Award No. 1591
Docket No. 1518
2-ACL-BM-'52

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Carroll R. Daugherty when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 42, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Boilermakers)

ATLANTIC COAST LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1—That under the current agreement Boilermaker L. F. Witt was unjustly dismissed from the service effective Friday, August 4th, 1950.

2—That accordingly the carrier be ordered to reinstate this employe in the service with seniority rights unimpaired and compensate him for all loss of time since August 3rd, 1950.

EMPLOYES' STATEMENT OF FACTS: At Pinners Point, Virginia, in the fore part of July, 1950, the carrier regularly employed Mr. N. V. Oldenbuttal, foreman, one machinist, one machinist helper, one electrician, a small force of carmen, a few laborers, a clerk, hostlers, and maintained in addition to some other equipment or facilities a stationary boiler No. 40, located on a floating pile driver. This point is located about one hundred and twenty-five miles from Rocky Mount, North Carolina.

The carrier elected to have this boiler No. 40 annually inspected by Mr. L. F. Witt, lead boilermaker and inspector from the roundhouse at South Rocky Mount, North Carolina, where he had been employed for approximately twenty-five years as a boilermaker and for the past twelve or fourteen years as lead boilermaker and inspector in the roundhouse. In other words, Mr. Witt's employment record as a boilermaker with the carrier is approximately twenty-eight years. Boilermaker L. F. Witt, hereinafter called the claimant was assigned by the carrier to proceed to Pinners Point to do this annual inspection job Tuesday and Wednesday, July 4 and 5, 1950. Upon arrival there it was apparent to the claimant that the boiler had been out of service for a considerable period of time and consequently he sought the opportunity to examine the inspection records of this boiler but the foreman informed him that those records were maintained at Rocky Mount. The claimant then applied the hydrostatic pressure to the boiler in the manner directed by the foreman so that the inspection of the boiler for defects and leaks could be completed. Mr. Oldenbuttal, the foreman, and the machinist helper, after the machinist applied the steam gauge to the boiler, assisted the claimant in holding the hydrostatic pressure on the boiler at one hundred pounds (20% above the allowable steam working pressure of eighty pounds) for approxi-

"The line check was in good condition. The ¾" globe valve between the check and the boiler was found ¼ turn open with the operating hand wheel off." Mr. Fairchild admitted at the hearing that this was unusual. The valve should be entirely open.

The carrier does not question that this boiler did receive a hydrostatic test of 100 pounds. It was admitted at the oral hearing that on account of rust, slag, etc., no leak would show under a cold water pressure. Steam pressure was not given this boiler on account of the leaky condition of the old wooden water storage tank. Witt signing a statement that a test was made under steam is about the only damaging evidence presented.

The real cause of the boiler explosion can be questioned. The carrier attempts to say that the flues pulled away on account of a weakened condition, yet we cannot overlook the fact that two staybolts were pulled through a sheet that no one has questioned was serviceable. This accident happened while machinist and helper were firing up the boiler to test the safety or pop valves.

This record shows to what length the carrier went to relieve its responsibility, but when the General Chairman began to handle the case and asked for a further investigation, he was refused and told the case was closed.

This record sustains the employes' claim that in the handling of this case Boilermaker Witt did not receive fair treatment, and that the carrier has gone to great length to relieve itself of any obligation. There is insufficient evidence in this record to support the carrier's position toward Witt.

The employes' position must be sustained.

A. C. Bowen

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.

L. F. Witt, lead boilermaker and inspector for some twelve years at the carrier's South Rocky Mount roundhouse in North Carolina and having a favorable over-all employment record of about 28 years with the carrier, was sent to inspect on July 4 and 5, 1950, an upright tubular stationary boiler, A.C.L. No. 40, located on a floating pile driver at Pinner's Point, Virginia. In the course of his inspection Witt subjected the boiler for about 15 minutes to a hydrostatic test under pressure of 100 pounds, 20 pounds more than allowable steam working pressure. No leaks were discovered in the flues at the bottom and top flue sheets. The flues were visually inspected by three-cell flashlight. Little or no hammer-testing for rust and corrosion was done.

On completion of his inspection Witt had one of the carrier's clerks fill out answers as dictated by him, to questions on boiler inspection form MD-27. On this form, which he signed in the presence of a notary public, Witt stated that the condition of the fire tubes (flues) was "fair." He also answered "yes" to the question, "Was boiler examined under steam?"

