Award No. 4358

Docket No. 3965

2-CRI&P-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 6, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Carmen)

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: (1) That under the current agreement, Carman J. P. Keeter was unjustly dismissed from the service of the Carrier on July 14, 1960.

(2) That accordingly, the Carrier be ordered to restore Carman Keeter to service with all seniority and service rights unimpaired and compensate him for all time lost retroactive to July 14, 1960.

EMPLOYES' STATEMENT OF FACTS: Carman J. P. Keeter, hereinafter referred to as the claimant, entered the service of the Chicago, Rock Island & Pacific Railroad, hereinafter referred to as the carrier, on March 24, 1923. On June 26, 1960, Claimant was working his assignment as car inspector in the train yard at Liberal, Kansas, assigned hours of 8 A. M. to 4 P. M.

At about 3 P. M. June 26, 1960, train No. 94 derailed at Pratt, Kansas. Under date of June 29, 1960, the claimant was instructed by written notice from Superintendent J. F. Orlomski that an investigation would be held at Pratt, Kansas at 9 A. M., Tuesday, July 5, 1960, "to develop the facts, discover the cause, and determine your responsibility, if any, in connection with derailment of Train 94."

The investigation was held as scheduled with the carrier calling two witnesses, Messrs. E. J. Gwin and S. C. Oswalt, and the employes called four witnesses, Messrs. Walter E. Smatherman, Vernon E. Ralston, H. J. Wriston, L. C. Fuller. Mr. A. L. Francis was also called as a witness.

It should be noted that the four witnesses called by the Employes are not named on the first page or top of page 2 of the hearing record.

Following the investigation, the claimant was notified by letter dated July 14, 1960, that ". . . your employment with this company and any and

Q: To your knowledge, did anyone in any capacity make any effort through any source to contact No. 94 to inform them that they had departed from Liberal without an air test?
A: Not that I know of."

Now, because any one of the above-outlined procedures were readily available to Keeter and because our rules and special instructions require Keeter to follow such procedures and because this serious accident could have been avoided had Keeter done his job in any one of the above-outlined ways, the carrier submits that Keeter's dismissal from service was fully justified.

Keeter's failure was serious. Keeter's failure was individual, and certainly could not be treated lightly. Keeter knew then and Keeter knows now as well as all employes know that prompt, complete compliance with all rules and special instructions are required under circumstances similar to those present at Liberal when Train 94 started out without an air test. The carrier believes that this accident shocked all Rock Island employes and hopes that none, including Keeter, will ever forget it, nor will any carman, including Keeter, ever again be found guilty of such total neglect as Keeter was on this particular day. For your Board's attention, Mr. Keeter was returned to the service of the Rock Island Railroad on April 17, 1961 based solely upon the fact that the carrier felt that Mr. Keeter had learned his lesson from this horrible accident, and would, in the future, comply promptly with all rules and special instructions.

The Carrier submits that it has been extremely lenient with Carman Keeter and the discipline assessed him and urgently requests that your Board upholds the action taken by the carrier which was fully justified by the facts recorded in the formal investigation.

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.

The Claimant J. P. Keeter was employed as a Car inspector at the Carrier's Liberal (Kansas) yard. On June 26, 1960, he was assigned to make an air test on train 94, a fast moving freight train, which arrived at Liberal at 11:30 A. M. He commenced making said test. However, before he was able to complete it, the train started moving and left Liberal at 12:05 P. M. It approached Pratt, Kansas, at approximately 3:00 P. M. When fireman G. E. Pritchett, who operated the lead engine, attempted to slow the train before entering a passing track, the brakes failed to hold properly. Brakeman H. D. Nunn, Jr., who was seated in the cab of the engine, pulled the emergency brake valve but the brakes again failed to slow the train. It entered the 15 m.p.h. turnout at a substantially higher speed. A derailment occurred in which 49 cars were destroyed resulting in a loss of more than $500,000.

After a formal investigation hearing, the Carrier dismissed the Claimant

from its service, effective as of July 14, 1960, on the ground that he (i) violated certain specified rules of the Rules and Instructions Governing Employes in the Operation of Train Air Brakes and Air Signal, and (ii) failed to take action to stop train 94 after he found it had left Liberal without an air test. The Claimant filed the instant grievance in which he contended that he was unjustly dismissed. He requested re-instatement with all rights unimpaired and with compensation for all time lost. The Carrier denied the grievance and the Organization referred the grievance to this Division. Thereafter, the Carrier re-instated the Claimant with full seniority rights, effective as of April 17, 1961 but without compensation for time lost. As a result, the only claim before us is the Claimant's request for compensation for the period from July 14, 1960, to April 17, 1961.

