

Award No. 9444

Docket No. SG-11393

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Merton C. Bernstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern Railway Company that:

(a) The action taken by the Carrier in dismissing Signal Maintainer L. M. Nichols with assigned headquarters at Joplin, Missouri, from the service of the Carrier following an investigation held on April 14, 1959, in connection with a train-motor car accident occurring when Extra 40 South struck a motor car near M.P. 173, about 11:50 A. M. on April 6, 1959, was unwarranted, unjust, in abuse of its discretion and in violation of the current Signalmen's Agreement, particularly Rule 77.

(b) The Carrier therefore be required to restore Mr. L. M. Nichols to his former Signal Maintainer position at Joplin, Mo., with all seniority and all other rights unimpaired, compensate him for all time lost and expenses incurred since unjustly held from service, and clear his personal service record of the entire charge.

OPINION OF BOARD: The principle issue in this case is whether the Claimant was responsible for the collision between the motor car he had left on the mainline track and an extra train. We believe that if he was responsible for the accident, or contributed to its occurrence, his discharge cannot be set aside by the Board.

Procedural Issues

Preliminarily, Claimant asserts that there were procedural defects in the handling of his case which rendered his discharge improper.

(a) **Refusal to Exclude Witnesses at Investigation**—At the investigation the Organization asked that witnesses be excluded. Those whose presence was challenged were crew members of the train which struck Claimant's motor car. The Trainmaster conducting the investigation refused to exclude them on the ground that their conduct was also in question and they could be disciplined on the basis of the record of the investigation without further formal charges. In fact only some of the witnesses could be considered in this cate-

gory—those in the Extra's cab. Before Claimant testified the two brakemen and the engineer on the Extra were excused.

It is dubious that the brakemen could have been considered in any degree responsible even before the formal investigation. The engineer was potentially responsible and later was held responsible. Apparently he asked to be excused before Claimant testified and so waived any right to cross-examine Claimant. This action is not chargeable to the Carrier. Fireman Williams stayed throughout the proceeding.

While the Board's practice favors the exclusion of witnesses, such action has not been considered indispensable to a fair hearing. Award 5061 (without referee). In formal legal proceedings, such exclusion is discretionary. The brakemen's testimony did not concern any essential element. The Engineer and Fireman had a right to be present to protect their interests as principals. We find this objection without substance.

(b) Claimant objected to the presence and asserted right to cross-examine of supervisors other than the Trainmaster conducting the investigation. We do not see how this could be challenged as improper. They had a right to be present and their cross-examination (only one used the right and then only briefly) would have the tendency to develop the record fully and factually. There could have been cause for complaint if a group of officials had taken turns in cross-examining in third degree fashion. Nothing approaching such a situation occurred or was alleged. We find this objection without substance.

(c) Claimant contends his rights under the Agreement were violated because he was not accorded a hearing within ten days of his appeal as required by Rule 77 of the Agreement. Carrier responds that the hearing was held fifteen days after appeal, well within the sixty days provided for such action by Article V of the Agreement of August 21, 1954. The Board has held that Article V superseded provisions concerning the time for processing grievances under a similar Signalmen's Agreement where the issue was essentially the same. Award 8712 (Weston). Awards cited as contrary involved one arising before the 1954 Agreement; in another the parties were not bound by the 1954 Agreement; and in a third a subsequent agreement provided otherwise. We therefore find the objection without substance.

The Collision on April 6, 1959

Most of the essential facts are not in dispute.

Signal Maintainer Nichols started work at 8:00 A. M. at Joplin, Missouri. He had obtained a line-up which listed the extra train, Joplin Dodger South, for a departure from Joplin "about 10:00 A. M.". The line-up bore the time of issuance, 7:33 A. M.

After working around Joplin, Mr. Nichols proceeded alone by motor car to the Neosho Yard, some twenty miles away, arriving there at about 10:00 A. M. At about 11:35 A. M. he headed northward (back toward Joplin) on his motor car.

It is clear that a line-up is effective under circumstances such as these for only one hour and a half under Rule 19 (c) of the "Rules Governing Operation of Motor Cars," etc. It is clear that Mr. Nichols did not make any effort to obtain an additional line-up until about 11:35 A. M. (i.e. three and a

half hours after he started work and four hours after the issuance of the line-up he had obtained).

Carrier points out that Mr. Nichols could have obtained information about the Dodger's schedule at the telegraph office a few hundred feet from his point of departure in the Neosho Yard. Mr. Nichols testified he did not do this because he would have had to wait for others to transact their business. In preference, he proceeded alone on his motor car up the main line track to the telephone booth at the Frisco crossing (still within the Neosho Yard).

In getting to that point, he passed a "normal red" signal which governs the Frisco Crossing approach; it indicates that the Kansas City Southern is "junior" at this crossing. The red light requires only that a movement on the Kansas City Southern stop, observe that there is not a movement on the Frisco line approaching the crossing, after which it can proceed through the crossing. Mr. Nichols also observed that another "home" signal, south of the crossing, was yellow, indicating that a southbound train had not entered the circuit approaching the crossing at that time.

However, Mr. Nichols did know that the Joplin Dodger had not yet reached the Neosho Yard. He proceeded to the Frisco crossing and stopped his motor at a set-off, but did not remove the car. He went to a phone booth some fifty to seventy feet from the set-off and tried to use the telephone booth in order, he testified, to obtain information about the schedule of the Dodger.

