

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 101

In the Matter of the Dispute
between the Parties:

Brotherhood of Locomotive
Firemen and Enginemen

and

River Terminal Railway
Company

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Claimant:

J. C. Hawkins

Case #1

Statement of Claim: "Claim of Fireman J. C. Hawkins for reinstatement on the board, and pay for all time lost awaiting reinstatement (Claim dated 3/24/67).

Findings: Public Law Board No. 101, upon the whole record and all the evidence, finds that the Parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction over the dispute involved herein.

The Parties to the said dispute waived hearing thereon.

The transcript of the testimony at the disciplinary proceedings, conducted by the Carrier, reveal that the conductor, two brakemen on Job 221, on which the claimant was fireman and the crew dispatcher, were not called as witnesses.

We find, after a careful examination of the transcript of the testimony that a fatal error was committed by the Carrier in that it failed to call the crew dispatcher as a witness at the disciplinary proceedings.

Upon reviewing the transcript we find that the Claimant testified that he left the train at 9:15 P.M. informing the Engineer that he was going to the

crew dispatcher's office to make a bump. He further testified that he had been ill for the three preceeding days with stomach ailment and had previously gone to the men's room four times that evening. He stated that when he left the train he went to the men's room and thereafter at 10:00 or 10:15 P.M. he went to the crew dispatcher's window and spoke with the crew dispatcher.

Since the Carrier contends that the claimant never attempted to place a bump but instead deserted the train, it must be the conclusion of the Board that the crew dispatcher was a material witness, who could have offered substantial and vital evidence to the matter in dispute, if he had been called to testify at the disciplinary proceedings. He was available and could have been summoned by the Carrier.

While it may well be that the testimony of the crew dispatcher may not have been supportive of the Carrier's position, his testimony was material and necessary in that area of conflict.

It is the further conclusion of the Board that, even though the claimant himself did not call the crew dispatcher to testify, the Carrier carried the obligation to produce the crew dispatcher as a witness, to give material testimony of those events which he witnessed.

We find support for this conclusion in Award 20094 First Division (Referee Seidenberg), wherein it is stated:

"While the course of the disciplinary proceedings is under the control and direction of the carrier, nevertheless it is not permitted to cull or select data for presentation which only tends to demonstrate or prove the fault or wrongdoing of the employee being tried. In this case the authority to invoke disciplinary proceedings flows from Regulation 6-A-1 of the Agreement, which provides:

'Firemen will not be suspended nor dismissed from service without a fair and impartial trial . . .'

This provision is a guarantee by the carrier that it will deal impartially with the employee in accordance with the commonly accepted standards of fairness. It means that not only will there be a complete investigation, but that there will also be a complete and fair trial. And that in the conduct of that trial it will present all the material facts - those which favor as well as those which are adverse to the claimant - in order that it may determine upon the full record whether the imposition of sanctions is warranted.

* * * * *

The Division also holds that the engineer's testimony constituted such a basic and essential element in the fact finding process, that this testimony cannot be considered waived by the failure of the claimant, on his own initiative, to introduce it. The responsibility placed upon the carrier for insuring a fair and complete trial means that it must meet this responsibility without regard to the action or inaction of the claimant. This responsibility is particularly grave when the witness to be summoned is under the control of the carrier."

Also see Award 16699 First Division.

One additional fatal defect in the proceedings exists in the fact that the transcript of the disciplinary proceedings is incomplete and does not contain a true record of all the testimony given at the hearing. During the course of the proceedings the tape of the tape recorder ran out. The transcript contains only such testimony as was recorded by the tape recorder but fails to contain any record of testimony given subsequently. Neither does the transcript reveal that the claimant made any admission that he had a fair and impartial hearing or that he had no additional evidence to offer.

Although the Carrier later proffered a unilateral statement of the unrecorded testimony, we must conclude that this statement did not cure the defect

✓ A careful examination of the recorded testimony in the transcript does not warrant the conclusion that the Carrier maintained its responsibility to conduct a fair and impartial hearing on its claim that the claimant "deserted" his train.

In the light of the findings herein that defects in the disciplinary proceedings existed which prevented the claimant from receiving a fair and impartial hearing, the claim for reinstatement on the board, and pay for all time lost waiting reinstatement will be sustained, less any earnings received during the period herein involved. ✓

Inasmuch as the findings herein require no discussion of the merits of the claim, it is the conclusion of the Board that none should be made.

AWARD: Claim sustained.

David L. Kabaker

DAVID L. KABAKER
Impartial Chairman of
Public Law Board 101

T. E. Malloy

Carrier Member

E. F. Beckman

Organization Member

Dated at Cleveland, Ohio
this 18th day of April, 1968.