Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9392
SECOND DIVISION Docket No. 8934
2-BRCofC-CM-'83

The Second Division consisted of the regular members and in addition Referee John Phillip Linn when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Belt Railway Company of Chicago

Dispute: Claim of Employes:

1. That as a result of an investigation held on August 23, 1979 Carmen Robert L. Anderson and William G. Klein were dismissed from the service of The Belt Railway Company of Chicago, effective Tuesday, September 4, 1979.

   Said dismissal is arbitrary, capricious, an abuse of managerial discretion and in violation of Rule 20 of the current working Agreement.

2. That the Belt Railway Company of Chicago be ordered to reinstate Carmen Anderson and Klein to their services with seniority, vacation and all other rights and benefits unimpaired plus compensation for all time lost as a result of said dismissal until their reinstatement is in effect.

3. That The Belt Railway Company of Chicago be ordered to pay any and all dental, hospital, surgical and medical benefits under the Agreement that Carmen Anderson and Klein suffer for all time held out of service and that the premiums for their group life insurance be paid for all the time they are held out of service. In addition to the money amounts claimed herein, The Belt Railway Company of Chicago shall pay Anderson and Klein an additional amount of 6% per annum, compounded annually on the anniversary date of claim.

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.

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

This case involves the dismissal of Car Inspector William G. Klein (seniority date of June 11, 1979) and Car Inspector Robert L. Anderson (seniority date December 21, 1978) who allegedly failed to comply with the Carrier's Rules when inspecting an interchange train on track #3 without having the switches properly

lined and locked and without having a blue flag displayed at both ends of the track as required by the Carrier's Rules and Federal Railroad Administration regulations on July 21, 1979. The dismissal action was taken on September 4, 1979 as a result of an investigation held on August 23, 1979.

By written notice dated July 23, 1979 from R. W. Kurtz, Assistant Superintendent of The Belt Railway Company of Chicago (Carrier or BRC) the Claimants in the instant case, Anderson and Klein, were individually advised that a joint BRC/MP (Missouri Pacific Railroad) investigation would be conducted on August 2, 1979 "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with a personal injury sustained by you and (the other named Claimant) while you were inspecting Track No. 3, part of a 148-car LN Train and Engines 718/1234/1226 which was being yarded on Tracks No. 3 and No. 10 in the East Yard at about 4:35 PM, July 21, 1979."

Subsequently, by written notice dated August 1, 1979, the same notice of investigation was sent to each of the Claimants changing the date of such investigation to August 23, 1979 because of postponement at the request of Missouri Pacific Railroad and agreed to by Mr. L. Leach of the Brotherhood of Railway Carmen of America & Canada.

At the August 23, 1979 joint BRC/MP formal investigation there were four other persons charged by language similar to that used in the notice to Claimants regarding the July 21, 1979 incident on BRC property. Those four persons were S. Rodman, Engineer, M.P.; S. Howard, Conductor, M.P.; E. Sumila, Brakeman, M.P.; and T. Kingery III, Brakeman, M.P. The notice to these four charged persons was later changed to indicate that the train involved was Train 718 being handled by LN Engines 2507, 1234, and 1226. No such change was reflected in the notices sent to the two Claimants here, but no objection concerning this matter was raised during the investigation or thereafter.

Following the August 31, 1979 notice to each of the Claimants terminating their services with the Carrier effective September 4, 1979, Local Chairman Leonard J. Leach submitted a formal appeal on behalf of Claimants from the dismissal decision on the grounds that the Claimants were not apprised of the precise charge against them as required by Rule 20 of the Agreement between the parties so that the investigation and decision resulting therefrom was null and void. Specifically, Mr. Leach contended that by instructing Claimants to report "for the purpose of ascertaining the facts and determining your responsibility, if any, ..." there was no indication to Claimants that the Carrier believed them guilty of any offense, and the effect of the notice was to tell Claimants that they would participate in a general inquiry rather than a trial. It was asserted that because the Carrier could not place a specific charge against Claimants the two employes could not be disciplined.

The claim was denied by Superintendent Car Department J. D. Mowery by letter dated November 5, 1979, that read in part:

"Your claim that Mr. Anderson and Mr. Klein was not apprised of the charge against them as required by Rule 20 of the current working Agreement, I can only point out that the Notice of Investigation apprised Mr. Anderson and Mr. Klein of the precise time, date, location and nature of the offense. I must conclude that your claim that the charge against Mr. Anderson and Mr. Klein was so imprecise as to not apprise them of the charge against them is wholly without merit.

