

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23878
Docket Number SG-23335

George E. Larney, Referee

PARTIES TO DISPUTE: { **Brotherhood of Railroad Signalmen**
 { **Kansas City Terminal Railway Company**

STATEMENT OF CLAIM: "Claim of the **General Committee** of the Brotherhood of Railroad Signalmen on the **Kansas City Terminal** Railway Company:

On behalf of Signal Maintainer W. N. Secrest and Assistant Signalman P. J. Samson, suspended **from** service for ten (10) days, **due to an** investigation held in Kansas City, Missouri on May 24, **1979**, with a request that claimants be compensated for all fringe benefits and **time** lost for a period of **ten** days and their personal record cleared of any reference to this matter."

(Carrier File Nos. SG-1-79-30 and SG-g-79-30)

OPINION OF BOARD: Upon reporting for duty on date of May **14, 1979**, Claimants, W. N. Secrest, Signalman-Maintainer and P. J. Samson, Assistant **Signalman**, along with a third **employee, K. E. Bradrick**, a **Signalman-Maintainer** were assigned to repair Switch No. **45** on Track No. **7**. At approximately **7:40 A.M.**, while the three **named** employees were in the process of dismantling the switch, a Burro crane shoving a **dump** car struck both Bradrick, who sustained severe injuries and Secrest, who sustained minor injuries. **Claimant** Samson escaped injury altogether.

By notice &ted May 17, **1979**, both Claimants along **with Bradrick** and the three **(3)** employees operating the Burro crane were each ordered to report on **May 24, 1979** for a formal investigation to "determine cause, develop facts and place your particular responsibility, if any, for the accident that occurred at Penn Avenue Interlocking Plant in vicinity of Switch No. **45** on Track No. **7**, at about **7:40 A.M.**, on **Monday, May 14, 1979**, when **Burro Crane TX501**, with air **dump** car **KCTX5060**, struck and injured three employees of the Kansas City Terminal Railway Company". As a result of the evidence adduced at the investigation, Claimants were adjudged guilty of having violated Rules L, M, and U, of the Kansas City Terminal Railway Rules and Regulations and Safety Rule **159** and accordingly were suspended for a **period** of ten (10) working days. Rules L, M, and U read as **follows:**

"L. Employees who are careless of the safety of themselves or of others; or who are **insubordinate, dishonest, immoral, quarrelsome** or vicious; or who handle their personal obligations so as to cause the railroad to be criticized or to lose good will, or who are **convicted** of a felony or other Crime **involving moral** turpitude, **will** not be retained in the service.

"Property of the railroad, including freight and articles of value found in or on cars, or on the right-of-way, must be cared for and properly reported, and not **in** any way disposed of, or **removed** from Company premises or **right-of-way** without first securing proper authority."

"**M.** Safety is of first importance in the discharge of duty. Obedience to the rules is essential to safety. To enter or **remain** in the service is an assurance of willingness to obey the rules."

"**U.** Employees must exercise care to avoid injury to themselves or **others**. They must observe the condition of equipment and the tools which they use in performing their duties and when found defective will, if practicable, put them in safe condition, reporting defects to the **proper** authority."

They **must inform** themselves as to the **location** of structures or obstructions where clearances **are** close.

They must expect the movement of trains, engines or cars at any time, on any track, in either direction.

They must not stand on the track in front of an approaching **engine** car for the purpose of boarding the same.

Employees must not ride or walk on the roof **of any moving** car.

In every case of accident a full and complete report must be made at once by every employee present, no matter whether he considers his statement of Importance or not.

Employees must report all personal injuries, regardless of how slight, to the proper supervisory officer before leaving the **Company's** premises, stating time, place and cause thereof, furnishing forms and statements as soon as possible. Even slight injuries should receive **immediate** attention to prevent infection."

And Safety Rule **159**, reads as follows:

"**159.** Employees are prohibited from sitting on rails, ties or any other part of track structure, except when necessary **in** performance of duty, and then only when sufficiently protected to insure their safety."

The **Organization** argues the investigation, subsequent findings by Carriers, and the discipline imposed on the Claimants, should be overturned **on** the procedural **ground** Carrier failed to be precise in its **charges** against **Claimants** by not citing the particular rules and regulations allegedly

violated. The Organization contends that as a result of Carrier's imprecise statement of charges, **Claimants'** rights to a fair and impartial hearing were seriously **compromised**. Moreover, the Organization submits that by not bringing precise charges against the Claimants, Carrier is in violation of Rule **701(c)** of the controlling Agreement bearing effective date of September **16, 1968**, which reads in relevant part thusly, "**The** Employee alleged to be at fault shall be apprised in writing of the precise charge or charges..." As further support of its position the Organization cites Third Division Award 20560, contending said case is parallel to the case at bar, wherein the **Board** held that: "fundamental **fairness** requires that this Board study the rule or rules under which Claimant was disciplined as well as the **evidentiary** record in order to judge whether the evidence **conforms** to and relates to the violation of the specific rules. This Board is left to speculate . . . and this we cannot do." The Organisation posits that as in this **preceding** case, the Board again is left **to** speculate.

