

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19853
Docket Number W-19702

Benjamin Rubenstein, Referee

(Brotherhood of Maintenance of Way Employees

PARTIES TO DISPUTE: (

(Burlington Northern Inc. (Formerly Northern Pacific
(Railway Company)

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

(1) The discipline of Track Supervisor A. F. Lechler was improper, without just and sufficient cause and based upon unproven charges (System File MW-20(b) - 2/1/71).

(2) The personal record of the claimant be cleared of the charges placed against him and reimbursement be made for all wage loss suffered in accordance with Rule 52(g).

OPINION OF BOARD: The claimant, a Track Supervisor, was discharged as of November 20, 1970 for "failure to recognize a defective condition and take proper actions in order to protect the movement of trains."

The claimant examined the track in question at 11:30 A.M. of November 19, 1970, and although he knew, that the track was generally in a "troublesome" condition, he noticed no change in it from his previous inspection and did not order any slow down of trains or take any other action. Between 11:30 A.M. November 19, and 1:30 A.M. November 20, six trains have passed over that portion of the track without mishap. At 1:30 A.M. November 20, a seventh train while passing over the tracks, was derailed, causing over 200,000 dollars worth of damage.

Charges were brought against claimant and he was found guilty of failure "to recognize a defective condition and take the proper actions". He was discharged as of November 20, 1970 by letter, dated December 11, 1970.

On February 16, 1971 he was, by agreement between the parties, reinstated without loss of seniority. The agreement further provided, in part:

"The question of pay for time lost prior to reinstatement and clearing of his record may be submitted to the Third Division, National Railroad Adjustment Board, for adjudication."

This matter is now before us for adjudication.

The carrier, apart from its general position on the merits, moves to dismiss the claim on the ground that the position taken by Claimant on the property is different from that taken by it before the Board, in that, on the property, claimant merely contested "the measure of discipline", while before the Board he claims that "the discipline was without just and sufficient cause and based upon unproven charges".

In Award 17222 (Jones) we said in a similar issue:

"As has been noted in other cases before this Board; we must avoid being 'super technical' in resolving disputes".

Citing Award 11214 (Dolnick), we quoted:

"It is not the purpose of the Railway Labor Act... to dismiss disputes on mere technicalities. It is rather, the intent to resolve them on the merits unless it is clear that the essential procedural provisions have been completely ignored...."

We feel that the so-called claim of variation in positions is merely a play on semantics. The carrier agreed that the issue of back pay and clearing of the record of claimant be decided by the Board.

The letter of C. O. Morehouse, General Chairman, addressed to Mr. S. A. Anderson on January 7, 1971, advised the carrier that the Organization does not agree with the findings of the carrier as to the responsibility of the claimant for the accident. The letter ends with the request for full reinstatement with compensation for time lost because of the "improper disciplining". The claim of "improper discipline" is, evidently, based on the claim of lack of "responsibility", and disagreement with the Carrier's findings. This is different from a mere disagreement on the "measure of damages".

We find that there is no substantial difference between the presentation of the claim on the property and the presentation to the Board.

We shall, therefore, proceed with the merits of the case.

In Award Number 19696, and numerous others, we held that the Board can not substitute its judgment for that of the Carrier in evaluating evidence, where the finding is based on substantial evidence (underscoring supplied). To sustain this well established maxim, the evidence must be substantial. Where there is lack of evidence, a finding of guilt not only may but should be reversed by the Board, regardless of whether it was arbitrary or capricious.

A study of the transcript herein does not establish any evidence that the claimant was guilty. It shows that he performed his duty, examined the tracks and found them in the same condition as on previous occasions. He could not have been expected to foresee that something will happen. Although the passage of one or two trains, without mishap, may not absolve one of his neglect, if there was such, the mere occurrence of an accident does not establish guilt, or neglect, if there was none.

The mere fact that the Carrier agreed to reinstate the claimant after discharging him shows that it was not so sure of its own belief in his guilt.

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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

Claim is sustained in all respects.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 13th day of July 1973.