Award No. 8807
Docket No. SG-9734

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Lloyd H. Bailer, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee on the Missouri Pacific Railroad Company that:

(a) The action taken by the Carrier in dismissing W. S. Mitchell, Signal Foreman, from the service of the carrier following an investigation in connection with an accident involving motor car operated by Mitchell and an automobile at the 11th Ave. Crossing in Nebraska City, Nebraska, on July 25, 1956, was unwarranted, unjust, and in abuse of its discretion.

(b) The Carrier now restore W. S. Mitchell to his former position, with all rights unimpaired, and compensate him for all time lost, beginning from the time he was taken out of service pending investigation, and clear this charge from his personal service record. [Carrier's File: VG-S 225-287]

OPINION OF BOARD: Following investigation held on August 3, 1956, Signal Foreman Mitchell was given written notice that he was dismissed from service due to violation of Maintenance of Way Rule 145-(a) resulting in collision between a motor car operated by claimant and an automobile driven by an outside person, L. E. Reed. The dismissal decision was issued on August 9, 1956. On August 14, 1956, General Chairman Shaver appealed this decision to G. M. Holzmann, Assistant General Manager, contending that violation of the subject rule had not been shown at the investigation. On August 20, 1956 the Assistant General Manager denied the appeal. On September 4, 1956 the General Chairman appealed the matter to the Carrier's highest designated appeals official, Chief Personnel Officer T. Short. The General Chairman again asserted that the charged violation of M of W Rule 145-(a) was not shown, but also raised for the first time the contention that Carrier had failed to comply with Agreement Rule 26(d) because it did not send a copy of the dismissal decision to the claimant's representative who assisted him at the investigation (said representative being Local Chairman J. H. Craig). This procedural question is urged before this Board, as well as the merits of the case. In executive session with

the Referee, Carrier Members urged still another procedural point, to-wit: that the Organization failed to comply with the requirement of giving timely written notification to the Carrier officer who made the dismissal decision that said decision was being appealed. It is urged that since no such written notification was in fact given at any time, the case was closed before it reached this Board .

With respect to the latter procedural question, the only basis for contending that the involved notice was not given is that there is no specific indication in the record that any such notice was transmitted to the appropriate Carrier officer. We do not **know** that it was not given, however. The Carrier does not contend that the proper procedure was not followed by the Organization. We are not entitled to assume it was not given. We therefore reject this contention without passing upon the question concerning whether lack of the subject notice would have been fatal to the claim.

Agreement Rule 26(d), which Carrier is charged with having violated, provides:

> "Decision to the employe, with copy thereof to representative who assisted him at the investigation, will be rendered in writing within ten days after completion of investigation."

The decision was issued in writing to claimant on the sixth day following completion of the investigation. It is established that a copy of the decision was not sent to Local Chairman Craig at that time. Carrier states said copy was transmitted to the Local Chairman when the "oversight" was brought to its attention, although Management does not contend this transmittal was made within ten days after completion of the investigation. Organization responds the Local Chairman has never received copy of the decision. Petitioner contends the subject rule was placed in the Agreement in order that the representative could properly protect the employe against a miscarriage of justice, that this is an important procedural requirement, and that Carrier's violation thereof had an adverse effect upon the handling of this case in behalf of the claimant.

We agree with Petitioner's view of the purpose of the subject rule, but we cannot see that Carrier's failure to comply therewith had an adverse effect upon the Organization's handling of the case, or that such failure was otherwise prejudicial to the claimant. The General Chairman who contended at the final appeal stage on the property that Carrier's failure had adversely affected the Organization's handling of the case was the same employe representative who made the initial appeal to the Assistant General Manager five days after the decision was issued. This first appeal did not allege that lack of notice from the Carrier had an adverse effect upon preparation of the appeal. Moreover, this appeal as presented in writing disclosed full knowledge of the dismissal decision, cited the operating rule claimed to have been violated, and discussed in detail the testimony offered at the investigation. We hold to the general view that procedural requirements of the Agreement are to be complied with, but we are unable to say that Carrier's failure in the subject regard was a fatal error which justifies setting aside the discipline imposed.

Maintenance of Way Rule 145-(a), which is contained in the section of rules captioned "Operation of Track Cars," reads in pertinent part as follows:

"Crossing Highways.—Highway traffic at grade crossings must be given preference. Approach all crossings prepared to stop and if necessary, stop car, flag highway traffic and push car over crossing."

