusive conduct.

Thus, we think, it is conclusive that your board has clearly recognized the gravity of such conduct as the claimant was guilty of in the case here before you cannot be tolerated or go unchecked by the carrier. Discipline is a necessary adjunct between employes and their supervisors in order to have proper relations between them. Also, the purpose of discipline is two-fold: (1) to punish the violator and (2) to point out to other employes the seriousness of violations of conduct. In this connection, may we draw this board's attention to Second Division Award Nos. 1542, 1547, 1844, 2066, 2787, 3262, 4018, 5022, and others.

As outlined previously in this submission, the charge placed against the claimant was fully developed, and there can be no question that the claimant did, in fact, make threatening accusations against a foreman.

Secondly, the organization contends that the claimant did not receive a fair and impartial investigation because of the conducting officer.

The conduct of the hearing officer was purely and simply that of a hearing officer charged with the responsibility of making a complete and thorough "investigation"—that, after all, is the name of the game. In investigations involving railroad employes, no prosecutor as such is involved—it is the responsibility of the hearing officer to "make the record", even the point (if necessary) of indulging in honest questioning about the believability of certain testimony and holding the testimony to the issues.

The Petitioners imply that the claimant did not receive a fair and impartial investigation because the conducting officer supposedly prevented the questioning of witnesses. **This is not factual**, and nowhere in the investigation were the claimant's rights violated. The conducting officer has the duty to maintain an orderly procedure in the investigation, as was done in this investigation.

The conducting officer has the obligation and duty to develop the true facts and to challenge testimony which is not relevant to the issue regardless of the party introducing such testimony. This is exactly what was done in this investigation. This in no way prevented the claimant from having a fair and impartial investigation. The claimant was allowed all opportunity to produce witnesses in his own behalf and to cross-examine witnesses testifying against him.

Although any officer conducting an investigation or hearing tries to maintain an orderly procedure, the hearing does not have to be conducted (nor can it be conducted) with the same legal preciseness of a court room; the fact remains that rules of legal proceedings are not applicable to railroad investigations. The railroad proceeding is more in the nature of administrative proceedings than that of a formal action of law. (See First Division Award 20071, also *Edwards v. St. Louis-San Francisco R. Co.*, 361F92d, 946; 7th Cir., 1966.)

This, then, leaves only the question as to whether the discipline was excessive. The claimant's service and discipline record follows:

| Entered Service   | Service Capacities | Dismissed        |
|-------------------|--------------------|------------------|
| February 22, 1968 | Machinist          | October 30, 1968 |

#### Discipline

|                  |  |
|------------------|--|
| October 18, 1968 | Investigation held and subsequently given 30-day record suspension in lieu of dismissal—failure to perform assigned duties as instructed and sleeping on duty. |
|------------------|--|

Even a casual review of the claimant's service and discipline record shows that the discipline of dismissal was not excessive.

As can be seen from the claimant's discipline record, he was given a 30-day record suspension in lieu of dismissal on October 18, 1968, for his failure to perform assigned duties, or insubordinate and sleeping on duty. Also, as evidenced by the case, this was the second serious offense in which formal investigation had to be held on the claimant within the mere eight-month period service. The claimant's attitude and behavior since he has been with the carrier is convincing evidence that Carrier would be assuming an unwarranted risk in continuing claimant in its employment. Obviously, he has no intention of becoming a proper employe.

It is the position of the carrier that it may properly consider the past record of an employe when assessing discipline after a finding of guilty, and, in fact, it should do so in fairness to its employes with otherwise good records who might be penalized more severely than would an employe with a bad record.

In Third Division Award No. 1599, the board clearly defined the duty of the carrier to consider the employe's record in connection with matters of discipline. There the board denied the claim and held in Part 2 of its opinion that:

“Second: In disciplinary matters it is not only proper, but is essential, in the interest of justice, to take past record into consideration. What might be just and fair discipline to an employe whose past record is good might, and usually would, be utterly inadequate discipline for an employe with a bad record.”

Also see Second Division Award No. 1367, which stated that it was not only proper, but essential, to take into consideration the employe's past record.

