Award No. 6919
Docket No. MW-6986

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CENTRAL OF GEORGIA RAILWAY COMPANY

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

(1) The Carrier violated the Agreement when it dismissed Section Foreman C. E. Ison without just and sufficient charge and on charges unproven;

(2) The Carrier now reinstate Mr. C. E. Ison with full seniority, vacation, and other rights unimpaired and compensate him for all wage loss suffered account of the unjust dismissal.

OPINION OF BOARD: About 12:13 P. M., July 29, 1953, in the vicinity of Chewacla, Alabama, the ninth and tenth cars (Cafe-Lounge DC 4001-Pullman Valley Pass) of first class passenger train No. 10, The Seminole, were damaged and some personal injury sustained as the result of their derailment. A separation occurred between the eighth and ninth cars permitting the engines and eight cars to remain on the track. A further separation occurred between the derailed cars, the cafe-lounge car going over and coming to rest on the left side about 540 feet east of the point of derailment. The Pullman car came to a halt at about an angle of 15 degrees.

Unless, as found and determined after an investigation on the property and occurred in by ICC Report No. 3531, the derailment was account of insecure condition of the track, the cause of the accident remains unknown and not determined.

The case is here for review because claimant was held accountable for rules violation in connection with the accident and has been dismissed from service. Ordinarily the Board will not interfere with discipline imposed if the evidence reasonably tends to support the Carrier's action. Our powers of review do not permit the substitution of our judgment for that of the Carrier and it is not right that we should say what we might have done on the facts of the case if it had been our duty to make the decision in the first instance. Our only concern is whether a grievant has had a fair and impartial hearing on the facts of record and as provided for by Rules of Agreement.

In the instant case we have a record of 265 pages, including 127 pages of transcribed testimony and recorded proceedings, which puts us on notice, at the outset, that substantial rights of Claimant are at issue on

a claim that he has not had that fair and impartial hearing to which he is entitled under the investigation rules of the Agreement. Consequently there is a double burden upon the Board to uphold the Carrier's action if the facts warrant, and, on the other hand, to set aside the discipline if Claimant's rights have been prejudiced by failure to abide by the Rules of Agreement. The conflict is readily apparent but, in the face of the apparent conflict, the Board, at times, feels under compulsion to set aside discipline due to procedural defects of record. We do not always find that compulsion as strong, though, in aggravated cases of proven guilt as we do if there is some uncertainty that the punishment is just from the standpoint of the record as a whole for reasons we shall explain.

Procedural rules of these Agreements are for protecting the rights of the innocent as a general proposition and we do not look with favor upon them being for shielding the fault of the guilty, if guilt is clearly proven. It serves no purpose to direct that one who is obviously at fault for a serious rules violation, be reinstated if he has had the full, fair, and impartial investigation to which he is entitled except for failure on some one count alone to observe all investigation rules with meticulous care. On the other hand, it is just as possible for the employe to be the victim of arbitrary and capricious discipline or bad faith where all procedural rules have been observed as in the case where they are not, so in the end there is no real substitute for considering the merits of the case along with those procedural defects in the record when searching for prejudicial error, and in attempt to do full justice to all the rules in effect on the property.

If the above approach is more generally adhered to there will be greater validity in and to all the rules, and less probability of the Board unwittingly compromising the position of poth parties in order to do as little harm as possible to either. With all the foregoing in mind we have carefully reviewed this entire docket for that prejudicial error, if any, which will entitle Claimant to reinstatement. Our review has gone as much to the facts of the case as to claim of defect in the investigation.

Pursuant to notice dated August 2, 1953, given to Claimant and requiring him to appear at the time and place stated, to answer for his alleged fault with reference to the derailment the investigation was opened by reading the heading of the investigation which is, in part, as follows:

> "THIS IS AN INVESTIGATION to develop the facts and place the responsibility in connection with the derailment of the two rear cars of the Seminole, train No. 10, in charge of Conductor W. R. Chalkley and Engineer J. N. Perkins, at Chewacla, Ala., about Mile Post 316.6 Birmingham District, at 12:13 P. M., July 29th 1953.
>
> Section Foreman C. E. Ison is specifically charged with violation of Rule 1 as shown in Rules and Instruction for the Maintenance of Way and Structures, effective January 1st, 1918, which rule book is still effective, reading as follows.
>
> 'SAFETY FIRST—Foremen and others in charge of work must always bear in mind that safety is the first and most important consideration.
>
> 'In all cases of doubt or uncertainty the safe course must be taken and no risks run.'
>
> also, Special Instructions contained in Division Engineer's letter of April 2nd, 1953, file 154-7-RC, concerning the liability of track buckling during warm weather, quoted below:
>
> 'Supervisors: Bowers, Dodgen, Deason, Olive, Montgomery, Tondee:

'Now that general work is in progress and the weather is getting warm, the liability of track buckling has to be reckoned with and guarded against.

