

NATIONAL. RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20238
Docket Number MW-20095

Dana E. Eischen, Referee

(Brotherhood of Maintenance of Way Employees

PARTIES TO DISPUTE: (

(Burlington Northern Inc.

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

(1) The thirty (30) day actual suspension of **Sectionman M. R. Bahr** was improper and in violation of the Agreement because

(a) Charges **were** not filed as per Rule 40(c).

(b) **The Organization's representative was** not furnished a copy of the notice of investigation.

(c) The claimant was not proven guilty of any offense (System File MW-20(b), 12/3/71)

(2) The record of **M. R. Bahr** be cleared and that he be compensated for wage loss suffered (Rule 40G).

OPINION OF BOARD: Claimant **M. R. Bahr** appeals a 30-day suspension for alleged violation of certain Carrier operating rules in connection with an accident on August 13, 1971 when a motor car he was operating was struck by Train 85, identified as Extra 6422 West. The basic facts underlying this dispute are not in contention.

On August 13, 1971 Claimant, a regularly assigned **sectionman** at **Connell**, Washington, reported for work at 7:30 a.m. About 10:30 a.m. Claimant prepared to travel some five miles west to Cactus, Washington to perform work there. He **secured** from the agent-telegrapher at **Connell** a **current** train lineup listing Carrier's train activity that morning. That lineup indicated, **inter alia**, that Train 85 was some two hours overdue into **Connell** and headed west. Claimant nonetheless placed his track motor car on the main line and headed west out of **Connell**. Approximately one mile west of **Connell**, Claimants' motor car developed mechanical difficulty and stalled. Claimant did not protect his incapacitated motor car by setting out **fuses** or torpedoes. Rather, he attempted to re-start the vehicle and when this proved impossible he attempted to push it toward the nearest set-off. Before he was able to remove the car from the main track, Train 85 bore down upon him and collided with the motor car at 10:58 a.m. Fortunately, Claimant escaped injury but the motor car was demolished totally by the collision.

On August 16, 1971 Carrier sent the following notice of investigation to **Claimant**:

"Mr. M. L. Bahr, **Sectionman**
Box 331
Connell, Washington

"Attend investigation in the Assistant Superintendent's Office **at Pasco**, Washington, Wednesday, August 25, 1971, at 10:00 A.M. for purpose of ascertaining the facts and determining your responsibility in connection with your motor car being hit by Extra Train 6422 West on or about **11:00 A.M.**, August 13, 1971 at Mile Post 112. **Arrange** for representative and/or witnesses if desired, in accordance with governing provision of prevailing schedule rules.

"Please **acknowledge** receipt by affixing your signature in the space provided on copy of this letter."

The investigation was held on August 25, 1971 and Claimant was represented thereat by the Organization's Assistant General Chairman. On September 22, 1971, Claimant was assessed **discipline** as a result of the investigation pursuant to the following letter:

"Portland, Oregon
September 22, 1971

Mr. M. R. Bahr, **Sectionman**
c/o Mr. J. S. Mootz, Roadmaster
Pasco Depot

You attended formal investigation held in connection with your motor car being hit by Extra 6422 West **at** M.P. 112 on August 13, 1971.

This investigation develops violation of Rule 40, General Notice, General Rule 'M' and Rules **101**, 108, 700 and 702 of the Rules of the **Maintenance** of Way Department on your part.

For the above indicated violation of the **Maintenance** of Way Rules, you are hereby **actually** suspended from service for a period of thirty days, effective **Monday**, September 27, 1971. You will return to service on October 27, 1971.

/s/ R. O. Hammerstrom
R. O. Hammerstrom
Superintendent"

It is the contention of the Organization that Claimant did not receive a proper notification of investigation in accordance with Rule 40(c) of the Agreement, that the local representative of the Organization did not receive notification as provided in Rule 40(c), and that Claimant was not proven guilty of any offense. Rule 40(c) reads as follows:

"RULE 40. INVESTIGATIONS AND APPEALS

* * * * *

"C. At least five (5) days advance written notice of the investigation shall be given the employe and the appropriate local organization representative, in order that the employe may arrange for representation by a duly authorized representative or an employe of his choice, and for presence of necessary witnesses he may desire. The notice must specify the charges for which investigation is being held. Investigation shall be held, as far as practicable, at the headquarters of the employe involved."

We have examined the notice in question, the applicable contract language and numerous awards cited by the parties. We adhere to the well established principle that the fundamental purpose of the notice is to provide the employe with an opportunity to prepare his defense against the accusations of his employer. Awards 11170, 11783, 13969, 16154 and others. In this connection we have said that the formulation of a charge and the giving notice thereof need not be in the technical language of a criminal complaint. It is sufficient if it appears that the one charged understood that he was being investigated for the dereliction of duty set forth in the notice. See Awards 3270, 12898. By these standards we must conclude that the notice was precise and comprehensive enough to place claimant on notice as to the matter under investigation, and was not in error as alleged by the Organization.

As to the issue of notice to the local representative, Carrier admits that he was not furnished a copy of the notice and ascribes this dereliction to administrative oversight. There is no doubt that this is a violation of the precise language of Rule 40(c). In some circumstances, this procedural shortcoming may well constitute **reversible** error. Carrier disregards the contractual mandates in this regard at its peril. Careful consideration of the record in the instant case, however, demonstrates that the local representative had actual knowledge of the investigation, appeared and represented claimant and presented no indication of undue surprise or lack of preparation. In these circumstances there was no demonstrable prejudicial effect upon claimants' case by Carrier's procedural defect. Accordingly we conclude that Carrier's violation does not in the facts of this case constitute reversible error.

Finally, analysis of the record indicates that Claimant by his own admission failed to clear Train 85 by 10 minutes nor did he set out **fusees** or torpedoes to protect his stalled motor car. This **constitutes** substantial evidence of violation of Carrier rules governing motor car safety. Thirty days suspension in these circumstances cannot be said to be so arbitrary, unreasonable or capricious as to constitute an abuse of Carrier's disciplinary discretion. Consequently, we shall not disturb the assessment of discipline in this case.

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 **Employes** involved in this dispute are respectively Carrier and **Employes** 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 to the extent indicated in the Opinion.

A W A R D

Part 1(a) of the **claim** is denied.

Part 1 **(b)** of the claim is sustained to the extent indicated in the Opinion.

Part 1 **(c)** of the claim is denied.

Part (2) of the claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A.W. Paulos*
Executive Secretary

Dated at Chicago, Illinois, this 17th day of **May** 1974.