With regard to the merits, the Organization asserts Claimants Were not perpetrators of a rules violation but victims thereof. In support of its position on this point the Organization asserts the crew operating the Burro crane had the responsibility pursuant to Rules **14(b)** and **14(1)** of the Kansas City Railway Rules and Regulations to sound a whistle signal at the **time** the crane began to wve. The Organization notes no whistle signal was sounded and therefore the **Claimants** Were given no forewarning es to the movement wer the track. The Organization presumes that had the crane's horn been operated as prescribed by Carrier Rule **14**, there should be no doubt that it would have been heard by the Claimants in which case Claimants **would** have reacted appropriately by taking evasive action.

With regard to the specific Rules violations **Claimants** are charged with, the Organization takes the following positions: (1) as to Rule L, the Organization submits that Carrier's findings of culpability for this violation is based not on any facts presented, but on the presumption that Claimants were careless of their safety. The Organisation argues that the occurrences of an accident does not of itself **prove** that the victims, in this case the Claimants, **were** negligent; (2) as to Rule M, the Organization submits that nowhere in the record evidence has Carrier shown that **Claimants** ever expressed an unwillingness to obey any of its rules including those on safety; (3) as to Rule **U**, the **Organization** contends Claimants did exercise every caution to avoid injury while in the course of performing their assigned **duties**; and (4) relative to Rule **159**, the Organization asserts this charge lacks total foundation as no evidence or testimony was produced by **Carrier** to indicate either of the Claimants **were** "... sitting on rails, ties or any other part of track structure ..." Rather, the **Organization** maintains the positions assured by the Claimants Were necessary to the performance of their duties. In sum, the Organisation declares the Carrier's finding of guilt on the part of the Claimants is not supported by the evidence of record and therefore a sustaining award is justified.

In defense of its position **Carrier** argues the notice of charge was, in fact, sufficiently precise and satisfied all requirements of the Agreement. This is so, states Carrier, as Claimants were put on notice as to the specific incident **under** investigation including the date, place and other details of

the subject accident. As to the Organization's position the charge was imprecise because it failed to specify violations of particular rules, Carrier cites Award No. 5 of Public Law Board 1267, as a refutation of such position, wherein the Board held:

"The fact that no specific rule violations were mentioned in the Notice does not render it invalid for, as a matter of substance. Carrier's right to impose discipline, in the event of certain conduct, ***, is beyond the realm of debate."

In further support, Carrier notes in relevant part Third Division Award 17998, wherein the Board stated:

"*** A notice is sufficient if it meets the traditional criteria of reasonably apprising an employee of what set of facts or circumstances are under inquiry so that he will not be surprised and can prepare a defense. *** A careful review of this record *** does not disclose that the Claimant's substantive rights were violated by reason of the notice he received not containing a direct charge that he violated a specific rule. ***"

The Carrier takes the position that notwithstanding its affirmative defense on this procedural objection, said objection should be dismissed as it was not timely raised by the Organization.

As to the merits, Carrier asserts evidence adduced at the investigation clearly reflects Claimants were very much aware they were working on a track that was in service at the time and that traffic could move over that track at any time in any direction. Carrier submits based on the Claimants' own testimony that they were in complete disregard of the Agreement Rules and safety precautions while engaged in the performance of their assigned duties of repairing the switch. Carrier charges Claimants were careless as to their own safety and the safety of others and concludes this carelessness contributed to the subject accident.

In our review of the entire record and close scrutiny of the relevant evidence, we find the procedural objection raised by the Organization to be without foundation. We are persuaded by an examination and reading of the notice of charges that it was specific enough in apprising Claimants of the matter under investigation, to wit the accident they were involved in on May 14, 1979, and sufficient enough to allow them to prepare an adequate defense. In so finding, the issue as to whether the Organization timely raised this objection becomes moot.

On the merits of the case at bar, it is our determination based on Claimants Own testimony they were aware Track No. 7 was in service at the time they were repairing the signal, that they were careless of their own safety and the safety of others, and thereby guilty of the rules infractions, cited above. Accordingly, we find we must deny the instant claim.

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

That **the Agreement** was not violated.

A W A R D

Claimdenied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie **Brasch** - Administrative Assistant

Dated at Chicago, Illinois, this 13th day of May, 1982.