'Supervisors and Foremen must acquaint themselves with locations where track is tight enough to involve danger of buckling and promptly take necessary steps to relieve the danger, preferably by driving back the rail, or, in case of emergency, to use shorter rails. Supervisors and Foremen will be held jointly responsible for correcting tight rail conditions.

'In working track that is known to be too tight to work safely, sufficient expansion must be provided for before opening up track.

'In all classes of work during hot weather not over two ties in a place should be removed before replacing the new ties and spiking them up. All new ties must be spiked as soon as put in and before trains are allowed to pass over. The least possible amount of track should be opened up in connection with the work and must be filled in to top of ties close behind.

'Surfacing must be done under protection of slow flags, and if rail is tight enough to cause suspicion on the part of the foreman as to safety, the work must be done under protection of red flags. It is desirable, when practicable, that work be so arranged that the track will be filled in and in normal condition for passage of important passenger trains and flags taken down, to avoid delays to these trains.

'See that instructions are issued to all of your foremen, and let me know when you have received acknowledgment from each man to whom instructions are issued.' "

Prompt objection to the investigation proceeding on the opening statement above quoted was interposed by Claimant's designated "counsel" and announcement was made that Claimant would not participate unless the specific charge against him was withdrawn. This objection was resolved when the presiding officer stated on the record:

"On the request of General Chairman Padgett, the specific charges against Mr. Ison are being withdrawn, with the understanding that at the completion of the investigation, if the evidence points that there was any failure on Mr. Ison's part after joint conference such evidence then will be injected into the investigation. Is that all right?

"ALL PRESENT agree that this is satisfactory."

Rule 13 (b) of the Parties' Agreement, among other safeguards, provides that no employe shall be discharged or disciplined without a fair hearing and that the employe will be informed in writing of the precise charge against him. We agree with Petitioner that the requirement for an employe to be advised in writing of the precise charge against him is unquestionably a pre-requisite to invoking a penalty.

Whether a penalty has been assessed without notice of the precise charge, and, therefore, asssessed in violation of the clear and unambiguous terms of Rule 13 (b), is what we are called on to decide, along with a determination which must be made as to the sufficiency of the proof for establishing

violations on Claimant's part. We think the two are inseparable for purposes of knowing to what extent, if any, Claimant in this case has been prejudiced by action of the Carrier in the conduct of the investigation and by imposing discipline under all the facts and circumstances of the case. We shall turn our attention first to the matter of proof.

On the day in question Claimant, as foreman, was directing the work of six sectionmen in renewing ties on the curve on which the accident occurred. The process was to remove sufficient ballast at the location of each tie to permit the removal of the tie. Spikes were then pulled and tieplates removed. It does not appear that the rails were raised high enough to disturb the adjacent ties in the ballast. As each tie was removed a new tie was immediately put in place. After tieplates were applied and placed on the new ties sufficient ballast was tamped under the ends of the ties to raise the ties against the bottoms of the rails. We digress for the moment to lay a predicate for testimony to be later quoted verbatim.

Claimant acknowledges that he was working under Special Instructions contained in Division Engineer's letter of April 2, 1953, file 154-7-RC (quoted above) and that he had full knowledge and information about same. The weather was hot as usual in this section of the country in late July and early August. In three hours of the morning, from 7:30 A. M. to 10:30 A. M., the temperature had risen from 76 degrees to 83 degrees and was still climbing. During the middle part of the day it was in the 90's. "It was unusually hot." From this, we feel privileged to find and conclude that the written instructions including the next quoted paragraph thereof, were in full force and effect. We quote:

> "In all classes of work during hot weather not over two ties in a place should be removed before replacing the new ties and spiking them up. All new ties must be spiked as soon as put in and before trains are allowed to pass over. The least possible amount of track should be opened up in connection with the work and must be filled in to top of ties close behind."

