Award No. 9637

Docket No. SG-9180

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the Chicago, Rock Island and Pacific Railroad Company:

a. That Signal Maintainer E. L. Rollings was unjustly treated when he was assessed far more discipline than other employes, under like circumstances, for alleged violation of this Carrier's Rule 142, Rules and Regulations for Maintenance of Way and Structures.

b. That E. L. Rollings be paid for all time lost account of discipline being assessed unjustly; the General Chairman, as his representative, not being properly notified within ten (10) days of the discipline assessed in accordance with Rule 64 (b) of the Signalmen's Agreement and Rollings not being furnished with a copy of the transcript of the investigation in accordance with Rule 64 (c).

OPINION OF BOARD: The claim is (a) that Signal Maintainer Rollings "was unjustly treated when he was assessed far more discipline than other employes under like circumstance" for the violation of Carrier's Operating Rule 142; and (b) that he should be paid for all time lost because the General Chairman was not notified within ten days of the discipline assessed in accordance with Rule 64 (b) of the Signalmens' Agreement, and because Claimant was not furnished with a copy of the transcript of the investigation in accordance with Rule 64 (c).

For some nine and one-half years Claimant had been a Signal Maintainer and was well acquainted with his territory and equipment. He secured the lineup of train schedules before leaving Limon at 8:30 A. M., reached the east end of his territory about 10:00 A. M., started on his return trip westward, and reached Arriba about noon. As the operator was not there he saw the section foreman about 2:25 P. M. and received a lineup showing that there were two eastbound trains to look out for, the first being Train 8, reported on time; the other, Train 92, was scheduled to leave Limon at 2:40 P. M. but actually left about 2:05, thirty-five minutes early, so that it was ahead of Train 8. On giving Claimant the lineup the section foreman asked if he had time to reach Bovina ahead of Train 8; he replied that he was not going that far. He did not know that Train 92 was ahead of Train 8, but kept a careful lookout and had gone only a mile farther west when he saw the smoke of Train 92; it was still three-

quarters of a mile away. The nearest setoff for motor cars was four and one-half pole lengths ahead, but instead of continuing to that point he stopped and tried to remove his motor car from the track, although aware of the heavy load of twenty gallons of water and fifteen battery cells, in addition to his regular tools and equipment. The engineer saw the motor car and could have stopped in time to prevent hitting it, but Claimant, thinking he could clear the track, gave no signal and the engineer did not cut his speed until he saw that a collision was inevitable.

Part (a) of the claim is not that Claimant's discipline was excessive for the infraction, but that it was excessive in comparison with the discipline given other employes under like circumstances. It has been held by this Division that discipline cannot be measured on a statistical basis in comparison with other infractions. Awards 1310 and 9034. This is necessarily so, since each case must be decided on its own facts. While it was held in Award 7177 that the measure of discipline imposed in similar violations is one factor to be considered in determining whether the discipline in any particular case was reasonable, yet that consideration cannot be the sole criterion, as assumed by the claim.

The other instances relied upon by the employes are stated as follows:

> "J. D. Boots' motor car was struck by Illinois Central Railroad engine No. 1246 on November 10, 1954, about 3:30 P. M., which train was ahead of schedule as in the instant case. Investigation was held on November 12, 1954, and no discipline was given. Prior to this date, C. E. Dufy's motor car was struck by a train and no investigation was held but he received a few demerits against his record. L. H. Baker's motor car was struck by a train. No investigation was held and he only received a few demerits against his record. Section Foreman A. Buckleheide's motor car was struck by a train and he was not taken out of service. Section Foreman John Merklein had an accident when struck by a train while headquartered at Wabaunsee, Kansas, and was not taken out of service. He was later taken out of service after having had a second accident when struck by a train when headquartered at Norton, Kansas."

Practically no particulars are given concerning those cases. Consequently we have no basis for a comparison of the relative disciplines imposed, which Award 7177 holds as one factor to consider.

It is well settled that this division will not ordinarily substitute its judgment for that of the Carrier in an accident case, in view of the Carrier's responsibility for the safety of its employes and property as well as of the public. Awards 6919, 6924, 7072, 7477, 8715, 9034, 9045 and 9046.

Considering part (a) of the claim as contending that the discipline assessed was so extreme and unreasonable as to impute bad faith or abuse of discretion, we cannot sustain it. While there are mitigating circumstances, the fact remains that Claimant had a last clear chance to prevent the accident but for some reason did not utilize it. The discipline assessed was suspension for only thirty days, which is certainly not extreme or unreasonable, even though, as his representative stated, "that was the first motor car accident wherein he was struck by a train in more than nine years".

The contention is made that it was not humanly possible for Claimant to have complied with the Carriers Operating Rule 142.

The rule reads as follows:

"Rule 142 Protection of Movements—Employes going to and coming from their work must exercise care to avoid accident. Information regarding train movements should be obtained in writing from the operator, but such information will under no circumstances relieve the person in charge of the car from fully protecting car against train movements at all times.

