

Award No. 6307
Docket No. MW-6261

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS

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

(1) That the Carrier violated the effective agreement when it failed to accord Extra Gang Foreman C. N. Glass a fair and impartial hearing and subsequently discharged him on unjust, malicious and unproven charges;

(2) That Extra Gang Foreman C. N. Glass be reinstated with all rights restored and be paid for all time held out of service because of the violation referred to in part (1) of this claim.

OPINION OF BOARD: The System Committee makes this appeal on behalf of Extra Gang Foreman C. N. Glass. It claims Carrier discharged him from its service without a fair and impartial hearing on the charge it had made against him and, of doing so, without proving such charge. Because thereof it asks that Glass be restored to Carrier's service with all service rights unimpaired and that he be paid for all time he has been held out of service because thereof.

On June 3, 1951 Carrier charged Glass with failing to comply with its rules and instructions in raising and surfacing track near mile post 326, pole 25, on Tuesday, May 29, 1951, resulting in track being made unsafe and in delay to important train. A hearing was had on this charge on June 8 and 9, 1951. Based on the evidence adduced thereat, Carrier found Glass guilty of the charge it had made against him. On June 18, 1951 J. F. McCurdy, Division Engineer, advised Glass of that fact by letter and therein also advised him that he was dismissed from its service.

On May 29, 1951 Claimant was in charge of Extra Gang No. 1. Extra Gang No. 1 was then engaged in out-of-face surfacing of Carrier's track near mile post 326, pole 25, just north of the north switch of Eagle Mills siding. Out-of-face surfacing is the progressive raising of the complete track structure a predetermined height, for a predetermined distance. In doing the work the gang, working in two units, skeletonized, raised and surfaced the track.

At about 11:30 A. M., on May 29th, the rails of the raised portion of the track buckled or kinked within the limits of three rails. This is referred to as a sun kink. It was caused by expansion of the rails from the heat. The track was then relined about 4 feet from its original center to allow trains to

pass. One train was delayed about 44 minutes. By cutting off about 6½ inches from one rail, it was possible to put the track back to its original location and leave about 5 to 5½ inches of space for expansion joints. This work was completed about 5:00 P. M.

The rules which have application here are, in so far as material, as follows:

"138. Subdivision of Rules—While the rules and regulations are subdivided for convenience, yet they apply equally to all and must be observed wherever they relate in any way to the proper discharge of the duties of any employes."

"255. Frozen Joints. A rail joint in which movement of rail is impossible is termed a 'frozen joint'. This condition is caused by over-tightening bolts, or corrosion. The result is serious. * * * In hot weather alignment is distorted, track rides badly and is liable to buckle.

"* * * When frozen joints are found, loosen bolts, equalize expansion, oil joints and retighten bolts. (See Rules 338, * * *.)"

"338. Sun Kinks—Special care should be taken to prevent buckling of track. Sun kinks are most likely to occur during hot weather at foot of heavy grades or on sags. At such locations, expansion should be adjusted and rail anchors reset before resurfacing or flat work is undertaken. In making the renewals, spikes must be drawn from individual ties and each tie full spiked as put in. Track should be kept filled in, and the level board must be used in spotting up joints, centers, and quarters. Disturb track as little as possible by raising the low rail only. Raising track should not be done when rail is tight in heat of day, if in danger of track buckling. * * *

"In out-of-face surfacing, foreman must watch track carefully to detect any tendency to buckle or kink. * * * Track jacks should be used in pairs and set plumb, and directly opposite each other. * * * Keep ties squared up and spaced properly, spikes driven down, and bolts tight, unless it is necessary to loosen bolts temporarily where there is expansion available in a stretch of unusually tight track. Run-offs of sufficient length must be made. * * *"

Claimant admits that at the time the track buckled it was very tight and that he made no attempt to loosen any frozen joints, which he knew existed, because, as he says, there was very little, if any, space available in the joints for expansion so loosening them would serve no useful purpose. However, there is competent evidence that there were frozen joints on each side of where the sun kink occurred and that, if the joints had been loosened, there would have been sufficient room for expansion to have prevented the kink. Although he knew the track was very tight, Claimant thought the rails had expanded their limit and did not have enough force left to cause a kink. Consequently, on May 29th, he did not watch the track carefully to detect any signs that might be evident of a tendency to buckle or kink. In fact he took no special care to prevent buckling, although the weather was very hot, but relied entirely on the fact that he had had no trouble of that kind on the previous days when his gang had been doing the same kind of work. In doing so, under the circumstances shown, we think he failed in the performance of his duties, as provided by these rules, and that the evidence adduced at the hearing fully supports Carrier's finding to that effect.

In this respect Claimant seeks to shift his responsibility as foreman of this gang to Roadmaster Farmer and Assistant Roadmaster Pipkin. Particularly Pipkin because he was at the scene about 10:00 A. M. on May 29th and advised Claimant that the work was progressing satisfactorily. This was about an hour and one-half before the track buckled. Whether or not these men failed to properly perform their duties is not here for our consideration. Nor would that fact, if true, excuse Claimant from failing to perform his. He was

immediately in charge of Extra Gang No. 1 and the duty of meeting the requirements of the rules herein set forth, as far as his Gang's work was concerned, was his, as neither of these men had taken over his job.

The Organization also claims that Claimant is being discriminated against because there have been previous cases of sun kinks on this Carrier's tracks but, to the best of its knowledge, this is the first one where the person in charge of the work, when it occurred, has been disciplined by being dismissed from the service. That may be true but we cannot tell the Carrier what it must do about disciplining its employes. We can only decide, once the charge has been made and the guilt established, if the discipline imposed is unreasonable and unjust. In that respect this fact is a proper element for us to consider.

In view of the foregoing, and other circumstances such as the extra work of filling out the applications of new employes and teaching some of them how to do the work, we would normally be inclined to think the punishment of dismissal too severe. However, Claimant, in this respect, has a very unsatisfactory past record. This Carrier had the right to, and should consider this past record, in determining the amount of the discipline to impose. See Awards 3342, 4479, 4684 and 6006 of this Division. When we consider Claimant's past record in relation to the offense of which he has here been found guilty, we do not think dismissal to be either unreasonable or unjust.

It is finally contended Claimant did not have a fair and impartial hearing within the intent and meaning of the rules of the parties' Agreement covering discipline and grievances. See Rule 6-2. This is primarily based on the fact that Carrier's Division Engineer J. F. McCurdy acted in the dual capacity of examiner and judge. We have often ruled against this contention, unless it appears from the record that the conduct of the official so acting was so biased and prejudiced that it cannot be said the employe had a fair and impartial hearing. See Awards 4840, 5026 and 5701 of this Division. Such is not the situation here.

Mention is made of the fact that the notice advising Claimant of his dismissal was handed to his wife. How this shall be done is not provided for in the Agreement. Considering the circumstance which brought this about, and the manner in which it was done, we find nothing to criticize in that regard.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employe involved in this dispute are respectively Carrier and Employe 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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 7th day of August, 1953.