

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Herbert B. Rudolph, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of System Committee of the Brotherhood that Charles M. Gallagher, 'Accounting Clerk,' be restored to service and reinstated with seniority date and rights unimpaired, and compensated for all wage loss sustained since October 14th, 1939, account unjust dismissal."

OPINION OF BOARD: The Board is of the opinion that the carrier by its acts as disclosed in this record waived a strict compliance with Rules 3, 4, 5, and 6, insofar as these rules relate to appeals from the order of dismissal and that the dispute is properly before this Board. As disclosed by the letter of Mr. M. E. Pangle, dated November 16, 1939, this officer who was the officer to which a final appeal might be taken, passed upon the merits of the order of dismissal, without then questioning the procedure taken to get the question before him. We hold that this constituted a waiver by the carrier of a strict compliance with the rules.

It is a well established rule of this Board that the action of carrier in dismissing an employe will be sustained unless it is arbitrary and without some basis of evidence. The rules do not require that there should be such a preponderance of evidence in support of the charge as would satisfy the requirements of a strictly legal proceeding. Cf. Award 232. However, the rules do contemplate a fair and impartial hearing where evidence in support of the charges should be adduced. Cf. Awards 135, 232, 431, 562, and 775. The rules do not specify the type of evidence that should be adduced, but that the rules require evidence of some kind to support the charge we believe to be implicit in the very rule which provides for the hearing.

This record discloses that no evidence in support of the charge was produced at the hearing upon which the dismissal was based. The unanswered question propounded to Gallagher certainly cannot be considered evidence. This was simply a restatement of the charge already preferred. In the carrier's final statement to this Board appears a copy of an affidavit signed by one Mary Constantineau. There is no showing that Gallagher knew of this affidavit or had ever been advised of its existence. The propriety of this affidavit appearing for the first time subsequent to the hearing before this Board might well be questioned, but, be that as it may, neither the affidavit or the matter to which it relates was made a part of the record at the hearing. The fact is, as shown by this record, that the affidavit is dated some weeks after the order of dismissal was made.

For this Board to sustain the procedure upon which this dismissal was based would be to abrogate entirely the requirement for a fair and impartial

hearing and upon this record we can do nothing other than hold that the dismissal has no support in the evidence and cannot be sustained.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the dismissal is without support in the evidence.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 17th day of December, 1940.