



Award Number 17163

Docket Number TE-16522

NATIONAL RAILROAD ADJUSTMENT BOARD

**THIRD DIVISION
(Supplemental)**

James Robert Jones, Referee

PARTIES TO DISPUTE:

**TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
READING COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the Reading Company, that:

1. Reading Company violated the T.C.U. Agreement when and because it removed Robert J. Horan from the relief towerman position at Pottsville Junction, on January 18, 1966, without cause.
2. Because of this violation Reading Company must restore R. J. Horan to relief towerman position at Pottsville Junction, and compensate him at the hourly rate of \$3.3328 for all lost wages from January 18, 1966, to date he returns to his position at Pottsville Junction.

OPINION OF BOARD: Petitioner bases his claim on three contentions: 1) The charge was not proven; 2) Claimant was not charged with violating any rules or instructions of the Carrier; 3) Responsibility for the derailment was caused by the crew of Train PN-21, engine 3640, violating signal rules, interlocking rule 663 and 670.

Taking these contentions in reverse order, we first must determine if the negligence of the train crew would relieve Claimant for any negligence on his part that may have contributed to the derailment. This Board has ruled that a Claimant who is found guilty of negligence cannot absolve himself of that guilt by proving negligence of others. (Award 13631). The Carrier determined that on the basis of evidence and testimony presented at the hearing that Claimant was guilty of negligence in his primary responsibility of properly setting the switches. Carrier further determined that on the basis of testimony presented at the hearing; Claimant improperly notified the Conductor to move his train when in fact the switches were not properly set. It is not for this Board to determine the credibility of witnesses when there is conflicting testimony at the hearing. When the hearing determined that the Claimant was negligent, this Board cannot overturn that finding based solely on the negligence of others.

Second, should the finding against the Claimant be reversed because he was not charged with violating any rules or instructions of the Carrier? We think this cannot be a basis for reversing a finding of the hearing investigation. A railroad employee is held responsible for a standard of care in per-

forming his primary responsibilities. This rule for a non-negligent conduct does not need to be written.

Finally, Claimant contends this Board should overrule the Hearing Officer's finding because the charge was not proven. As was stated earlier, it is not the province of this Board to substitute its judgment for that of the Hearing Officer; as to credibility of witnesses, weight of evidence or conflict of evidence. It is our function, however, to determine that the Carrier acted so as not to be arbitrary or capricious in his finding against the Claimant. We cannot find in the record that the Carrier acted unfairly or arbitrarily against the rights of the Claimant.

At the oral hearing before this Board, Petitioner contended that Claimant was found guilty of authorizing the conductor to back up the train when tracks were not properly lined. Petitioner contends that Claimant was not charged with this and therefore was deprived of due process as guaranteed by the constitution. Petitioner cites Award 562 in support of this contention. That Award states: "A fundamental incident of a fair and impartial hearing is that an accused shall be advised definitely as to what he is charged with."

We agree that due process is involved here. However, we find that the investigation did not deprive Claimant of his right of due process. When Claimant received notice of the investigation, he was informed of the essential facts to be considered and was alerted that the purpose of the hearing and investigation was "to determine your responsibility, if any, in this matter." Claimant was afforded representation at the hearing. Claimant had opportunity at the hearing to examine and cross-examine any witness and to present any evidence to absolve or mitigate any guilt on Claimant's part. Further, both Claimant and his representative signed the transcript of the hearing affirming that the hearing had been conducted in a fair and impartial manner.

There is sufficient evidence to uphold the findings of the Hearing Officer that the charge against the Claimant was proven. It is not for this Board to judge credibility of witnesses, nor the weight of evidence.

The constitutional right of due process was not violated in the hearing and investigation.

The fact that Claimant was not charged with violating any rule or instruction of the Carrier is not reason for overruling the findings of the Hearing Officer. The standard for a railroad employee of non-negligent case in the performance of his duties does not have to be written.

Negligence of others which contributed to the derailment does not absolve Claimant of his responsibility for negligence on his own part.

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 Employee involved in this dispute are respectively Carrier and Employee 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.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of May 1969.

SPECIAL CONCURRENCE TO AWARD 17163, DOCKET TE-16522

REFEREE JAMES R. JONES

We agree that the Claimant was properly disciplined, but take exception to any question of "constitutional due process" being involved. The "due process of law" clause found in the Fifth Amendment to the U. S. Constitution applies its force on the Federal Government and the "due process of law" clause in the Fourteenth Amendment applies its force on the governments of the States. Neither applies to disciplinary proceedings under a collective bargaining agreement.

/s/ J. R. MATHIEU
J. R. Mathieu

/s/ R. A. DEROSSETT
R. A. DeRossett

/s/ C. H. MANOOGIAN
C. H. Manoogian

/s/ C. L. MELBERG
C. L. Melberg

/s/ HARRY S. TANSLEY
H. S. Tansley