During foggy and stormy weather and on curves, and at other obscure and dangerous places, where trains cannot be seen sufficiently in advance to remove cars from track, special precaution must be taken to avoid accident. The operator of a car must protect himself with proper signals, when necessary. In case of doubt, remove car from the track and know that it is safe to proceed before again attempting to operate car.

Employes must expect cars or trains to operate in either direction, on any track, at any time. Sharp lookout must be kept for animals and other objects obstructing the track."

We can find nothing in the rule with which it seems beyond human ability to comply. If the employes mean that it was humanly impossible in this instance for Claimant to have prevented the accident, that also cannot be granted. Claimant could readily have given warning so to stop the train and prevent the damage. He certainly should have done so if he had the slightest suspicion that in view of the weight of his load and the lack of a setoff he could not clear the track in time. The argument is made that it was humanly impossible for him to comply with the rule because he could not flag in both directions at the same time. All it is necessary to say on that score is that Claimant was in no doubt concerning the direction from which the train was coming and would not have had to flag in any other direction. And, as pointed out in Award 9444, he could have set a signal device behind him if necessary.

The engineer testified at the hearing:

"As the train reached this location and the track ahead came into view I saw a motor car being removed from the track. He was considerable distance away and apparently had sufficient time to remove the car under normal and ordinary circumstances. I immediately sounded the whistle, but felt no alarm at this time. However, as I got closer to the motor car it became apparent that he was in difficulty and possibly would not get the motor car off the track. I could not tell the nature of the difficulty but he did appear to be unable to pull the car off to the south as he had intended to do."

Apparently the circumstances were not "normal and ordinary" due to the load of water and batteries; they were not known to the engineer, but they were known to Claimant, and he should have given the engineer warning.

Claimant stated at the investigation:

"I am very sorry that this accident occurred and from it I gained much valuable experience. If I am permitted to remain in the service I will wholeheartedly attempt to provide more protection and try to avert a recurrence of this sort." He also stated, "I did not wilfully violate the rule, although I did not comply with it fully." Thus he admitted the charge, which did not include any element of wilfulness but only of carelessness or poor judgment.

While Claimant's representative asked him: "Have you had any previous accidents with a train striking your motor car?" and much was made of the fact that this was the first such accident in nine and one-half years, the record shows that on August 9, 1948, Claimant was dismissed from Carrier's service for the violation of its operating rules; within approximately six months later he was reinstated on a clemency basis. Under all the circumstance Claimant can hardly have actually regarded the thirty-day suspension as excessive.

In view of these facts it seems obvious that part (a) of the claim cannot be sustained as a complaint of abritrary and unreasonable discipline.

Part (b) of the claim is purely technical. It charges two violations of the rules: first, that no notice of the discipline was given to Claimant's representative as required by Rule 64 (b) of the agreement; second, that a copy of the transcript of the investigation was not furnished Claimant in accordance with Rule 64 (c).

These rules are as follows:

"(b) Such investigation shall be held within ten (10) days from the date his immediate superior of the rank of at least Signal Supervisor has knowledge of the offense. Suspension pending investigation is not a violation of this rule; in such cases the investigation shall be held as promptly as possible but not later than five (5) days after date employe is withheld from service. Decision will be rendered within ten (10) days after date investigation is concluded. The employe and his representative will be advised in writing of the decision.

"(c) Copy of the transcript of the investigation will be furnished the employe and his representative after they have signed the same."

The report of the investigation prepared by the Carrier stated that those present included "R. A. Watkins, General Chairman, BRSA representing Mr. Rollings" and "K. C. Kraus, Division Chairman, BRSA representing Mr. Rollings." It is not apparent upon what the stenographer based that designation except that Mr. Kraus was the Division Chairman.

Rule 64 (a) of the Agreement provides that at the investigation the employe "may be assisted by one or more duly accredited representatives of his own choosing". Asked at the start of the testimony if he desired a representative, and if so who, and whether he was present, Claimant stated "I do. He is present. His name is Ralph A. Watkins."

General Chairman Watkins participated in the questioning and signed the transcript of testimony of Claimant and two of the other three witnesses as "Representative", "General Chairman BRSA" or "General Chairman BRSA Representing Mr. Rollings". Mr. Kraus participated in neither questioning nor signing and was present as the new Division Chairman only as an observer.

At the end of the investigation Mr. Kline, who conducted it, asked: "Mr. Watkins, as Mr. Rolling's representative, do you feel that this investigation has been fair to Mr. Rollings?" "Mr. Watkins, representing Mr. Rollings, has this investigation been in accordance with and does it fulfill the requirements of the B. of R. S. of A. Agreement?"