With respect to your contention that Mr. Anderson and Mr. Klein were not charged with a specific violation, I must refer to the investigation notice and again point out that an investigation is to develop all facts material to the charge both for and against the employe. That it is an attempt to secure the facts of an occurrence so that if there was fault in the conduct of the employe, it will be disclosed. I can only respond that after a thorough reading of the investigation, that Mr. Klein and Mr. Anderson were fully aware of the investigation and their responsibility of the rules and regulations that apply in this instance."

The referenced Rule 20-Grievances reads as follows, in part:

"No employe shall be disciplined without a fair hearing by designated officer of the Carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employe and his duly authorized representative will be apprised of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired and compensated for the wage loss, if any, resulting from said suspension or dismissal."

The appeal and conference procedure has been utilized up to and including the highest designated officer of the Carrier, with no adjustment of the claim. The Organization has submitted the matter to this Board to determine whether Claimants have been given a fair hearing and whether they and their duly authorized representative were apprised of the precise charge against Claimants as required by Rule 20. The Organization argues that Rule 20 was violated in both respects.

The Organization emphasizes that by common dictionary definition the word "precise" means: 1) exactly or sharply defined or stated; not vague or equivocal; as, precise directions; 2) minutely exact; not varying in the slightest degree from truth, accuracy, standard, etc.; and 3) strictly conforming to rule or usage. The notice of investigation was not "precise" as the contract requires. Claimants did not know what the precise offense or charge was. They did not know whether

they were charged with violating a company rule, with negligence in the performance of their duties, or with negligence causing personal injury.

Further, the Organization asserts that the conduct of the hearing was improper with BRC Conducting Officer Urtz reading several Carrier rules and regulations into the record in an obvious attempt to create charges against Claimants, which charges Claimants could not possibly defend against simply because they were never apprised of such charges prior to the conduct of the investigation.

The Organization contends that the investigation transcript is replete with evidence proving that the Blue Flag Law was complied with by Claimants, that Claimants were not responsible for their personal injuries suffered on July 21, 1979 (but that the train crew operating the 148-car LN train failed to safely handle their duties as required by BRC's Book of Rules), and that Claimants were not given locks for their use in locking switches when inspecting cars and the Carrier knew that numerous tracks throughout the facility had switches not properly supplied with the necessary means to be locked. Given the facts of record, the Carrier acted arbitrarily, capriciously, and with abuse of managerial discretion when it violated Rule 20 of the working Agreement and dismissed Claimants.

It is the Carrier's position that the Notice of Investigation did not violate Rule 20, but was precise in apprising Claimants that they were being investigated concerning their personal injuries while inspecting a particular train on a particular track at a particular time, date, place and location. The Notice sufficiently informed Claimants that they might be found responsible for the specific misconduct occurring in that particular incident.

The Carrier stresses that Rule 26(h) expressly requires that "when workmen are on, under or between rolling equipment or any track, the following protection must be provided: 1. Each manually-operated switch providing access to the track must be lined against movement to that track and secured by an effective locking device. A blue signal must be placed at or near each such switch." Claimants were aware of the requirements of Rule 26, but neglected to follow those requirements and, as a consequence, cars were able to move back in on top of the train they were inspecting and directly caused their personal injuries.

The Carrier reminds the Board that the Blue Flag Protection Rule of the Carrier's Book of Rules (Rule 26) is taken directly from the Federal Railroad Administration Safety Act, which the Carmen's Organization vigorously urged be adopted based on the argument that human life and safety hazards were at stake when Carmen are required to work in the train yards. The FRA adopted a strict regulation and has held the Carrier liable and subject to fines for noncompliance with the Blue Flag Protection Rule; and the Carrier has thoroughly instructed its employes in the safe and proper procedure for working trains, and has never permitted its employes to deviate from the requirements of Rule 26. Consequently, the discipline assessed by the Carrier must be sustained when violation of said rule is supported by the facts, as contained in the record of this case, and the claim must be denied in its entirety.

