NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21020
THIRD DIVISION Docket Number CL-20742

Louis Norris; Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(George P. Baker, Robert W. Blanchette, and Richard C. Bond, Trustees of the Property of Penn Central Transportation Company, Debtor

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7530) that:

1. Carrier violated the Agreement between the parties when it removed and suspended Mr. R. L. Smith from service for thirty days commencing May 6, 1973, without cause.

2. Carrier shall compensate Mr. R. L. Smith for all time lost and expenses incurred commencing on May 6, 1973, until his return to work.

'PINION OF BOARD: On May 6, 1973, the date of the occurrence involved in this dispute, Claimant, with 19 years of service, was temporarily assigned as extra telegrapher to the 3rd Shift Block Operator position at Gridley Tower on Carrier's Indiana Division. At approximately 3:30 A.M. on said date a derailment of two cars in a train occured at CP-Taft caused by the train running thmugh a switch not properly lined for its mute. CP-Taft is an interlocking facility remotely controlled from Gridley Tower.

As a result, Claimant was removed from service on the same day, and both he and the members of the train crew were notified to appear at formal Investigation on May 16, 1973. The Notice reads precisely as follows:

> ". . . to develop the facts and determine your responsibility, if any, in connection with the derailment of the second and third cars of Train SLD-2, Unit 2374 plus one, at approximately 3:30 A.M., May 6, 1973 at CP-Taft, Cleveland-St. Louis Main Line."

Thereafter, the Investigation was held as scheduled. Claimant was found guilty of responsibility in connection with the derailment, and discipline of 30 days suspension was imposed. The record indicates that the members of the train crew were also disciplined.

Petitioner raises two basic issues. One, that the Notice of Investi-ation "did not apprise Claimant of any charges" as required by Article 8, Sec-.on 1; and Two, that Claimantwas not proven guilty of violation of any Rules or instructions.

On the first contention, Petitioner cites a number of Awards as precedent, many of which are not germane since they relate to language of charge markedly different from that present in the case before us. These include Awards 4607, 6213, 8992, 11794, 13443, 16330, 16740, 17352, 18467, 18430, and 18620. However, the following Awards do relate to similar Language and are supportive of Petitioner's contention of "vagueness": Awards 4473, 11019, 11222, 12814, 13447, 14778, 16587, and 17151.

The purpose of a Notice of Investigation, as this Board has held in innumerable awards, is to place Claimant on timely notice as to the specific incident involved, the date and close approximate time of the occurrence, and sufficient detail so that Claimant can properly prepare his defense. Thus, initially, is he assured of due process. Niceties of Language are not essential, nor is the purpose of the Rule designed to afford technical procedural loopholes to avoid responsibility in a particular case.

The overwhelming weight of authority in this Division, in cases dealing with precisely the same language as confronts us here, has confirmed the foregoing substantive tests as to the basic contents of a Notice of Investigation.

See, for example, Awards 16637, 17163, 17525, 17761, 18037, 18606, 18903, 19746 and 20285, among many others.

See, also, Awards 17998, 19396, 19411 and 20428, in some of which the language of the Notice is not precisely similar, but which confirm the controlling principle stated above.

To hold to the contrary would imply that a series of Investigations should be held. Initially, an all purpose inquiry to determine "what if anything occurred" and which individual employes were specifically responsible. This would then be followed by service of separate charges against each individual and separate Investigations in each case. In substance and actuality, this is precisely what was accomplished in the single Investigation held in this case, and in practically all the others we have reviewed dealing with similar incidents.

We are not persuaded, therefore, by the reasoning and conclusions in those Awards which hold contrary to our findings here. Moreover, we would indeed be rewriting the Agreement as negotiated between the principals, for we find no Rule requiring such prolonged and repetitive investigatory procedures.

We conclude, therefore, that the Notice before us fully guaranteed Claimant his rights of due process and was in compliance with Article 8, Section 1, of the Agreement. In short, that the charge was sufficiently detailed and precise to apprise Claimant of the purpose of the Investigation, adequately enabling him to properly prepare his defense to the specific charge. Moreover, Claimant was fully familiar with the incident involved, understood the charge, and testified fully as to all aspects thereof. Clearly, he suffered no disadvantage by the language of the Notice.

Accordingly, we do not sustain Petitioner's contention on the Latter issue.