On the morning of July 18, 1950, a machinist and helper were instructed to test the pile driver's machinery. After putting water in the boiler, they fired it up. At 11:33 A. M. the boiler blew up, fatally injuring both men.

After recovering the boiler and its attachments, the carrier inspected them and investigated the accident. The carrier concluded that the cause of the explosion was faulty flues in the boiler.

On July 27, 1950, the carrier notified Witt that his responsibility in not properly inspecting the boiler would be investigated on August 1, 1950. During the investigation which was held on that date Witt admitted that he had falsified his answer on the inspection form in respect to examining the boiler under steam. The Pinners Point foreman, N. V. Oldenbuttal, who was with Witt during much of the latter's inspection on July 4 and 5, was present at this investigation but was neither examined by others nor asked questions himself.

On August 3, 1950, Witt was notified of dismissal from the carrier's service. After that date, while the case was being developed by the Organization, Witt made statements, with supporting affidavits, on matters that he had not presented at his investigation. He said that (1) at Pinners Point he had expressed concern to Foreman Oldenbuttal over the condition of the boiler's flues; (2) he had told the foreman not to put the boiler into service until he (Witt) had looked up the records on the boiler upon his return to Rocky Mount; (3) after returning to Rocky Mount he located the records with some difficulty and found that no repairs had been made on the boiler since 1941; (4) on July 14 he telephoned Oldenbuttal to this effect and suggested that it would not be advisable to put the boiler into service; and (5) Oldenbuttal told him he would report these things promptly.

The carrier denies that, before Witt left Pinners Point, he and Oldenbuttal had any understanding in respect to the correctness of the form MD-27 signed by both of them. The carrier acknowledges the July 14 telephone conversation but denies that Witt advised Oldenbuttal the boiler was unsafe and should be held out of service. According to the carrier, Witt merely stated that he could find no record as to when the flues had been renewed and suggested only that they be replaced at some convenient date.

When, subsequent to Witt's dismissal, the carrier was told of this additional evidence and asked by the Organization to grant a rehearing it refused to do so.

As in all such cases, our task is to ascertain from the record whether the Organization has sustained its burden of proving that the carrier violated the agreement's provisions on discipline, including the making of a precise charge in writing; the providing of a fair hearing; and, if the offense be considered proved by the carrier, the imposing of a punishment compatible with the offense. Part of the Organization's obligation is to show that the carrier's own burden—that of establishing guilt—was not upheld.

It is possible to determine this case on rather narrow, technical grounds. We might find that (1) Witt did indeed falsify some of the answers to form MD-27; (2) after receiving a precise, written charge he was given ample opportunity at the hearing (a) to explain why he did the above and (b) to bring out the evidence he testified to after his dismissal; (3) he did not seize this opportunity, and he stated at the close of the hearing that it had been a fair one; (4) he was at least partly responsible for the death of two men; and (5) in view of all these things the carrier did not violate Rule 21 on Discipline but sustained its own burden of proof and applied a proper penalty.

But to render such a decision on such grounds would not be a complete fulfillment of this Division's responsibility. We are obligated to weigh all the evidence in the record; we are not limited to that developed at the carrier's own investigation of Witt. We must, in short, give due weight to Witt's post-investigation contentions, for they tend to weaken the carrier's charge of his total responsibility.

On this broader basis it does not appear that the carrier gave Witt a fair hearing. We think the carrier should have agreed to reinstate Witt without prejudice pending a reopening of the case during which the carrier would have received the additional testimony, pro and con. Then, on all the available evidence, it could have made a decision that might well have been compelling.

Accordingly we direct the carrier to reinstate Witt, with seniority rights unimpaired, as of August 3, 1950. We further direct the carrier to compensate Witt at pro rata rates of pay for all time lost because of his dismissal, from the total amount of which shall be deducted all wage income earned by him in other employment since the date of his dismissal.

Obviously there is nothing in our ruling here to prevent the carrier from re-investigating Witt's responsibility for the accident of July 18, 1950, at Pinners Point, Virginia, and from assessing an appropriate penalty for whatever offense may be finally proven.

AWARD

Claim sustained to extent set forth in Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 26th day of November, 1952.