1. The law of labor relations is firmly settled that an employe's obligation to observe reasonable care in the performance of his duties is implied in the employer-employe relationship. Hence, no explicit provision in the labor agreement or the working rules is necessary to impose said obligation upon an employe. Failure to meet this obligation ordinarily constitutes negligence. The essence of such negligence is the failure to observe that degree of care, precaution, and vigilance which people of ordinary prudence and sagacity would use under the same or similar circumstances. See: Gallick v. Baltimore and Ohio Railroad Company, 372 U. S. 108, 118; 83 S. Ct. 659, 665 (1963). Because of the wide variations in given factual situations, the degree of care required or expected of an employe must usually be determined in each case on the basis of the specific facts underlying it. However ,an employe is generally obligated, solely by virtue of the employer-employe relationship and without explicit rules or instructions, to observe a maximum degree of care and vigilance in any case where human life or safety hazards are at stake. This applies specifically to the railroad industry because of its perilous nature and the Carrier's legal obligation to provide safe transportation.

Applying the above principles to this case, we have reached the following conclusions:

It is undisputed that the Claimant was prevented from completing the air test in question by action taken by other employes of the Carrier and that the train departed from Liberal for reasons beyond his control. It is also beyond dispute that the accident was caused by a combination of inattentiveness on the part of several employes and not the Claimant alone. It cannot validly be disputed, however, that the Claimant was obligated **immediately** to report to his superior or take all reasonable steps to stop the train when he realized that it was departing without an air test.

The Claimant contends that he reported to car leadman L. L. Casady before the latter went for lunch, or at about 12:07 P. M., that no air test was made. He also asserts that assistant master mechanic A. L. Francis was standing near enough to hear this report (Organization's Exhibit "B," pp. 54, 58, 60). Casady has categorically denied that the Claimant made the report to him (ibid., pp. 98, 100). Moreover, Francis has failed to corroborate the Claimant's contention that he overheard the report allegedly made by the latter to Casady (ibid., pp. 107, 109). In view of the conflicting evidence, we are unable to make a finding that the Claimant did report to Casady at about 12:07 P. M.

Furthermore, the record shows that the Claimant could have contacted the engineer of train 94 by using the radio of the switch engine which was standing near by, or that he could have reported to the chief dispatcher, whose

office was about twenty car lengths away, that the train had left without an air test. The Claimant took none of those steps, although he was admittedly aware that he could have taken them (ibid., p. 63). Actually, he did nothing to prevent a possible accident until Casady returned from lunch at about 1:00 P. M., or approximately one hour later after the train's departure, at which time he reported to Casady that no air test was made. This belated report does not excuse his initial failure promptly to report to his superior or take all reasonable steps to stop the train as soon as it left Liberal.

In summary, we are satisfied that the Claimant failed to observe that degree of care, precaution, and vigilance which was justly demanded by the circumstances and which a reasonably prudent person would have taken in the light of the obvious seriousness of the situation. His failure to do so constituted gross negligence.

2. The Claimant argues that trains had left Liberal without an air test on several occasions. This argument is besides the point. Even if one assumes that other employes were also negligent in the performance of their duties, this fact in no way absolves the Claimant in the instant case. He also asserts that the Carrier never advised him or any other carmen what they should do in a situation such as the one here involved. The flaw in that assertion is that no special instructions are necessary to the effect that an employe shall observe a reasonable degree of care, precaution, and vigilance.

3. The right of the Carrier to discipline the Claimant in the instant case cannot be doubted. We have consistently held that a Carrier's disciplinary action can successfully be challenged before this Board only on the ground that it was arbitrary, capricious, excessive or an abuse of managerial discretion. See: Awards 4000, 4098, 4132, 4195, and 4199 of the Second Division. We are of the opinion that the Claimant's suspension without pay for the period from July 14, 1960, to April 17, 1961, was not based on such unreasonable grounds. He did not merely commit an excusable error in judgment, but was guilty of gross negligence. His suspension was a fair exercise of the Carrier's managerial discretion. Accordingly, we hold that he was not unjustly suspended from service within the contemplation of Rule 34 of the applicable labor agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 16th day of December, 1963.