Claimant's own testimony convicts him of ignoring instructions intended to assure the safety of work for protection of passengers, freight, equipment, and those of the operating crafts whose life and limb are entrusted to the care of their fellow workers along the line of road. We quote:

"Q. Were any of these 38 ties that had been put in spiked up?

A. No, sir. They were caught up, but not spiked."

* * * * *

"Q. Do instructions call for each tie to be spiked up as it is installed?

You are familiar with that part of it?

A. Yes, sir.

Q. Why didn't you spike these ties, Mr. Ison?

A. Well, if you stop and put in a tie and catch it up and spike it up as you go, you will cut down on your work in half. The reason why I didn't spike them up was we were trying to get out there and go as fast as we possibly could and do a good day's work.

Q. You realize that you were violating these instructions then when you were doing it?

A. Yes, sir, in a way, and in a way I don't see where it was a violation no more than not having the ties spiked."

* * * * *

"Q. Were all ties, except the new ones, spiked?

A. Yes, sir. 8 spikes to the tie, except the new ones."

* * * * *

"Q. Had Supervisor Bowers instructed you or cautioned you with reference to spiking ties up before a train passed over them?

A. We had instructions that the ties would be spiked before a train was over them."

* * * * *

"Q. Have any of your supervisors told you to violate these written instructions in order to do more work in a day's time?

A. No sir."

We do not know how a more clear case of violation could be shown. We think the violation does not stop with the instructions, but goes to the very heart of Rule 1, General Instructions, quoted above, and again quoted, in part, for emphasis, viz:

> "SAFETY FIRST.—Foremen and others in charge of work must always bear in mind that safety is the first and most important consideration.
>
> "In all cases of doubt or uncertainty the safe course must be taken and no risks run."

When the derailment occurred, the crew had taken off for lunch with full knowledge that a crack passenger train was due to run over this section of track. Trains were running without slow orders. Without protection of any kind the passenger train hit the track doing almost the maximum permissible speed of 60 miles an hour.

In the face of what appears to us to be negligence, Petitioner argues that Claimant was not at fault for the accident. Serious question could be raised about the right of Petitioner to require proof that the violation in question contributed to the accident on a record that speaks unmistakenly of failure to observe all possible precaution for safety and a wreck having resulted.

Argument such as that now urged loses sight of the inviolable character of safety rules and instructions bearing thereon. In addition to the stake that all have in safety, the rule and instructions in question are promulgated as much in the interest of those like Claimant, as for those who are threatened with loss and injury by reason of a mishap occurring. Compliance here would have left the Claimant absolutely free of any possible fault and no blame could have been laid at his door, for a wreck yet unexplained if his negligence did not at least contribute thereto. The point is that rules and instructions like those at issue are for the protection of the worker in connection with his work performance and, if observed, he is not otherwise called to account.

But in view of Claimant's honest belief, shared by his able "counsel", that he already has been mistreated by allegedly having been denied a fair investigation on the property, we will not give him the short answer here and say, he should not have done it.

In an opinion already longer than usual and growing still longer, we can only touch upon the remaining high points of his defense, but we have overlooked nothing that would inure to his advantage in dealing with the merits.

A short time before the derailment of the cars in question train 29, a west-bound freight out of Columbus consisting of 73 loads, 4 empties, 4012 tons, powered by three diesel engines, at the time running 30 to 35 miles an hour, passed over this same track without mishap and it appears that the track remained in normal alignment. Petitioner thinks this is a circumstance in Claimant's favor. To us this seems to be only another link in the chain of damaging circumstances. Once over a disturbed and loosened track structure, a moving train added to the insecure condition of the track and all taken together, the track structure did not provide normal resistance to the lateral stresses exerted by the movement of the passenger train on the curve at a maximum permissible speed for a sound track.

Petitioner would have us find that the accident just as readily could be blamed on a defective car, defective equipment, or a defective air application. For us to adopt any such theory there must be irrefutable proof to support it in order to lay aside the conclusion expressed in the preceding paragraph which we consider supported in fact and a fair deduction from all evidence.

It appearing, however, that others of unquestioned integrity and most qualified to know that about which they speak, in the persons of the Division Engineer, and the Engineer Maintenance of Way, may be of an opinion contrary to ours and that of the Carrier Officers, who fix the blame in the first instance with no little support from the ICC, their testimony will bear close scrutiny.