As to Claimant's responsibility for the derailment, severally or jointly with the train crew, the testimony indicates that Train SLD-2 was proceeding eastward and was stopped west of CP-Taft, two westbound trains being due to pass. After these two trains had passed, the Engineer on SLD-2 advised Claimant that he still had a red signal. Claimant then instructed the Engineer to proceed through the CP-Taft interlocking, as the mute was "lined and locked" for this movement, but "to watch the points", referring to the crossover switch points. However, it appears chat the track was not lined for such movement and Claimant was so advised, but only after SLD-2 had run through the trailing switch. Claimant then instructed the crew to make a reverse move; this caused the derailment of two cars.

The testimony of the Engineer and the Fireman establish that the track was not properly lined for eastward movement of SLD-2, although Claimant had stated that it was. Claimant testified to having problems with his switch mechanism and that he was attempting "to align them" by various procedures, but, in fact, had not succeeded in doing so when he informed the Engineer that his mute was "lined and locked". Additionally, Claimant failed to inform the Engineer of the mechanical problems he was having with Taft interlocking until after the derailment. It appears further, that with the information then available to Claimant, he was in a position to alert the crew and prevent the resultant derailment, rather than simply instructing them to make a reverse movement.

In short, there was sufficient evidence in the testimony to warrant the finding by Carrier that Claimant had authorized an unsafe procedure *in* violation of the pertinent Operating Rules.

We stress the well established principle that where substantial probative evidence is present in the record supporting the charge against Claimant, this Board will not substitute its judgment for that of Carrier in weighing the credibility of the witnesses or in evaluating the evidence. Nor, will we disturb the action of Carrier in discipline cases where its burden of proof has been sustained by convincing evidence as to the guilt of Claimant of the offense charged and upon which his disciplinary penalty is based.

See Awards 9449, 14120, 15574, 16268, 17914, 19487, 20245, 20252, 20471, 20828 and 20918, among many others.

Such substantial probative evidence is present in this case. Additionally, we cannot conclude that the discipline here imposed, 30 days suspension, was unreasonable, arbitrary or in violation of due process.

Accordingly, there being no basis here upon which to disturb the action taken by Carrier, we will deny the claim.

FINDINGS: he 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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1976.

LABOR MEMBER'S DISSENT
TO
AWARD 210.20 (DOCKET CL-20742)

The Opinion is obviously based upon the Referee's failure to comprehend themechanical functions of an interlocking machine as well as the Operating Rules applicable to the Claimant at the time of the incident giving rise to this dispute.

The Opinion seems to be based on the fact that the "track was not properly lined for eastward movement of SLD-2, although Claimant had stated that it was." Factually, the Claimant's statement was, of necessity, based on the coded position of the switch as shown on the interlocking machine; he was not able to visually check the alignment of switches at Taft Interlocking which was five miles from his work location at Gridley Tower.

Claimant had to rely on his interlocking machine. If the machine indicated that the switches were properly aligned for the route to be traversed, Claimant could rightfully assume that the switches on the ground did correspond to the indication shown on the interlocking machine in the tower. Claimant testified that he coded No. 1 switch to the reverse indication and the No. 2 switch to the normal indication which was the proper alignment of the two switches involved in the desired route for SLD-2. Furthermore, in advising the Engineer to "look out for the points," the Engineer was advised of the possibility that the switches might not be properly aligned.

Instead of considering the factual situation at the time of the incident, the Referee engages in hindsight in asserting:

> "Claimant . . . was attempting 'to align them' . . . but, in fact, had not succeeded in doing so when he informed the Engineer that his route was 'lined and locked.'"

Again, the fact that the position of the switches on the ground did not correspond to the indication on the interlocking machine in the tower was unknown to Claimant. When he told the Engineer the route was "lined and locked" he was acting upon the only information available to him, which information did, in fact, convey the indication that the route was "lined and locked."