DISSENT OF THE CARRIER MEMBERS TO AWARD NO. 1591, DOCKET NO. 1518

The effect of this Award is two-fold. First, it finds that a Boiler Inspector, who (1) by his own admission, neglected to make a proper inspection of a boiler, (2) "did indeed falsify" his sworn certification to the safety thereof, (3) "was at least partly responsible for the death of two men", and (4) "was given ample opportunity" to explain or defend this conduct, should not have been dismissed from service ("a proper penalty") because some three months after his admittedly "fair and impartial" investigation the Carrier refused to allow his demand that the case be reopened for the purpose of considering matters that, for no explainable reason, "he had not presented", but had "ample opportunity" to present at said investigation. Second, in substance, it holds that a man, whose employment relationship with the carrier has been lawfully terminated under due process of agreement, may thereafter continue to enjoy benefits by virtue of the schedule governing his former class of employment and may continue to claim rights under the Railway Labor Act.

The claimant, as a boilermaker and inspector, was employed to, and received extra compensation for, assuming charge of boiler inspections and certifying under oath the safe condition of any boiler thus inspected. On July 4 and 5, 1950, he was dispatched to Pinner's Point, Virginia, for the sole and express purpose of inspecting an upright tubular stationary boiler located on a floating pile driver. After making this inspection, the claimant completed a form, and swore to its accuracy, wherein he certified that some 26 observations and tests had been made and that "all defects disclosed by said inspection have been repaired, except as noted on the back of this report" (there was no notation on the back thereof). Just 13 days

later the pile driver was fired up to test out its machinery in order to ascertain if it could be used immediately for driving piles. A mechanic and his helper fired up the boiler, and it exploded. Both men suffered horribly painful injuries, lingering a short while and finally died.

Subsequent tests and inspection of recovered parts of the boiler disclosed that the flue sheets were half wasted away by rust corrosion and that the fire tubes were extremely weak. A proper inspection, including a steam test, would have disclosed these defects. Yet, the claimant had certified that a complete inspection had been made, that the flues were in fair condition, that a steam test had been made and that all repairs necessary for safety had been completed. This could only lead to a serious question as to the quality of the claimant's inspection and the veracity of his certification. Therefore, he was charged with "not giving proper inspection to stationary boiler No. 40 located on A.C.L. floating pile driver at Pinner's Point" and was granted an investigation in compliance with Rule 21 of the controlling agreement.

At the investigation the claimant admitted both that his inspection had not been complete and that his certification had not been correct. He has not since denied the correctness of these admissions and neither the majority nor the petitioner have ever contested them. After the claimant had agreed that his investigation had been fair and impartial and that he had nothing more to present, it was closed. The facts presented therein led to the inescapable conclusion that the claimant was guilty as charged, and the carrier so found. Consequently the claimant was dismissed from service.

The majority calls our particular attention to the foregoing, but then proceeds to ignore it in sustaining this claim for reinstatement and back pay. They do not pretend that the Claimant properly inspected the boiler, correctly certified its safety, or ever was denied any of his rights under Rule 21, the investigating rule. Instead, they treat the case as though the claimant was disciplined not for these things, but for causing the death of the two machinists. The carrier could have, and did discipline the claimant **only** for improperly performing his duties as inspector. Moreover, this was done on the basis of claimant's own admissions.

After launching their opinion on this false premise, the majority sustained the claim, not on the grounds that the carrier up to or including the date of dismissal, or ever, denied the claimant has contractual rights, but on the grounds that the

> "carrier should have agreed to reinstate Witt" because the claimant made
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> "post-investigation contentions" which
>
> "tend to weaken the carrier's charge of his **total** responsibility."
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> They urge that if the carrier acted "on all the available evidence", then
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> "it could have made a decision that might well have been compelling".

These "post-investigation contentions" had nothing to do with the offense of which the claimant was charged and for which he had been dismissed. They leave unaltered the fact that his inspection had been incomplete and his certification false. Instead when he came forward three months after the date of his dismissal; he suddenly asserted that he had known right along that the boiler had been unsafe and that he had made remarks to his foreman to this effect. Petitioner told the Division that the

claimant could see "that the boiler had been out of service for a considerable period of time" (Employees' Submission, page 1). The claimant now alleges that he remarked to the foreman that he did not believe the boiler should be put in service until he ascertained its condition, not by proper inspection, but by checking "the records" made by other inspectors (Employees' Exhibit 4). Petitioner told the Division that some nine days after his inspection, the claimant discovered from the records "that there had been no flue work performed" on this boiler "for approximately nine years"; that "immediately after the claimant observed these inspection records he proceeded" to tell the foreman that "the boiler was in an unsafe condition" (Employees Submission, page 2).

