

Award No. 1402

Docket No. 1327

2-L&A-MA-'50

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee E. B. Chappell when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 59, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. (Machinists)**

LOUISIANA & ARKANSAS RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 1. That under the current agreement, Machinist J. T. Fitzpatrick was unjustly suspended and dismissed from the service on September 26 and October 9, 1947, respectively.

2. That accordingly the carrier be ordered to reinstate this employe to all service rights with pay for all time lost, retroactive to September 26, 1947.

EMPLOYEES' STATEMENT OF FACTS: Machinist J. T. Fitzpatrick, hereinafter referred to as the claimant, was employed by the carrier at Minden, Louisiana, with a seniority date as of May 24, 1929, and his regular assignment of hours were from 7:00 A.M. to 3:00 P.M.

The carrier's General Foreman Hearron suspended the claimant from the service about 10:00 A.M., Friday, September 26, 1947, for cause reflected in charges preferred against him the next day by Master Mechanic Cailleff, copy submitted and identified as Exhibit A, and which summoned the claimant to stand trial at 2:00 P.M. Monday, September 29, 1947. This investigation proceeded as scheduled, with copy submitted and identified as Exhibit B of the question and answer statement conducted between Master Mechanic Cailleff and General Foreman Hearron, without the claimant present. Copy of the question and answer statement between Master Mechanic Cailleff and the claimant is also submitted and identified as Exhibit B-1.

The carrier's master mechanic made the election to discharge the claimant from the service on October 9, 1947, and copy of his letter to the claimant is submitted and identified as Exhibit C.

The rules of the agreement effective August 1, 1945, as subsequently amended, are controlling.

POSITION OF EMPLOYEES: It is submitted that this claimant was an employe of many years of employment relations with the carrier, which subjected him to be dealt with fairly, and certainly entitled to all the rights accruing to him as contemplated in the aforementioned controlling agreement, particularly that part thereof contained in Rule 30, which reads as follows:

"No employe shall be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a

witnesses or to question the veracity of General Foreman Hearnon. Therefore, this case is based on a question of veracity as between the two men, and, as shown, it was known that Fitzpartick indulged in intoxicants, that the general foreman knew this and tried every way he could to keep from reporting the matter, but Fitzpatrick in his drunken condition refused to cooperate and thereby forced Foreman Hearnon to suspend him and make a report thereof.

Prior and subsequent cases of intoxication as shown by the records confirm the habits and attitude of Mr. Fitzpatrick.

Claim should be denied, and the Board is requested to so find.

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.

The parties to said dispute were given due notice of hearing thereon.

In conformity with Rule 30 claimant was suspended on September 26, 1947, pending hearing upon a charge that on that date he was under the influence of intoxicating liquor and created undue disturbance while on duty. On September 27, 1947, both claimant and his local chairman were apprised of the precise charge in writing and the hearing was set for September 29, 1947, at 2 P.M., before the master mechanic. Such hearing was then held whereat claimant was represented not only by the general chairman, but also by his local chairman who had knowledge of the facts because he was present at the time and place where the alleged offense occurred and there saw and talked with both claimant and the foreman who then suspended him. The foreman testified at length. Both the general chairman and local chairman were given opportunity to cross-examine him, but the general chairman asked only one question and the local chairman asked none. Claimant then testified at length, but the general chairman and local chairman, although given opportunity to do so, asked him no questions and offered no other testimony. Neither claimant nor his representatives made any requests or objections at the hearing or questioned its fairness in any manner. On October 9 thereafter, claimant was notified that he was dismissed from the service for being under the influence of intoxicating liquor while on duty.

Claimant contends primarily that he was not given a fair hearing because he was not permitted to face his accuser when his testimony was given. The transcript does not disclose whether or not the foreman testified in the presence of claimant, and if he did not, no objection was made thereto by claimant or his representatives. The master mechanic who conducted the hearing makes the statement that claimant's representatives agreed to the procedure followed at the hearing and the reporter who witnessed the signatures and took the testimony verified that statement.

In the absence of controlling contractual provisions, as here, an accused employe having authorized representatives of his own choice present will not ordinarily be permitted to participate in a disciplinary hearing without objection as to the manner in which it is conducted and after an unfavorable result, complain of its fairness. See Awards 1251, 1334 and First Division Award 13606.

In the light thereof and the record before us, we conclude that the hearing was fairly conducted and that evidence there adduced by the carrier supported

the charge. Therefore, we cannot conclude that it acted arbitrarily, unreasonably or unjustly. In such a situation the Division cannot substitute its judgment for that of the carrier. See Award 1389.

In the discipline to be imposed after determining his guilt, it was not only proper but essential in the interest of justice for the carrier to take into consideration the employe's past record. See Award 1367. In view of such past record and the nature of the charge, we do not find the discipline imposed to be either arbitrary, unreasonable or excessive.

For the reasons heretofore stated the Division concludes that the claim should be and is denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling,
Secretary

Dated at Chicago, Illinois, this 26th day of July, 1950.