It is the opinion of this Board that the Notice of Investigation did meet the requirement that it be precise in apprising both Claimants and their Organization of the charges to be faced. The term "precise charge" is met when the one charged must reasonably understand that he is being investigated for dereliction of duty at a particular time and place. With such notice, there is opportunity to properly prepare any defense and obtain any witness(es) able to speak to matters relevant to the charge. Thus, in Award 2475, Fourth Division, it was held that a precise charge requirement is satisfied where the notice given to a Claimant "identified the time, the date, the place and the specific engines involved", and "the notice specified the purpose of the investigation was to determine the extent of Claimant's responsibility in connection with the accident". This interpretation meets an employe's contractual due process. It serves the purpose of the Rule without affording unintended technical procedural loopholes.

It cannot reasonably be asserted that Claimants here did not know what their duties were and how they were being conducted at the particular time and place as specified in the Notice of Investigation. Indeed, the testimony presented by Claimants in the voluminous record of this case belies any contention that Claimants were unable to prepare an informed defense or were in any manner taken by surprise during the conduct of the hearing as a result of the notice given.

With regard to the contention of the Organization that Claimants did not receive a fair hearing, it is the determination of this Board that a fair hearing was had, even though the Conducting Officer did not call two witnesses requested by the Organization during the hearing who could have given additional testimony material to the total investigation.

As recognized by Superintendent Car Department Mowery in his letter of declination dated November 5, 1979, an investigation is to develop all facts material to the charge both for and against charged employes. By the general principle of fairness, a hearing officer is obligated to call witnesses who may be able to shed factual light on the occurrences involved to fulfill the duty to obtain all essential facts related to the charge. Where all such witnesses are not called, there may be procedural error sufficient to overturn any decision based on the hearing record because an insufficient and incomplete investigation was conducted that offends basic concepts of fairness in development of the facts.

The Board concludes that there was not procedural error sufficient to find a lack of fair hearing in the instant case because the purpose for calling the additional witnesses would not have affected evidence established in the record upon which the Carrier relied to determine that Claimants violated Rule 26(h).

The Carrier believes that there is sufficient evidence in the record of this case to permit findings that Claimants had not lined the switches away from movement into track number 3, had not locked the switch and had not reported the lock missing, and had not displayed the required blue flag on the east and west ends of track number 3. The Carrier concluded that Claimants' noncompliance with the provisions of Rule 26 contributed to the fact that the cars reentered track number 3 and ultimately resulted in the alleged injury to Claimants. This Board agrees with the Carrier in the matter.

There is contradictory evidence in the record as to whether Claimants lined the switch and how that work was done. That contradictory evidence could reasonably have been decided against Claimants. There is also conflicting evidence as to whether the blue flag was placed at the west end of track number 3, and the Carrier again could reasonably conclude from that evidence that the metal blue flag that Claimants contend was displayed was never put in place. Claimants admit that they did not place a blue flag at the east end of track number 3, even though it was their duty to do so, because another Car Inspector had said he would perform the duty for them. Because the investigation indicated the inquiry would be with regard to the events leading to the alleged injuries to Claimants, and it is clear no injury resulted because of any failure to display a blue flag on the east end of track 3, the Board does not attach significance to the conflicting evidence as to whether a blue flag was placed at the east end of track 3. Finally, with regard to the missing switch lock there is no dispute. The lock was missing. The missing lock was not reported by Claimants and no effort was made by Claimants to secure another lock so that they might be in conformance with Rule 26(h) in this matter.

The Organization has argued that Claimants, as relatively new employes, could not be expected to refuse to inspect the track because the switch did not have a lock, and emphasizes that evidence in the record discloses that many switches throughout the yard were without locks. The Board does not find the Organization's argument persuasive. The required safety procedures apply to all persons given the duties as assigned to Claimants on the date in question. The Claimants knew the safety requirements and, indeed, could and should have refused to inspect cars if they could not first comply with the safety requirements imposed by law as well as by Carrier Rules. The Carrier would not have been at liberty to require the employees to perform duties on threat of discipline where safety requirements were a condition precedent to performance of the work, and this Board would not sustain discipline or discharge based on alleged insubordinate conduct for refusal to perform work where the law, as well as working rules, imposed certain conditions for safe work performance prerequisite to the commencement of other duties, as here.

Neither Claimants nor the Carrier could ignore the legal requirements of the job assigned to Claimants on the day in question. The record supports a finding that Claimants did not perform the safety requirements and, consequently, contributed to their alleged injuries.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By _____
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 9th day of February, 1983.