Do these assertions tend to make the claimant's certification to the safe condition of the boiler less false? Or do they change the fact that his inspection of the boiler, itself, was not complete? Not even the petitioner so contended. Indeed, one might wonder why the claimant would approve a boiler, when he had grounds for doubting its safety. (We think, however, that petitioner has supplied the only possible explanation for this otherwise perplexing behavior. On page 2 of the Employes' Brief they tell us it must have appeared to the claimant "that the carrier had little intention of using this boiler again".) However, irrespective of this, and of the doubtful verity of the claimant's assertions, nothing has been offered which possibly could alter the grounds for which he was dismissed.

It is of obvious significance that the "post-investigation contentions" offered by the claimant were founded on, and consisted solely of assertions by himself. Why did he refrain from expressing them at the investigation? He had "his day in court", why did he fail to use it? The answer is found in the fact that his defense at the investigation directly counters the position he now takes. During the investigation he endeavored to lessen his culpability by asserting that, although his inspection might not have been as complete as it should have, from the observations he did make he truly believed the boiler was safe. Thus his position was, that despite the negligent performance of his duties, he did not deliberately certify the safety of an unsafe boiler.

At the prompting of petitioner's local chairman, he said (transcript, page 5):

"Q. In your opinion and to the best of your knowledge the boiler was okay?

"A. Yes sir.

Now, the claimant says that he was initially uncertain of the boiler's condition and ultimately concluded that "the boiler was in an unsafe condition". This, the majority say, would

"tend to weaken the carrier's charge".

They neglect, however, to enlighten us on why this would be so. On the face of it, only two conclusions can follow: (1) The claimant not only withheld information at the investigation, but also lied; (2) the claimant's action in falsely certifying the safe condition of the boiler was wanton and deliberate, not just carelessness and negligence. This reveals the character of the man that the majority would compel the carrier to return to the job of inspecting boilers.—At the investigation the claimant volunteered this enlightening information (transcript, page 5):

"Q. You inspected this boiler as you have inspected all boilers in the past?

"A. Yes sir.

"Q. In making out the form, did you make this form out any different from any other form?

"A. I made it out just as I have been filling out all other forms of this kind."

If this award were lawful and enforceable, which we think not, one might well expect the claimant to continue his pattern of utter disregard for his responsibilities. We might wonder how the claimant's fellow employees would feel about working with equipment hereafter put into service on the basis of the claimant's inspections.

However, these consequences will not flow from the majority opinion. In sustaining this claim, we think, the majority have exceeded the authority of this Division. The fruits of their efforts are void and unenforceable, and their award is a nullity.

It is a principle as old as the law itself, that in the absence of contract, an employment relationship is revocable at the will of either party. An employer with impunity may discharge an employe, whether there be cause or not. See 35 American Jurisprudence, Master and Servant, Sec. 34. A contract such as Rule 21 of the agreement here, serves as an abridgement of this inherent power of the employer. However, the abridgement exists solely and to the extent that it is expressed therein. In **Butler v. Thompson, Trustee for Missouri Pacific Railroad Company, 192 F.** (2d) 831, 20LC 66668, the United States Court of Appeals, Eighth Circuit, it is held:

"In investigations, conferences or hearings by or before officers of the carrier an existing legal contract controls * * *" (court citing Brooks v. Chicago, R. I. & P. R. Company, 8 Cir., 177 F. (2nd) 385).

And compare: Broady v. Illinois R. R. Company 191 F. (2d) 73, 20 IC 66,462; **Virginian Railway Company v. Federation, 300 U. S. 515.**

Rule 21 provided that the claimant could not be disciplined

"without a fair hearing".

At the close of the investigation the claimant was asked (transcript, page 6):

"Mr. Witt, are you satisfied that this investigation has been fair and impartial?

to which he replied:

"Yes sir.

The rule also entitled him to notice in writing

"of the precise charge against him".

On page 1 of the Transcript the claimant agreed that he had been advised by written notice that the investigation would be held

"to determine your responsibility in not giving proper inspection to stationary boiler No. 40".

