

Award No. 10076

Docket No. MW-9391

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Charles W. Webster, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) Section Foreman R. B. Chandler was not insubordinate in a telephone conversation with Division Engineer Robbins on May 7, 1956, as charged by the Carrier in a mailgram of the same date and said charges were not proven at an investigation held on May 14, 1956.

(2) That Section Foreman Chandler's record be cleared of such charge and that he be reimbursed for any and all pay loss suffered as a result of the improper discipline imposed on such unsubstantiated charge.

OPINION OF BOARD: This is a discipline case. The Claimant was suspended from service for 10 days because of alleged insubordination.

It is the contention of the Carrier that the Claimant, a section foreman, was insubordinate in that he used abusive language to the Division Engineer and that by innuendo stated that he would commit a battery on him.

The Organization, on the other hand, claims that the hearing does not sustain the charge and that the Claimant was not given a fair and impartial hearing.

Before proceeding to the merits of the case this Division wishes to point out that both parties have attempted to interject new matters before this Board which were not discussed on the property. This Division has consistently held that it will not consider such additional evidence and it has not in its determination in this case.

The first contention of the Organization is that the Claimant was not given a fair hearing in that the person who conducted the investigation announced immediately after the evidence had been presented that he found the Claimant guilty. No awards of this Division have been presented on such a point. The closest is Award 3358 wherein the claim before this Division was that the

decision was handed down before the transcript had been prepared although several days elapsed after the hearing. However, even without a transcript, the time lapsed gave the investigating officer the time for mature reflection. In addition, the Claimant in that case admitted his guilt. Therefore, this Division does not consider Award 3358 controlling. While the statement is made that the Claimant here also admitted his insubordination, a reading of the transcript does not hear out this contention. It is our judgment that there was a fact question to be decided. There is no question that under numerous awards of this Board we will not weigh the evidence and as long as the evidence is sufficient and supports the charge, the findings will not be disturbed. See Awards 6103, 6105, 6108 among others. However, these rulings do not deal with the question of whether a fair and impartial hearing was held.

The record also discloses that the Carrier in all steps after the hearing merely denied the claim. However, in their ex parte submission and at the time of the oral hearing for the first time they stated that they had taken into account the Claimant's past record. The Organization contends that his past record should have been introduced at the hearing and he was thus deprived of a fair and impartial hearing. This Division cannot accept this position. The purpose of the investigation is to determine responsibility for the specific charge. It could be extremely prejudicial to the rights of an employee, if, at the time a determination as to guilt or innocence is being made, his past record with the Carrier was also part of the investigation.

However, there is nothing in the record which shows that in the correspondence between the parties nor in the conference held on the matter the Carrier ever brought in the question of the Claimant's past record, some of which had resulted in disciplinary action which thus was a matter of record. In addition, the Carrier makes a naked allegation in its ex parte submission as to an event in 1948 involving alleged insubordination for which the Claimant received an oral reprimand. If the appeal procedure is to have any meaning, then both parties are under an obligation to state fully their reasons for the action taken. If this is not done the appeal procedure becomes an empty gesture and might as well be eliminated from the Agreement.

Finally, the characterization of the Claimant's acts as set forth in the Carrier's ex parte submission bear little resemblance to the facts as established at the investigation.

In light of all the above, it is the determination of this Division that the Claimant was not given the fair and impartial investigation called for by the Collective Bargaining Agreement.

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 the Employee involved in this dispute are respectively Carrier and Employee 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 Agreement has been violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of September 1961.