NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21601
THIRD DIVISION Docket Number CL-21281

Robert J. Ables, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
(
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7900) that:

1. (a) Carrier violated Rule 18 of the Clerks' Agreement on January 17, 1974, (following an investigation which was not conducted in a fair and impartial manner) when it disciplined Telegrapher-Clerk Mrs. R. L. Stewart, after failing to sustain the charge as set forth in caption of the investigation. (Carrier's file 380-3170).

(b) Carrier's action in assessing Mrs. Stewart's personal record with thirty (30) days' deferred suspension was arbitrary, harsh, and an abuse of discretion.

(c) Carrier shall now be required to expunge the discipline assessed and all reference thereto, from Mrs. Stewart's personal record.

2. (a) Carrier violated Rules 18 and 26 of the Clerks' Agreement, when it required Mrs. R. L. Stewart to attend an investigation on January 14, 1974, her assigned rest day, and then failed and refused to compensate her at the appropriate rate of pay as required by the Rules Agreement.

(b) Carrier shall now be required to compensate Mrs. R. L. Stewart for five hours and twenty minutes at the punitive rate of pay of her regularly assigned position of Telegrapher-Clerk, for January 14, 1974.

OPINION OF BOARD: The Claimant, Mrs. R. L. Stewart, along with the head brakeman, was disciplined for a derailment. The Claimant had been a control operator for at least five years. She was disciplined for her part in the derailment with a suspension for thirty days, which was deferred.

The Claimant asks that such discipline be expunged from her record. Also, the Claimant asks for pay for having to attend an investigation on her assigned rest day in connection with this discipline.

The essence of the complaint by the Carrier against the Claimant is that she did not follow a prescribed operating rule, thereby contributing to the derailment for which she should be disciplined, but because of the contributory negligence of the brakeman, the discipline imposed against the Claimant was deferred resulting thereby in only modest discipline against her. The essence of the position of the Organization is that Claimant followed the prescribed rule and therefore was not responsible in any degree for the derailment and, accordingly, that she should not have received any discipline.

The train in issue was stopped by a red block signal. The head brakeman telephoned the control operator, who is the Claimant here, to report the situation. Claimant conceded she had an indication on the control board that the switches were not locked. As a result, she advised the brakeman: "This should be lined west mainside. Be governed by Rule 104(c) and flag through."

The Carrier takes the position that the control operator should have "instructed" the head brakeman "to take the power off the switch" and be governed by Rule 104(c) and that if she had done this there would have not been an accident.

Rule 104(c) of the Uniform Code of Operating Rules provides:

> "104(c). EXAMINATION OF SWITCHES. -- Before proceeding from a Stop indication over a remote control switch under provisions of Rule 350 or Rule 402, member of crew must examine switch, see that switch points fit properly, and he must remain at switch until leading wheels pass over switch.
>
> If control operator does not know by indication on control panel that switch is lined and locked for route to be used, the switch must be placed in hand operation."

Rule 104(c) states that the switch "must be placed" in hand operation if the control operator does not know from signal indication on the board that the switch is lined and locked. Such language does not make clear who is responsible to see that the switch is placed in hand operation. The best interpretation, however, is that a member of the crew must place the switch in hand operation because Rule 104(c) requires a "member of the crew" to examine the switch and see that the switch points fit properly.

It would have been more precise and apparently the accident would have been avoided if the control operator specifically told the brakeman to take the power off the switch, and then got confirmation from the brakeman that the switch was lined and locked for safe operation.

But the question is, should she be required to do this, under the circumstances, in accordance with the rule?

The brakeman knew, or should have known, the requirements of Operating Rule 104(c), therefore, the control operator was not obliged to do more than tell him that the rule was operative. There would be no sense to the rule, which requires a member of the crew -- not the control operator -- to examine the switch and see that the switch points fit properly if it was not the trainman who had to make the necessary inspection of the switch. And, if he had done what he was required to do, he would have found the wedge blocking the switch which caused the derailment. Claimant operating the control board could not have operated the switch. Accordingly, the control operator did all that was reasonably expected of her under the circumstances and under the rule.

As to operating practices, the Claimant, who has been working on the control board for five years, testified that where there has been an uncertain indication about a switch, a crew member has called and asked for permission to take the power off the switch. Under this practice it cannot be said, as the Carrier contends, that Claimant had an "equal" obligation to make the decision to take the power off the switch.