There is no question that General Chairman Watkins was Claimant's authorized representative in the investigation, and Assistant Superintendent

Williams, in whose office at Goodland, Kansas, the investigation was held, recognized him as such by delivering to him the transcripts of the investigation. He is presumably overlooked the requirement that a copy should have been delivered to Claimant also. Apparently Mr. Watkins did not send a copy to Claimant, probably assuming that one had been sent him direct. Claimant did not receive a copy until December 15th, when he requested it personally. This was a delay not apparently contemplated by the rule, but is not claimed to have prejudiced him in the further processing of his claim.

On the 17th, only two days later, Superintendent Cartland sent out from his office at Fairbury, Nebraska, the notices of discipline to Claimant and to Division Chairman Kraus. He was not at the hearing and his office was apparently misled by the erroneous statement at the beginning of the transcript that Mr. Kraus was one of Claimant's representatives. None was sent to Mr. Watkins.

To that extent there were deviations from exact compliance with the Rules. But they occurred after the close of the investigation and were not jurisdictional; there is no contention that they were intentional or in any way prejudiced Claimant or impeded the further handling of his claim. It is therefore obvious that Claimant's authorized representative had timely notice of the discipline assessed, although it was not sent directly to him as contemplated by the Rule.

In Awards 1497, 3778 and 4169 the objection was made that notice of discipline was not given within the time set by the Rule, but in each case this Division held that the matter was not material, since no rights of the employe were prejudiced by the delay.

In Award 4169, this Board said:

> "This Rule does not provide that in the event the decision is not rendered within fifteen days it is void and an employe charged with the offense shall be cleared of the charge and reinstated. In this particular case we fail to see how the Claimant was in any manner prejudiced by the delay * * *."
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> "In our dealing with such a disciplinary case as this it would seem clear that in addition to our being charged with the responsibility of seeing to it that the Claimant has had a fair hearing on a proper charge, all pursuant to the provisions of the Agreement, we must also bear in mind the fact that in such a case our decision is important to the safety of the traveling public and that we owe that public the duty of not reinstating, on purely technical grounds, a Train Dispatcher who has admitted making such a mistake."

While in this case apparently the safety of the traveling public was not involved, we cannot feel less concern for the safety of Claimant and his fellow employes.

In this case it is clear that the Carrier's lack of exact compliance with the rules cannot have been intended to prejudice the Claimant's rights and did not have that effect. Consequently the claim must be denied.

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 Employe involved in this dispute are respectively Carrier and Employe 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 not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 17th day of November, 1960.

DISSENT TO AWARD 9637, DOCKET SG-9180

In this case the Referee and the Carrier Members found that:

> "* * * The discipline assessed was suspension for only thirty days, which is certainly not extreme or unreasonable, even though, as his representative stated, 'that was the first motor car accident wherein he was struck by a train in more than nine years' ".

thus implying that prior to nine years before he had been involved in accidents wherein his motor car was struck by a train. The record discloses that the statement attributed to Claimant's representative was: "* * * As the investigation bears out that this was his first motor car accident wherein he was struck by a train in more than nine years of operating a track motor car".

Having thus subscribed to such distortion of the facts, it is not surprising that the majority, having the added advantage of hindsight, should go to considerable length to point out how Claimant might have acted and reacted and thus prevented the accident. It is likewise understandable that the majority would, without knowing the details, accept Carrier's assertion concerning a previous dismissal as grounds for finding that the discipline assessed in this case was not excessive. It is equally understanding that the majority should look upon Carrier's violation of the procedural requirements of Rule 64 as purely technical and not prejudicial to the rights of the Claimant.

The majority, in closing its unfortunate opinion, expressed concern for the safety of Claimant and his fellow employes. Perhaps it is not expecting too much to hope that Carrier will upon receiving this award be similarily concerned about the safety of its employes and adopt rules that will properly and adequately protect those who must operate motor cars, especially those who in the performance of their duties must operate heavily loaded motor cars alone.

Award 9637 obviously was not arrived at by way of unbiased consideration of all the facts and circumstances surrounding the incident giving rise to Claimant's suspension. Therefore, I dissent.

/s/ G. Orndorff
Labor Member

COMMENTS ON DISSENT TO AWARD 9637, DOCKET SG-9180

No candid reader will find in the Award any suggestion that Claimant had experienced a prior motor car accident.

In view of the suggestion that the engine crew rather than Claimant was at fault the Award is not fairly open to criticism for mentioning the fact that Claimant knew the full circumstances, including the weight of the load on his car, and should have signaled if he had any doubt of his ability to clear the track in time. That is not hindsight, but elementary foresight.

Neither record nor dissent shows any prejudice to Claimant from the procedural technicalities complained of. Neither record nor dissent cites valid precedent for overruling discipline because of non-prejudicial procedural technicalities.

A prior disciplined offense shown in the record and not denied certainly has a bearing on further imposition of discipline, unless a first offender should be dealt with as strictly as a prior offender.

None of the objections made in the dissent is tenable and its charge of bias is unfair. If there is any bias to be found in this case, it is not in the Award or in these Comments.

Howard A. Johnson
Referee