



Award No. 15634
Docket No. SG-15309

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

**NORFOLK AND WESTERN RAILWAY COMPANY
(Formerly The New York, Chicago and St. Louis Railroad Company)**

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the New York, Chicago and St. Louis Railroad Company that:

(a) The Carrier violated the current Signalmen's Agreement, particularly Rule 58, when it suspended Signal Maintainer R. H. McManigell for ten (10) calendar days following an investigation held on October 23, 1963, to determine his responsibility, if any, in connection with motor car, operated by another employe, derailling on crossing at Morrical Boulevard, Findlay, Ohio, on August 26, 1963.

(b) The Carrier, at the investigation mentioned in paragraph (a), failed to prove that R. H. McManigell was responsible for the derailment.

(c) The Carrier be required to compensate R. H. McManigell for all time that he was held out of service. [Carrier's File: 30-21-21]

OPINION OF BOARD: This is a discipline case arising out of the derailment of Carrier's track motor car No. 1289 on August 26, 1963. Claimant was in charge of the motor car, which was actually being operated by a Signal Helper at the time of the accident. It appears that both men were thrown from the motor car simultaneously. The Signal Helper suffered serious face and head injuries, and the motor car was damaged. Although neither Claimant nor the Signal Helper observed any obstruction on the track at or near the crossing where the accident occurred, Claimant surmised that a stone or rock in the flangeway of the north rail caused the derailment.

Following an investigation held on October 16, 1963, Claimant was assessed discipline of ten days because he did not use sufficient care and make certain that the move could be made safely, which was his responsibility as the employe in charge of the motor car. Petitioner contends that Claimant was improperly disciplined because he was not charged with an offense or rule violation prior to the investigation, and further that Carrier failed

to show at the hearing that Claimant violated any rule justifying disciplinary action.

Carrier avers that no objection to the notice received by Claimant was raised during the investigation, and that failure to do so constitutes waiver. Furthermore, Carrier maintains that the notice in question was sufficient to reasonably apprise Claimant as to the nature of the hearing, that Claimant and his chosen representative fully participated in the investigation, and that neither of them took exception to the conduct of the investigation.

Carrier cites numerous prior awards of this Board concerning sufficiency of notice in support of its position. Whereas Petitioner relies primarily on our earlier Award No. 12814 as controlling authority for sustaining the instant claim on the ground that the Carrier failed to properly apprise Claimant of the specific charges against him in violation of Rule 58 of the Agreement.

Two earlier awards of this Board arose out of similar disputes between the same parties in which Petitioner argued that Carrier had violated Rule 58 of the same Agreement now before us. Awards 12814 and 15412.

In the instant case, as in the dispute involved in our Award 15412, Petitioner also has challenged the evidence offered by Carrier in support of the disputed disciplinary action. Here, two men were riding on the motor car, and Carrier has offered no probative evidence to rebut their statements that they did all that was required of them under Carrier's rules governing the use of motor cars to assure safe operation. Both testified that they saw no obstructions at the crossing and that they were proceeding at a normal speed under the circumstances.

Rule 37 of Carrier's then effective "Rules Governing the Use of Motor, Hand, Velocipede, Push and Trailer Cars" reads as follows:

"37. A sharp lookout must be maintained at all times for obstructions and objects on rails, especially in flangeways at public and private crossings, guard rails and frogs."

Carrier contends that the investigation conclusively established that the accident resulted from the failure of the Claimant to comply with the provisions of Rule 37. However, Carrier relies primarily on Claimant's apparent failure to observe a foreign object in a rail flangeway as conclusive evidence of his violation of said rule. The record discloses that no competent evidence was offered by Carrier establishing the exact nature of the foreign object, and there is undisputed testimony that Claimant and the Signal Helper stopped the motor car before proceeding through the crossing at which time both observed the crossing to see if there were any obstructions on rails.

Although we concur with Carrier's premise that Rule 37 is a safety rule and places a high degree of care on those bound to perform under it, we find no actual evidence that Claimant failed to exercise the proper degree of care that was required under the circumstances. Rule 37 does not place an absolute responsibility on Claimant to detect all defects and such a finding would be necessary to support Carrier's position. Although this Board is disposed to give Carriers broad latitude in determining the responsibility for accidents, some evidence of negligence is essential. A thorough review of this record convinces us that Carrier has failed to furnish the necessary

proof required in disciplinary cases to establish Claimant's violation of the Carrier's applicable safety rules. Award 15412. Accordingly, we will sustain the Claim.

In view of the foregoing, it is unnecessary for the Board to fully discuss the procedural objection raised by Petitioner except to point out that our previous Awards are conflicting concerning the sufficiency of notice. In the instant case, we do not believe that Claimant was denied a fair and impartial investigation.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of June 1967.

CARRIER MEMBERS' DISSENT TO AWARD 15634, DOCKET SG-15309

In finding for the Claimant on the merits of the case the Referee in Award 15634 refers to Claimant having "surmised that a stone or rock in the flangeway of the north rail caused the derailment", and also makes reference to Claimant's "apparent failure to observe a foreign object in a rail flangeway." Such equivocal language is necessary to sustain the claim. Expressions as "surmise" and "apparent" ignore the fact that Claimant submitted a report on the day of the accident in which he made a "positive" statement that: "Motor car 1289 hit small rock in flangeway of north rail derailing motor car." At the investigation Claimant also testified that in his opinion the derailment was due to motor car hitting a small object in the flangeway. He further stated that he "simply looked but did not see." Carrier thereupon found that the Claimant failed to comply with the provisions of Rule 37 of Rules Governing the Use of Motor Cars, etc. The Award finds the Claimant was not guilty of violating such rule, and thereby seeks to make an interpretation of one of the Carrier's operational rules, a function that is not within the jurisdiction of this Board.

We are, however, completely in accord with that portion of the Award which holds that the Claimant had a fair and impartial investigation, and which holding rejects the contention of the Petitioner that Claimant was improperly disciplined because he was not charged with an offense or rule violation prior to the investigation.

G. C. White
R. E. Black
P. C. Carter
G. L. Naylor
T. F. Strunck