From reading the Division Engineer's testimony in the record, we have no doubt that he was being eminently fair and was conscious, at all times, that a careles opinion expressed by him, if unfavorable to Claimant's cause might do irreparable injury. He gives only guarded opinions, although at one place in the record he does say that he does not believe the track was weakened by work done by the section foreman that morning to extent of being unsafe.

To best weigh his testimony, compare the foregoing observation with his other testimony, to-wit:

"Q. From your observation at point of derailment, can you give us a cause of same?

A. I can give you my opinion. I think derailment was caused by excessive lateral thrust of equipment in train No. 10 against the outside rail just ahead of and at point of accident.

Q. Would you care to state what, in your opinion, caused this lateral thrust?

A. I can state an opinion of what might have caused it but am unable to state an opinion as to what did cause it. In view of the subsequent reports on the condition of the equipment and testimony of train crew in regard to speed being made at that time.

Q. You mean the speed entered into it?

A. No, sir, I didn't mean to say that. I said in view of reports on the condition of the equipment found subsequent to derailment which was to the effect that there was no defective equipment, and in view of the testimony of the crew that allowed speed was not being exceeded, I am unable to form an opinion as to what caused this lateral thrust against rail."

It is obvious from the foregoing that, like Petitioner, he had a theory, but unlike Petitioner, he was willing to accept testimony that there had been no equipment failure, and in view of the uncontroverted speed of the train, he is left without basis in fact or reason for his theory unless he can now accept the judgment of others that the insecure condition of the track proved to be a contributing factor to derailment of the cars.

We also note that the Division Engineer is the author of the instructions that Claimant admits violating. In connection with those instructions, he testifies:

"Q. Mr. McKerley, you heard Mr. Ison's statement there that there was no rail with less than 21 ties spiked in the area of this accident and that there were no two new ties put in the rail together. In your opinion, do you think that 21 ties spiked but no new ties together would have been safe to operate trains over?

A. I think that would depend on the speed involved and the character of track involved. At this particular location I do not believe that could contribute to derailment. However, to safeguard Safety we have out instructions as has already been read into this investigation issued over my signature, dated April 2, 1953."

Questions by I.C.C. Inspector C. E. Danforth.

"Q. In issuing this bulletin dated April 2, 1953, what was your idea in issuing this 4th paragraph?

A. It was for the purpose of insuring the work being done in such a manner as to maintain the safeability of track when working track during hot weather.

Q. In other words, work not in conformity with those instructions would weaken track considerably, is that right?

A. I consider that it would weaken track to some extent but not necessarily enough in every case to make track unsafe."

Whatever comfort Petitioner finds in the Division Engineer's testimony, it does not hold Claimant free of guilt. The witness testifies:

"* * * I would like it understood that my testimony to the effect that I considered the replacement of ties in this connection as not to have lessened the safety of the track materially not to be construed as condonement in any degree of violation of any rules or instructions covering track maintenance."

The Engineer Maintenance of Way does not testify as a witness, but that to which Petitioner refers has to do with his interrogation of the Division Engineer, and the pertinent part is as follows:

"Q. Mr. McKerley, a good deal has been said about two ties in this rail length being loosened. Is it true that the standard number of ties per rail length has been decreased in the last few years, not only on the Central of Georgia but other railroads as well, and now the number of ties per rail needed for a good factor of safety is only 22 per rail?

A. That is correct.

Q. Then, if 2 ties had been completely out of this rail, it would not have materially lessened its holding power?

A. I do not think it would have.

Q. Taking the statement of the laborer who was the only eye witness to the derailment, had the train separated before derailment and the front part of the train left these 2 cars by themselves, could they have furnished the excessive lateral pressure?

A. My opinion is that it could have if it happened as he testified. I think released tension between the dining car and coach would have resulted in a sudden outward thrust of the front part of the dining car to north rail."

Whatever support there is in the testimony cited by Petitioner for Claimant's cause, and we do not take that testimony lightly as shown by the extent quoted and the pains we have taken to analyze and to weigh it, there is only this remaining to be said: It is the expert opinion of a qualified witness. It is not to be and has not been lightly regarded. It is not binding and is only persuasive to whatever extent it squares with all the other proof.

On the record, as a whole, the triers of the fact who had the testimony under consideration in the first instance did not find it of sufficient weight to excuse Claimant from fault. The witness did not see any excuse for Claimant violating instructions and rules of safety. We share both views.

All theory about an equipment failure and what evidence there is to support it is offset by positive proof to the contrary. We find nothing in the record before us on which to base a positive finding that defective air application was involved.