The carrier was also required to give him a

"reasonable opportunity to secure the presence of necessary witnesses".

At the start of the investigation the claimant was asked:

"Do you have any witnesses present?"

and the claimant said that he did; that he had brought with him a Mr. G. C. Holloman. Then the investigating officer asked the claimant's representative, Petitioner's Local Chairman (transcript, page 2):

"Q. Mr. Rinehardt, are you ready to proceed with this investigation?"

to which he said:

"Yes sir".

Finally, at the close of the investigation, the claimant was asked (transcript, page 6):

"Is there anything else you would like to say, Mr. Witt?"

The claimant replied:

"No sir".

In what regard was this claimant denied something to which he was entitled? The majority do not cite any provision of the agreement that the carrier has failed to meet. Indeed, nowhere in the record of this case do the majority question the fairness of the investigation.

Since the procedure leading to Witt's dismissal complied with the rules governing investigations, the employment relationship between the claimant and the carrier had been properly and irrevocably settled. Indeed the majority admits this in its findings of fact, although it goes on to order his reinstatement because of events which occurred after the employment relationship had been severed. When the claimant requested, **not an appeal,** but a re-investigation on October 21, 1950, he no longer enjoyed the status of "employe". Not being an employe of the carrier, he could claim no rights either under the controlling agreement or under the Railway Labor Act, except to appeal from that decision of dismissal which had already been rendered. On the contrary, he is now appealing, not from the **original** investigation, but from the carrier's refusal to schedule a re-investigation after he had been discharged.

Section 1, Fifth of the Railway Labor Act defines "employe" as "every person in the **service** of a carrier" subject to the carrier's "continuing authority to supervise and direct the manner of rendition of his service". The Act then describes and limits our jurisdiction to (Section 3, First i):

> "disputes between an **employe** * * * and a carrier * * * growing out of grievances or out of the interpretation or application of agreements".

In discussing the general application of this provision, it is said in **Thomas v. New York, Chicago and St. Louis Railroad Company,** 185 F. (2d) 614, 19 IC 66083:

> "* * * Appellant was entitled to reinstatement only if wrongfully discharged; he was wrongfully discharged only if some right arising out of contract or the law was violated by his discharge. No evidence was introduced from which the Court could draw such a conclusion. The Railway Labor Act does not abrogate the employer's right to hire or discharge employees. Texas & N. O. Rd. Co. v. Brotherhood of Railway & Steamship Clerks, supra; Beeler v. Chicago, Rock Island & Pacific Ry. Co., 169 Fed. (2d) 557 [15 labor Cases, para-

graph 64, 645] (C. A. 10). The statute creates no right of continued employment. * * *"

By this award the majority have endeavored to resolve a matter which neither concerned an "employe", nor a "dispute" which had grown "out of grievances or out of the interpretation or application of agreements".

The ultimate effect of their findings is to restore an employment relationship that has been properly severed. This is action far in excess of the authority of this Board. The general rule in this regard was well expressed in **First Division Award No. 13052**, E. v. WP, Referee Yeager:

> "Once the contract of employment, as distinguished from the agreement or schedule controlling employer-employe relations has been legally and properly severed it cannot be restored except by voluntary action of the Carrier and the employe."

As was done in the following:

First Division Awards Nos. 15316, 15317, and 15318, Referee Colby.

> "Claimant was dismissed for cause, following an investigation. Absent an appeal from carrier's determination, the relationship of employer and employe automatically terminated. The Board is without power to pass upon the propriety of the penalty imposed or to direct the carrier to reinstate or rehire. The principle laid down in Awards 13052 and 14421 is in all respects reaffirmed and controlling in this case."

First Division Award No. 14421, Referee Whiting:

> "A dismissal for cause terminates the employment relationship and the dismissed employe has no enforceable right to be reinstated or rehired by the employer. Reinstatement or rehire of a former employe dismissed from service is within the discretion of the employer. In the absence of any enforceable right to reinstatement there is no basis for this time claim."

First Division Award No. 13322, Referee Gilden:

> "The claimant's right to exercise seniority as a switchman vanished at the moment he conceded his discharge as Assistant Yardmaster to be for justifiable cause. When as a consequence of such discharge, he ceased to be an employe of the D&RGW, he also ceased to be among those included within the scope rule of the prevailing Switchmen's Agreement. Therefore, he was not entitled to the investigation provided in Article XVI of that contract."