On July 25, 1956 Claimant Mitchell was operating a track motor car going west, following train 193 and leaving Nebraska City, Nebraska. Signal Helper J. B. Shields was on the motor car maintaining a rear lookout as prescribed by the claimant. The motor car was moving between 8 and 10 miles per hour but claimant reduced speed to 4 to 6 miles per hour "prepared to stop" as the car approached the 11th Avenue crossing, according to his testimony. He stated that 75 or 100 feet from the crossing he made a slight application of the brakes and kept his hand on the brake with the brake shoes touching the wheel. As the car reached the edge of the crossing, Claimant observed an automobile about 100 feet away approaching from the north. He applied brakes full and came to a stop 5'4" beyond the edge of the crossing and into the highway. Claimant states he remained still, expecting the automobile to pass in front of him, but instead the auto driver "turned his car towards me, slid and hit me." Signal Helper Shields did not see the auto until after the motor car had stopped and claimed yelled. The Signal Helper was thrown from the motor car and injured to some extent. Damage was done both to the motor car and to Reed's automobile. Eleventh Avenue at this point is a gravel road 16 or 17 feet wide. A hedge and two trees are on the right of way, 25 to 30 feet from the track, but claimant testified he could not say they obstructed his view of the automobile. Asked why he did not get off the motor car and attempt to flag the automobile, claimant stated that since he assumed the auto was going to pass in front of the motor car he saw no reason to flag the other driver because there was no reason for him to stop. The facts surrounding the accident arise solely out of the testimony of claimant and Signal Helper Shields. There is no conflict in the statements of these two men. The Signal Helper testified that claimant approached the subject crossing prepared to stop, as stated in MW Rule 145-(a). Mr. Reed, driver of the automobile, was not called to testify.

It is apparent that when claimant brought the motor car to a stop there was sufficient room left on the highway for the automobile to pass. The explanation of the slide of the auto into the motor car is not known. It is Carrier's position, however, that regardless of whether Mr. Reed was a cautious or careless driver, the accident would not have occurred had claimant stopped his motor car at the edge of the crossing, thereby giving the auto preference over the full crossing, instead of only part of it. Carrier contends Rule 145-(a) required that claimant stop before occupying any portion of the crossing. The aggrieved insists he did give preference as required by the rule. Organization also asserts the employes generally had not been advised by the Carrier that it interpreted Rule 145-(a) to have the meaning now urged by Management.

In determining the degree of penalty to be imposed, Carrier states it took into consideration that on two prior occasions claimant had been involved in motor car accidents. The first of these was a collision with Yard Engine 9736 in June 1949; the second involved collision with Engine 9133 at Mile Post 287-5 in May 1953. (Claimant's service began in September 1945.) During the progressing of the present claim on the property, Carrier stated without contradiction that claimant had acknowledged violation of the rules in the two previous instances "and made promises that he would observe the rules in the future and exercise the greatest of care." There is no indication in the record that claimant was disciplined as a result of either

of the two prior accidents, or for any other occurrence during his service of approximately eleven years.

We are of the opinion claimant could have exercised greater caution in his handling of the motor car at the time in question. In the light of his description of the crossing location, including the obstacles existing on the right of way, it is logical to conclude he could have seen the approaching automobile before he was at the edge of the crossing, and therefore could have stopped before entering on the crossing. On the other hand, Rule 145-(a) does not clearly state that clearance of the entire crossing must be accorded highway traffic. The Carrier contends that since the rule does not specify preference over part of the crossing, it is to be presumed that the "entire crossing" is contemplated in the rule. However, we are not dealing here with a rule that was carefully hammered out at the bargaining table, but rather with one that was unilaterally promulgated by the Carrier with the expectation that the employes would comply with it. It is to be remembered, too, that the employes generally are not skilled in semantics. Claimant left autor driver Reed adequate room to pass in front of the motor car. We are not prepared to say that claimant violated the clear and unambiguous meaning of the rule as generally understood on the property.

It is true that the most prudent course to follow in dealing with highway traffic is to make allowance for the mistakes of others. As previously indicated, it appears claimant could have exercised greater caution, quite apart from the wording of Rule 145-(a). We think, however, that even after giving consideration to the two previous accidents cited by the Carrier, the penalty of dismissal was altogether excessive. A sixty-day suspension is the most severe discipline that would have been justified. We find, therefore, that the dismissal shall be reduced to the suspension just indicated, and compensation granted for time lost beginning sixty days after claimant was suspended pending investigation. Since we are advised that claimant suddenly died in July 1957, it follows Carrier's liability does not extend beyond the date of his demise.

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 the penalty assessed was excessive.

AWARD

Claim sustained to the extent indicated in the above Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 17th day of April, 1959.

Serial No. 183

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 8807

Docket No. SG-9734

NAME OF ORGANIZATION: Brotherhood of Railroad Signalmen.

NAME OF CARRIER: Missouri Pacific Rail Road Company.

Upon application of the Carrier involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

This request for interpretation of the subject award concerns whether the Carrier is entitled to deduct Claimant's outside earnings in computing the money payment due to his estate pursuant to said award. The parties agree that the amount Claimant could have earned in Carrier's employ during the period involved was $4,871.60. Carrier is required by law to deduct from this amount $17.00 in Railroad Retirement Board unemployment compensation which Claimant received. It also is agreed that Carrier has a legal duty to deduct the amounts required for the Railroad Retirement Tax and the Federal Withholding Tax. Carrier is required to transmit to the proper authorities the sums involved in these three deductions.

The record discloses that during the period during which he was improperly relieved from Carrier's service, Claimant earned $1,479.62 in other employment. We hold that in complying with Award 8807 Carrier was entitled to deduct this amount in computing the payment required by said award. The gross wages due to Claimant's estate therefore amounted to $3,391.98. From the latter sum Carrier must make the three deductions required by law, as indicated above, before making payment to the estate.

Referee Lloyd H. Bailer, who sat with the Division as a member when Award 8807 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of January, 1960.