We think it is now demonstrated that a conscientious attempt has been made to comply with Petitioner's request that the Board carefully review and analyze the testimony. The results of that effort have been to leave us with the positive conviction that there is no basis for holding the proof insufficient to warrant dismissal.

Now being satisfied that proof of guilt is absolute, it remains to be said whether Claimant was at some disadvantage in his efforts to meet and counter that proof. The proceedings were highly irregular and if there were more question of guilt it would be our bounden duty to lend whatever force there can be in a sustaining award to right the wrong. But guilt having been established beyond a peradventure of doubt, there must be some showing made in the record of prejudice to substantial rights of Claimant that would tend to prove there has been a miscarriage of justice.

As heretofore indicated, if Claimant had never been put on notice of the specific charges lodged or to be lodged against him, there would have been a failure of due process and he would have been entitled to reinstatement no matter how strong the proof of guilt or how grave his wrong.

But Claimant knew the specific charge with which he was confronted or to be confronted well in advance of the investigation. What now concerns us is whether there was anything about a conditional withdrawal of the charge that worked to his detriment, placed him in needless jeopardy, or put him to any disadvantage in submitting to the investigation pursuant to a stipulation that the record about to be made, could be used against him. According to the only protection provided by the stipulation, Claimant must have known that the knife hanging over his head was supported only by a slendar thread of an agreement, made outside of and having no support in the Rules of Agreement.

Because of what, at least, amounts to irregularity in the investigation on the property, we have looked with a critical eye to every phrase of the proceedings, but we find no prejudice to Claimant's rights, for reasons hereinafter stated.

It readily appears that the investigation was conducted more for the purpose of ascertaining the cause of the accident than to fix blame for same in strict accordance with Rule 13 (b). But a review of the entire record discloses that this works more to Claimant's advantage than to his disadvantage.

Despite what is argued in the docket there is no showing that witnesses have tried to shift the blame as a matter of self protection and in their own interest, in keeping with a tendency to do so on the part of one or more of those jointly charged and called to account in the usual investigation.

Although representatives of other crafts were quick to defend against any implication of wrong-doing or involvment no one pointed an accusing finger at Claimant. To the contrary, the Division Engineer, the Engineer, Maintenance of Way, and most of all others, by their testimony were most fair to Claimant in every way. We are impressed that everyone testified with forthright candor, and, in that respect, Claimant especially is entitled to commendation for his honesty and truthfulness. To now say, as we might, that he testified as he did because he did not stand charged, due to conditional withdrawal of the charges, would be to detract from his integrity and honesty of purpose, by implying that he might have testified differently had the investigation proceeded strictly in accordance with the notice. We will not impune Claimant's integrity or his honesty of purpose by making a finding that could be so construed.

We are impressed also with the fairness shown by the hearing officer in presiding over the investigation. The manner in which he met the objections of Claimant's "counsel" speaks only of a disposition on his part to have it known that Claimant was not under undue burden of having his guilt prejudged. Claimant was ably represented by "counsel" of his own choosing. All questioning of witnesses, some 25 in number, is free of any and all showing of bias, prejudice, or attempt to prejudge guilt. Every attempt appears to have been made to try to ascertain the true cause of the derailment. It only happens that a diligent, fair, and impartial attempt to ascertain the cause develops responsibility for rules violation and failure to obey instructions chargeable to Claimant.

We find that a full, complete, and thorough investigation was made of all facts and circumstances surrounding and bearing on the mishap. One of Claimant's chosen representatives states our position and our appraisal of the record when, at the conclusion of the hearing, he was asked:

> "In your opinion, was it (the investigation) held in a fair and impartial manner?"

and he answered:

> "Yes, very fair."

Finally we deem it most unfortunate that the parties are in disagreement about whether "joint conference" was held at the completion of the investigation as stipulated and agreed on the record. Those parties who made the agreement should know and are alone bound and we must leave it to their integrity as to whether the agreement has, in fact, been kept. It poses enough difficulty for this Board to deal properly with Rules of Agreements and we would only borrow trouble should we undertake to police collateral agreements and undertakings. All such matters rest in good conscience with which the parties themselves must live, without Board intervention. We do not undertake to pass judgment on who is right and who is wrong with respect to the controverted question of whether the agreed on conference was, in fact, held. The claims will be denied.

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 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 dismissal of Claimant was not in violation of the bargained Agreement.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 21st day of March, 1955.