The majority not only exceed the authority of this Division in the end they produce, but they also do so in the procedure they follow. They first assert that the record would justify a finding that:

> "(1) Witt did indeed falsify some of the answers to form MD-27; (2) after receiving a precise, written charge he was given ample opportunity at the hearing (a) to explain why he did the above and (b) to bring out the evidence he testified to after his dismissal; (3) he did not seize the opportunity, and he stated at the close of the hearing that it had been a fair one; (4) he was at least partly responsible for the death of two men; and (5) in view of all these things the carrier did not violate Rule 21 on Discipline but sustained its own burden of proof and applied a proper penalty."

However, they refuse to make this finding and pass it off as "narrow and technical". Such, they say, would not be a "complete fulfillment this Division's

responsibility". Should one wonder what indeed would be "complete fulfillment", the majority at another point has ruled:

> "As in all such cases, our task is to ascertain from the record whether the Organization has sustained its burden of proving that the carrier violated the agreement's provisions on discipline, * * *"

This is a correct pronouncement, but the majority do not follow it. Instead, they go outside the agreement and outside the investigation provided therein, and state:

> "We are not limited to that developed at the carrier's own investigation of Witt".

The answer to this obviously preposterous pronouncement is found in—

First Division Award No. 15319, E. v. CB&Q, Referee Colby, where it is held:

> "This Division here holds and decides, notwithstanding the adoption of Award 14445 over the dissent of the labor Members, that under the applicable rule governing discipline and investigations, the scope of our review is limited to the testimony in the transcript of the original investigation held on September 23, 1949, and that all matters purporting to serve any evidentiary purpose, extraneous to that transcript as incorporated in the docket now before the Division must be, as they have been, excluded from any consideration whatsoever in arriving at our Findings and Award herein."

To go outside the investigation, especially to consider alleged evidence withheld by the claimant, himself, places an impossible burden on the Carrier in imposing discipline. The danger of this procedure was recently recognized in **First Division Award No. 13204,** T vs. SP (Pac), Referee Donaldson:

> "The burden is upon the claimant or his representative to request the presence of any additional person they desire to question as a witness who is not present at the hearing. **The Carrier does not convene investigation hearings at its peril in this respect."**

For this reason, this Division has consistently held that anything not asserted at the investigation is deemed to be waived and may not be considered thereafter. In **Award No. 1402,** MA v. L&A, Referee Chappell, we found:

> "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 signature and took the testimony verified that statement.
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> "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."

And compare **Brotherhood of Sleeping Car Porters v. Pullman Company,** (USCA, 7th Cir., Cas. No. 10000, November 5, 1952), 22 IC 67228.

Were this award lawful, which we think it is not, its results would be to render all investigation rules meaningless. To avoid the consequences of his acts, a guilty employe would need only withhold evidence, and then come forth and charge that he had been treated unfairly. If the Carrier were to grant him a subsequent re-investigation, there would be nothing to prevent

his withholding still other information and claiming still other investigations, and so on ad infinitum. If such a result were to obtain, then the Carrier's rights to discipline and discharge its employes is not abridged, it is annihilated. It would no longer have the functions and duties described by this Division in **Awards Nos. 1252 and 1323, and** acknowledged by Referee Daugherty in **Award No. 1575,** where he said:

> "Numerous awards of this Board have established the principle that in discipline cases the Board will not substitute its judgment for that of the carrier, i. e., will not reverse or modify the carrier's discipline action, unless the employes and/or their representatives are able to produce substantial evidence of probative value that the carrier, in the exercise of its managerial prerogatives, has abused its discretion by proceeding in an unfair, arbitrary, or capricious manner. In considering these matters the Board analyzes the record in order to learn if the carrier's investigation has been conducted in a fair, impartial way and if the penalty imposed by the carrier has been compatible with the offense."

And no longer could Management meet the responsibilities acknowledged by the United States Supreme Court in M. St. P. & S. S. M. Ry. Co., v. Rock 279 U. S. 410:

> "The carriers owe a duty to their patrons as well as those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service."

For the reasons stated above, we the minority, hereby dissent.

/s/ C. S. Cannon

/s/ J. A. Anderson

/s/ D. H. Hicks

/s/ R. P. Johnson

/s/ M. E. Somerlott