The Referee's conclusion that the "Claimant failed to inform the Engineer of the mechanical problems he was having with Taft interlocking until after the derailment" must also be viewed as a statement made with the benefit of hindsight. After manipulating the switch levers to get the required indication - this procedure was often necessary at Taft interlocking, according to Claimant's undisputed testimony - Claimant did get the proper indication that the switches were lined properly. At that time he was unable to get a signal indication and to his knowledge this was his only remaining difficulty. The Engineer was aware of the signal problem; he was looking at a red signal and he should have had a proceed indication. At that time there was no mechanical problem that the Claimant was aware of and of which he could have informed the Engineer,

Dissent to Award 21020

Hindsight applied to discipline cases is no more acceptable when employed by a Referee than when engaged in by a Carrier. In treating with a similar case before Referee Sickles, the Third Division held in Award 20829:

> "Carrier has stressed that Claimants should have taken 'special precautions' under the circumstances here in issue. In situations such as this, especially when a tragic, fatal accident is under consideration; there is a very human tendency to employ a certain amount of hindsight, and toengage in certain strainedspeculations as to possible steps which might have avoided the incident. At the same time, there may be a tendency to excuse certain oversights based upon continued utilization of procedures which were questionable at the outset.
>
> "In any event, we have searched all documents of record concerning Carrier's contention that Claimants should have taken 'special precautions' tier the applicable regulations. We are unable to find, with a sufficient degree of certainty, what special precautions the Dispatchers should reasonably have taken, under all of the circumstances, and within their area of responsibility - as a prospective judgment, unaided by misleading, after the fact, speculation. We will sustain the claim."

The Referee jumped to a damaging conclusion, which obviously influenced his opinion, in allowing the discipline to stand:

> ". . .It appears further, that with the information then available to Claimant, he was in a position to alert the crew and prevent the resultant derailment, rather than simply instructing them to make a reverse movement." (Underscoring added.)

That conclusion was in complete error. The record is clear that the crew had advised the Claimant that No. 1 switch was not lined for the movement of their train from No. 1 to No. 2 track. It was in the normal position on the ground and it should have been reversed. This

was no reason for the Claimant to conclude that since the indication on his interlocking machine had shown that No. 1 switch was reversed when, in fact, it was normal on the ground, that the No. 2 switch, which his interlocking machine had shown was normal on the ground, was in fact reversed. One false indication did not mean that his entire plant had failed and was showing false indications. There was no way that the Claimant could have known when ordering SLD-2 to back up behind the signal that the train would derail when making this reverse movement.

Referee Norris concluded by stating, "Claimant had authorized an unsafe procedure in violation of thepertinent Operating Rules." The only pertinent Operating Rule involved was Rule 629. The record establishes that Claimant fully complied with that Rule when he gave the Engineer verbal permission to pass the stop signal and cautioned him to lookout for the switch points. That advice in and of itself suggested that the switches might not be properly aligned. If this procedure is unsafe then it is the Carrier's procedure which is unsafe; the Claimant had no alternative but to follow the Carrier's procedure. If the procedure proved unsafe, fairness would have dictatedthatthe Carrier change the procedure rather than discipline the employe.

The Referee's decision was palpably in error and, therefore, vigorous dissent is registered.

Gerald Toffpar

Labor Member

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S
DISSENT TO AWARD 21020 (Referee Norris)

The Claimant was found guilty of violating Carrier's Operating Rules and assessed 30 days suspension, when he advised a crew that the switches to be used in a cross over movement were "lined and locked" when in fact, they were neither lined nor locked.

The Dissentor asserts, page 2:

> "When he [Claimant] told the Engineer the route was 'lined and locked' he was acting upon the only information available to him, which information did, in fact, convey the indication that the route was 'lined and locked'."

Contrast the foregoing with the Dissentor's statement, page 4, reading:

> "The record establishes that Claimant fully complied with that Rule when he gave the Engineer verbal permission to pass the stop signal and cautioned him to look out for the switch points. That advice in and of itself suggested that the switches might not be properly aligned."
> (Emphasis supplied)

Accepting Dissentor's last statement as a correct portrayal of Claimant's belief that there Was in fact a malfunction in the interlocking equipment, the reasonable question then was - why did he authorize the train to move with the advice the switches were "lined and locked"? They either were "lined and locked" or they were not.

Contrary to Dissentor's assertion that the conclusions of the Referee were predicated on his "failure to comprehend the mechanical functions of an interlocking machine as well as the Operating Rules", his conclusions were founded upon suhstantial evidence in the transcript, which the Dissentor now concedes is present, that Claimant gave an improper order when he had serious doubts regarding the efficacy of that order and the conditions which existed at the interlocking. The award is correct and we concur.

W. F. Euker

P. C. Carter

J. E. Mason

G. L. Naylor

G. M. Youhn