Award No. 10233
Docket No. MW-12314

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

D. E. LaBelle, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MIDLAND CONTINENTAL RAILROAD

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Section Foreman H. L. Walters was without just and sufficient cause and wholly disproportionate to the offense with which he was charged.

(2) Section Foreman H. L. Walters be restored to the position from which he was removed, with seniority, vacation and all other rights unimpaired and that he be 'compensated for all time lost less what he may have earned in other employment' as set forth in Rule 19 (d).

OPINION OF BOARD: This is a discipline case growing out of collision of a motor car being operated by Claimant, which was struck by Extra 401 on August 23, 1960.

The first question to be resolved here is the claim of the Carrier that the employe failed to properly appeal the case under the provisions of Rule 19(b), which rule provides as follows:

"(b) Any employe dissatisfied with the decision, or his representative, shall have the right of appeal, which may be filed with the next higher officer of the Railroad Company and each such officer in turn designated to handle appealed cases, and a copy of such appeal furnished to the officer whose decision is appealed. Such appeals shall be made within fifteen calendar days after the date decision is rendered by the officer from whom the appeal is taken."

Rule 19(c) reads as follows:

"(c) After the highest officer designated by the Management to handle such appeals has rendered his decision, if further action under the provisions of the Railway Labor Act is not taken within (90) calendar days after the date of the decision, such failure shall be construed by both parties as withdrawal of the case."

An investigation was called on September 3, 1960 at 10:00 A. M. at Jamestown, North Dakota: the investigation was held by Mr. T. L. Wright, General Manager of Midland Continental Railroad, who was the person who preferred the charges. In addition to being General Manager, Mr. Wright was also the President of said Carrier. He was at the time, as stated by him, "the highest and lowest officer on which to start an appeal."

A full hearing was had and on September 9, 1960, Mr. T. L. Wright, acting as the hearing officer, sustained the charges and ordered Claimant dismissed from service.

No notice of appeal was taken from this decision until October 7, 1960 when the General Chairman wrote concerning the matter and on December 8, 1960, Mr. H. C. Crotty, President of the Organization filed an appeal.

We hold that inasmuch as Mr. T. L. Wright, General Manager and President of the Carrier, no one else being designated by the Carrier, having already notified Claimant of his decision and dismissal of Claimant, has precluded this Claimant from exercising his existing rights under the Agreement. It is not reasonable to assume that the President of Carrier can determine an appeal from his own decision made as General Manager, citing Award 6226. We will therefore determine the case on its merits and hold a proper appeal was filed.

The pertinent facts concerning this case are as follows:

This is a discipline case growing out of a motor car being operated by the Claimant being struck by Extra 401, on August 23, 1960 near Mile Post 10 plus 3½ poles, Northern Division, Midland Continental Railroad.

It appears from the transcript and records herein that on August 23, 1960 Claimant was assigned as Section Foreman at Wimbledon, North Dakota. On this date the Claimant and one section laborer went to Mile Post 5 to assist Section 2 in the work of moving certain tracks, using a track motor car furnished by the Carrier. This track motor car was not equipped with a top or windshield. It is conceded that the laws of the State of North Dakota require that such cars be so equipped.

It further appears that at about 2:30 P. M. on that day the forces at such point assisted Claimant in putting said motor car on the tracks for his return to Wimbledon, his home base. A light rain was falling as he started and this increased as he continued: shortly thereafter, the rain increased and "was raining awfully hard": in addition, the rain was accompanied by heavy lightning and thunder.

The record shows that train, Extra 401, operated by Carrier, had gone north and passed point where Claimant was working about 12:55 P. M. and he knew that it was due to return south later in the afternoon but did not know what time: at no time did he contact the Dispatcher relative to Extra Train 401.

Claimant in operating the motor car, with a Section Laborer riding with him, continued on to Hurning, M.P. 9, where there was a siding and a Dispatcher's telephone. Claimant did not pull into the siding, nor use the Dispatcher's phone to get clearance: his explanation for the latter is that because of heavy lightning he did not consider it safe to use the telephone, because

it was attached to a telephone pole, with only one's head covered and he was afraid to use it because of the thunder and lightning.

Claimant continued on at a speed of 15 miles an hour and approached M.P. 10, plus 3½ poles where there is a curve where he had a vision of about three pole lengths: as he approached he slowed down: at about this time Extra Train #401 came around the curve: Claimant could not see it until he "got pretty near on the curve where he could get straightened out".

The train was moving at about 8 miles an hour, Claimant and his employe jumped from the motor car and tried to move it back, but train hit motor car, Claimant jumping before the impact.

It is the contention of Claimant that because of the lack of windshield and top on the motor car his vision was obscured by the intensity of the rain and that this is an extenuating circumstance that should be taken into consideration. Claimant further claims that Carrier had issued no rules or regulations governing the operation of motor vehicles but permitted each employe to use his own discretion and judgment in such operation: We feel it is elementary that even in the absence of rules or regulations, that each employe of a Carrier is required to use due care in the use of any equipment of his Carrier, and to exercise due care in the performance of his duties as such employe, so as not to inflict injury or endanger the public, himself, or any employe subject to his control, or otherwise, or damage any of Carrier's property.

It is the Carrier's contention that Claimant was guilty of a very serious offense of carelessly operating his motor car which resulted in a collision with Extra Train 401, which resulted in at least a partial destruction of said car and did involve risk of his own life and that of his fellow employe.

With this contention of the Carrier we agree. Due care means absence of negligence and negligence is defined as the doing of something that a person of ordinary care and prudence would not have done under the same or similar circumstances or the failure to do something that a person of ordinary care and prudence would have done under the same or similar circumstances. This is a flexible rule and depends upon the circumstances then and there existing.

The absence of a windshield and top should indicate extra precaution to a reasonably prudent person under the existing conditions to wit with or without a windshield or top, his view of the track was obscured by the curve.

Claimant knew that Extra Train #401 had proceeded north on the track at about 2:55 P. M. and that it would return south, but did not know at what time. He knew it was dangerous, but started out, because he did it before, without incident. He made no check as to the whereabouts of train before starting. His failure to use the telephone at Hurning, is excusable under the circumstances then existing, but there was no excuse for his failure to pull into the siding there, until such time as he could have safely cleared with the Dispatcher or until #401 had passed.

The record discloses that in handling the matter on the premises, or subsequent thereto, Carrier agreed to reinstate Claimant on a leniency basis and without pay for the time lost, as a section laborer, which offer Claimant refused.

In view of the foregoing, upon the record we are unable to find that the dismissal of Claimant was not justified and that the action of the Carrier was not unjust, unreasonable, capricious or arbitrary.

Notwithstanding the foregoing, we feel that Claimant should have an opportunity to rejoin the Carrier in its employe and that, in view of the leniency offer of the Carrier and his employment with the Carrier since June 1, 1935 and the further fact he has been a Section Foreman since January 26, 1938, that he be reinstated as a Section Laborer, with any seniority rights held by him unimpaired, but without pay for time lost.

In passing it might be said that his 1960 Personal Record as Section Foreman is somewhat spotty, and shows, in addition to a written reprimand, dismissal from service January 1, 1960, with a reinstatement in the same position on a leniency basis.

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 was not violated.

AWARD

Claim disposed of in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 8th day of December 1961.