From the facts adduced in this record, the carrier is firmly convinced that:

1. Claimant was given a fair and proper hearing;
2. The record made at the hearing was sufficient to support a finding of guilt;
3. The punishment rendered was not an abuse of the carrier's discretion when weighed against the claimant's period of relatively short service with the carrier and his demonstrated poor record as an employe during that short period;
4. The organization has noted no challenges to carrier's conduct in this matter which have not been adequately and thoroughly rebutted herein; and, finally,
5. This record completely vindicates carrier's handling of this matter.

The claim should be denied in its entirety.

It would be unrealistic, and certainly not reflective of the record, to believe your Board, after consideration of the evidence presented, would render a decision favorable for the employes. However, if this claim should be sustained, compensation for wage losses can only be for the difference between what the claimant would have earned with the company and what he in fact earned in other employment during the critical period. Rule 33 states, in part:

“ \* \* \* If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal.”

**FINDINGS:** The Second 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.

Parties to said dispute waived right of appearance at hearing thereon.

When Claimant reported for work at the start of his regular third shift on the night of October 16, 1968, he was told that he could not work because of an incident that occurred during his preceding shift. He and a committeeman went to the general foreman's office to discuss the matter. During the discussion the Claimant said, with reference to his foreman, something to the effect that "I have been looking for him all day and couldn't find him, but I am going to get him sometime." This was the remark that brought the dismissal, which was based on a charge of "making accusations against a foreman" and occurred after the employe had been allowed to return to work for four days.

The Organization contends that the charge was vague, and that there was no evidence that the Claimant made any accusation. The Carrier contends that the record of the hearing supports its finding that Claimant was guilty of making threatening accusations and that the penalty imposed was reasonable in view of the Claimant's brief service and poor record.

The Organization's contention that the charge against the Claimant was vague and imprecise cannot be accepted. The notice of hearing clearly stated the charge as "making accusations against a foreman" and listed the time and place of the incident.

At the hearing held on the property there was testimony from three witnesses: the general foreman (to whom the remark was addressed), another foreman (who was present in the same room), and the employe's own foreman (who overheard the conversation from an adjoining room). In searching the hearing transcript for evidence of any accusation, we must bear in mind the meaning of that term. Its definition is covered in a letter from the Carrier to the Organization, quoting from four dictionaries and showing that the most common definition is "a charge of wrongdoing." Nowhere in the record do we find any mention by any of the witnesses of any charge of wrongdoing made by the claimant against his foreman. Claimant's statement appears to imply that he felt his foreman was guilty of wrongdoing, but no such charge was voiced. In fact, all three witnesses stated on cross examination that they heard no accusation.

QUESTION: What did Mr. Harvey accuse Mr. Boyd of, Mr. Brewer?

GENERAL FOREMAN: Nothing. He accused him of nothing. Just threatened him. . . .

QUESTION: Mr. Schnetzler, what accusation did Mr. Harvey make about Mr. Boyd?

FOREMAN: He said he had looked for him all day.

QUESTION: What did he accuse Mr. Boyd of doing?

FOREMAN: I never heard anything. . . .

QUESTION: Mr. Boyd, was anybody accused?

EMPLOYE'S FOREMAN: No, not to me, no, sir.

Careful study of the transcript shows that the subsequent finding of the Carrier that the Claimant was guilty as charged was completely unsupported by the testimony. On the contrary, the record shows conclusively that the Claimant was not guilty of the charge placed against him. Since Rule 33 of the Agreement requires that the employe be apprised of "the precise charge", he cannot be charged with one thing and found guilty of another. "Accusation" and "threat" are by no means synonymous. The discharge, therefore, cannot be sustained.

We, therefore, order reinstatement with seniority and vacation rights unimpaired and compensation for all wages lost, less outside earnings, since

date of discharge (October 30th, 1968). This Division has consistently held that rules such as Rule No. 33 in this Agreement preclude any award with reference to insurance premiums.

**AWARD**

Claim sustained to the extent indicated in the findings.

**NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of SECOND DIVISION**

**ATTEST: E. A. Killeen  
Executive Secretary**

Dated at Chicago, Illinois, this 11th day of December, 1970.