

The Second Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(Brotherhood Railway Carmen of the United States
(and Canada
Parties to Dispute: (
(Missouri-Kansas-Texas Railroad Company

Dispute: Claim of Employees:

1. That the Missouri-Kansas-Texas Railroad Company violated the current controlling agreement and the Railway Labor Act, as amended, when Carman J. M. Wheeler was assessed a fifteen (15) day deferred suspension as the result of an unfair hearing.

2. That the Missouri-Kansas-Texas Railroad Company be required to make Carman J. M. Wheeler whole in this matter by having the deferred suspension removed from his personal record, and that he be found innocent of all charges and compensated for the time that he lost in attending his hearing. This time loss amounts to seven (7) hours pay at the proper pro rata rate.

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 employes 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.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant is a Lead Carman with a service date of May 27, 1942. As a result of charges dated April 2, 1985, Hearing held on April 23, 1985, and by letter dated April 24, 1985, Claimant was assessed a 15 day deferred suspension for violation of General Rule D, Circular No. DP-3 for alleged negligence in the rerailling of a car on March 23, 1985.

On March 23, 1985, Claimant and several other employees were called to assist in the rerailling of a derailed trailer car at the Carrier's Ray Rip Track. Claimant and Lead Wreckerman, L. Beck inspected the derailment and discussed the appropriate way to proceed. The car was fairly level with one trailer leaning slightly to the south and the other trailer in a normal position. Claimant's examination of the stanchion blocks showed that they were in

a locked position. It was decided that the best way to proceed in light of the position of the car was to use an engine lift truck to pick up the west end of the car, place a wheel change truck on the south side of the car and use a fingerlift boom to stabilize and shove the car to a rerailing position after lifting. Beck operated the lift truck and Claimant drove the fingerlift truck and operated the boom. Beck brought the lift truck to the West end of the car and Claimant assisted him in spotting it to the proper position. Claimant moved the fingerlift truck to a position where the boom would be opposite the lifting pads on the car. Claimant, Beck and two other Carmen chained the trucks to the car, blocked the other end of the car and set rigging blocking under the lift truck. A lifting hook was attached to the coupler of the derailed car and the drawbar was allowed to slide towards the lift on the truck. Claimant positioned the boom of the wheel change truck against the derailed car with the outriggers down. Claimant was aware that some of the lading was shifted, but it was not believed that the car was in an unusual position as a result of the shifting. According to Claimant, "we proceeded in a normal lifting manner that we would any derailed car." Claimant next noted that the other two Carmen were clear and signaled Beck to begin lifting. Claimant observed the side of the trailer and did not at any time note leaning movement other than what was present when the procedure started. The car came up in a normal fashion and moved about a foot towards the rail. The drawbar was moved towards the south and Claimant repositioned the boom against the car. According to Claimant, at that point, all of the operations seemed normal. Claimant signaled Beck to again lift the car. The car came down above the rail and swung to a rerailing position. The procedure was stopped to observe the position of the trucks. Claimant noted that the car had moved completely away from the boom that had been against the side of the car. Claimant walked around the back of the truck and did not notice any unusual movements. Claimant proceeded towards the front to speak to Beck about lowering the car when he heard another employee sound a warning. The car then made a slow roll to the south. As the car was on its side, a trailer partially struck the rear deck of the fingerlift truck.

Claimant testified that he began his wrecker assignment in 1953 and since that time has been involved in a wrecking capacity. Claimant has been a Wrecker Foreman for 14 years. According to Claimant, Beck, and the two other employees present, the procedure utilized in the rerailing of the car was the normal procedure utilized in other similar operations. Beck and Claimant both testified that they were aware of a shifting load and took precautions to compensate for that factor.

The Organization first argues that the charge was vague and imprecise. In pertinent part, the charge reads as follows:

"Please arrange to report ... for formal investigation to develop the facts and determine your responsibility, if any, it being alleged that on or about 8:30 a.m., March 23, 1985, you were rerailing car TTX 604341, loaded with trailer, LCRZ 200164, and AVAZ 250768, and allowed same to turn over, doing extensive damage.

In this formal investigation you will be charged with violation of Circular No. DP-3 effective September 1, 1983, General Rule D. Employees must not be:
(2) Negligent."

Rule 26 requires that "the employe and his duly authorized representative will be advised of the precise charge and given opportunity to obtain the presence of witnesses, if desire." Given the nature of the incident, our reading of the charge satisfies us that it is sufficiently "precise" within the meaning of Rule 26 so as to put Claimant on notice of the allegations against him and to permit him the opportunity to prepare and present his defense to those allegations. We note that at the conclusion of the investigation, Claimant Representative indicated that no further witnesses were desired. Therefore, we are satisfied that Claimant's right to a fair Hearing was not violated by the wording of the charge. CF. Third Division Award 26177.

The Organization next objects to the inclusion in the record of a letter and sketches dated August 19, 1985 from Vice President Mechanical, M. F. Rister who analyzed the circumstances and concluded that had Claimant taken another approach to the rerailing, the car would not have overturned. The Hearing in this case was on April 23, 1985 and the determination to assess discipline was made by the Carrier on April 24, 1985. The evidence contained in Rister's letter was submitted long after the fact and its inclusion in the record and reliance thereon by the Carrier was improper. Since we are restricted to testimony adduced at the investigation, for us to consider such material, which was clearly available to the Carrier at the time of the Hearing, it was necessary for the Carrier to introduce that evidence at the investigation. Third Division Award 22826. Having failed to do so, we shall not consider it.

With respect to the merits, we agree with the Organization that substantial evidence does not support the Carrier's determination to assess discipline. Claimant has been charged with negligence. Negligence is defined in Black's Law Dictionary (West, 1979) as:

"the failure to use such care as a reasonably prudent and careful person would use under similar circumstances; it is the doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances."

It is therefore incumbent upon the Carrier to demonstrate by substantial evidence that Claimant's actions did not conform to the use of such care as would a reasonable and prudent person. The Carrier has pointed to no evidence properly in this record to meet its burden. On the contrary, all witnesses testifying at the Hearing stated that normal procedures were followed. Indeed, Claimant's detailed account of the event shows nothing out of the ordinary occurred and that caution was followed. Moreover, we note that the Carrier's argument that Claimant was negligent relies upon facts and follows

the analysis found in the August 19, 1985 letter which we have held not to be a proper part of this record. In any event, even if we considered the arguments made by the Carrier, such amounts only to a hindsight conclusion that perhaps there was a better way of performing the job. However, such is not a demonstration that Claimant was negligent. Finally, the fact that Claimant was aware that the car was brought to the Rip Track on the previous day for lading adjustment does not change the result. The record does not disclose that such knowledge was disregarded by Claimant in the handling of the rerailling. We shall therefore require that the suspension be rescinded and expunged from Claimant's record.

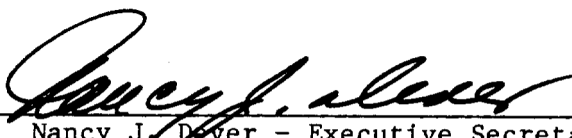
Finally, the Organization seeks payment for Claimant for having to attend the Hearing. We find no support in the Agreement for such an argument.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 30th day of September 1987.