There is an additional reason to conclude that Claimant took reasonable and responsible action under the circumstances.

She conceded that the light on her control board indicated that the switch was not locked into position but she did not concede that this automatically indicated the switch was not in fact lined and locked. Claimant testified, without rebuttal, that signal indications on the control board were sometimes faulty.

To the question about the meaning of a blinking switch light on her board and whether that indicates a switch is not locked, the Claimant testified: "Well sometimes, but not all the time. It gives you an indication that they are not locked but that is not true at all times." She testified further that only when the safety circuits (which are in the track and not the board) are working properly can there be any certainty about the significance of an indication on the board, and the Claimant testified she had had trouble with that board a week or two previous.

In this day of complex electronic equipment, it is not uncommon to question whether the equipment is out of order or the warning indicator is itself malfunctioning.

On the record, therefore, the rule was ambiguous as to who had responsibility to place the switch in hand operation, therefore, the ambiguity must be held against the Carrier that has exclusive responsibility to issue operating rules. Also, since the switch could be placed in hand operation only by a crew member, and a crew member under the rule is required to examine the switch, it follows that Claimant had no responsibility to "instruct" the trainman to take the power off the switch. This is true not only because this was implicit in the job of the trainman but because Claimant could not know for certain that the switch was not lined and locked since the control board did not always give accurate and reliable information on the position of the switch.

It would be unjust under these conditions to hold the control board operator responsible for the derailment and the rules do not require it.

The Investigation was Fair

The investigation did not prejudice the rights of the Claimant, as alleged.

It is true the notice for the hearing could have been more specific about charges or possible charges against her but she could not have been in doubt that the accident had occurred, why it had occurred, and that operation of the control board and conversations between her and the crew member were crucial to fixing responsibility for the cause of the accident. Accordingly, notice by the Carrier to the Claimant that the Company would undertake a formal investigation to develop facts "and place responsibility" for the derailment of a specific engine at a specific time and specific place was adequate notice as to the purpose and object of the investigation and the likelihood that Claimant might be charged with responsibility for the accident. The fact that Claimant was armed with the information to answer questions during the investigation and that she was duly represented by her Organization confirm that Claimant had all essential information about the investigation and possible charges against her.

No Compensation for Attending Investigation

The claim also asks for compensation for the time spent at the investigation which was held on Claimant's assigned rest day.

In a recent award on November 30, 1976 - Award #21320 (Dorsey), it was found that the Carrier did not violate the agreement and that it was the practice in the railroad industry that an employee who is charged with a violation of rules is not contractually entitled to pay for time in attendance at the hearing. It is easier to accept that pay is not authorized when attending an investigation where it is found that the Carrier did not violate the Agreement than would be true if the Carrier was to be found, as here, to have violated the Agreement.

In the situation where the employee is exonerated of the charges against him, a good argument can be made that the "costs" of the defense should be assessed against the company. That seemingly sensible argument, however, must be balanced against the better reasoning of not permitting costs to be awarded to such Claimant because of the potential for opening a floodgate for filing specious claims in the hope and on the contingency that a claim would be sustained. It is only one step further from awarding costs for exoneration from discipline charges to awarding costs for the successful prosecution of a grievance. As there is no history in this industry, or in others, to award such costs to a successful party, there is no sound basis to disturb this precedent. More important as far as this dispute is concerned, the parties have agreed in Rule 18 of their present contract concerning "Discipline and Grievances" that:

> "Employees called by Carrier to attend investigation will be compensated at the appropriate rate of pay".

Since there is a specific rule covering a particular class of persons who will be paid for attending an investigation concerning "discipline", it follows that those employees not covered by such specific provision shall not be entitled to compensation to attend an investigation concerning discipline. Presumably, if the parties had intended otherwise, they would have included such requirement in the contract.

Thus, pay shall not be authorized for Claimant for attending the investigation on her off day because there is no general or specific precedent to pay costs for arbitration and there is no rule on this property which specifically, or by fair inference, supports payment of any costs.

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.

A W A R D

Claims 1.(b) and 1.(c) are sustained.
Claims 1.(a) and 2.(a) and 2.(b) are denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 29th day of July 1977.

RECEIVED
AUG 24 1977
J. J. BERTA