Upon opening the phone booth door, Mr. Nichols testified, he was set upon by wasps or hornets and several minutes were required to fight them off. When he gained entry to the booth, he looked out of the window facing north, saw the Dodger coming, ran out of the booth waving his arms in a washout signal.

The Dodger's brakes were set a few moments later, but the train struck the motor car and traveled some 640 feet beyond the point of impact. No one was hurt, but the motor car was damaged substantially.

Some further details about the situation preceding the collision are in order.

Looking northward from the Frisco crossing the Kansas City track curves west. From the crossing itself, and from the point forty feet southward at the set-off at which Mr. Nichols stopped, there is visibility for several hundred feet (as shown by the testimony and a photograph in evidence). The telephone booth (built of wood) is located just north and west of the crossing and it obstructs the view between the set-off and the track lying northward a few hundred feet away. There was testimony that just before the accident, the door of the telephone booth was open and made a further visual obstruction between the set-off and a portion of the track down which the Dodger approached the crossing.

The Dodger carried three men on the day of the accident, the Head Brakeman, the Engineer and the Fireman. The Fireman (a promoted Engineer) was actually operating the locomotive and was on the side of the cab facing the outside of the curve. Some testimony was that the Dodger was going 20 m.p.h., but the Engineer put it at 25 m.p.h.

While they were a few hundred feet from the crossing (roughly 500 feet) the Brakeman and Engineer sighted Mr. Nichols waving and saw the motor

car. They both shouted to the Fireman to "big hole 'er", which he did a few moments later. The train was slowed to some degree before impact, to about 18-20 m.p.h. according to the Engineer.

It is uncontroverted that for five days prior to the accident the Fireman had reported that the locomotive's brakes were not operating properly. The Fireman testified that even if the brakes had been operating properly, the train would have struck the motor car.

Those on the train also said that their view of the set-off (which is somewhat south of the crossing) was also confused by the presence of standing freight cars on the west portion of the Frisco line whose colors were like those of the motor car. This testimony was not very clear, however, although there seems to be no doubt that the cars were there.

The Engineer and Firemen were disciplined for their actions. The precise grounds upon which they were found to have contributed to the accident does not appear in the record.

Rule 93 of the Carrier's Transportation Department Book of Rules provides:

"Yard Limit Rule. Within yard limits (designated by yard limit signs or special instructions), the main track may be used, clearing first-class trains at the time shown at the next station in direction of the approaching first-class train, EXCEPT:

"Within yard limits, the main track may be used without protecting against second and inferior class trains, extra trains and engines.

"Within yard limits, second and inferior class trains, extra trains and engines must move at restricted speed."

The definition of "Restricted Speed" is:

"Proceed prepared to stop short of train, engine, obstruction or switch not properly lined."

What element of Rule 93 may have been involved in the Carrier's decision cannot be determined. It appears to us that there was an element of inattention possibly involved, complicated by the obstructions and confusion already described. The situation was further complicated by the purely coincidental fact that the Fireman who was operating the train had the blind side of the curve. There also was a necessary delay between the sighting of Mr. Nichols and the car and the setting of the brakes comprised of the Engineer's sighting, registering what he saw, and shouting it to the Fireman, who took a moment to comprehend and act.

The Violations of Carrier's Rules

It can be seen that several factors contributed to the collision: the physical setting of the crossing, curve, telephone booth and freight cars on the Frisco line; the defective brakes; the understandable delay of sighting, relaying and acting upon the knowledge of the obstruction by the locomotive crew and some lapse for which the Engineer and Fireman were disciplined. In addi-

tion, it is not contradicted that Mr. Nichols had an encounter with wasps or hornets which cost a short amount of time. There was also the fortuitous interference with the view down the track possibly caused by the opened telephone booth door.

With all of this in mind, do the facts show that Mr. Nichols' conduct was improper and was a substantial factor in causing the collision?

We find that Mr. Nichols took a series of chances which amounted to violation of the Carrier's somewhat general rules on the subject of operating motor cars. We find further that these actions were major contributing causes of the accident.

At the very outset, Mr. Nichols neglected for a very substantial period of time to obtain a current line-up. At the time of the collision the line-up he obtained when he went on duty had expired more than two and a half hours before.

Rule 19 (c) is not absolute and requires only that the information be obtained "when practicable". There is no showing that any set of events or peculiar circumstances rendered it impracticable for the information to be sought within the time limits set by the rule. The violation of Rule 19 (c) was palpable and substantial.

Also involved was Carrier's Rule 19 (f) which provides:

"Leaving Car on Track: A car must not be left standing on the main track while men are at work. It must never be left on the track unprotected."

The requirements of the rule are not precise. At the oral argument before the Board, the Carrier conceded that a motor car can be left on a main track with propriety for short periods of time.

Carrier asserts that in this case the Claimant left the car "on the track unprotected". Claimant replies that he was so close to it (between fifty and seventy feet) that his presence provided protection. As it turned out, his proximity was insufficient. This lack of success Claimant ascribes to his bout with the wasps which he does not claim took more than a few minutes. He also stated that one reason for not removing the car is that it weighs one thousand pounds, but he indicated he is able to effect removal of the car to the set-off.

Under the circumstances was Rule 19 (f) violated? We hold that in this fact situation the Rule was violated. In the first place, Claimant knew the Dodger had not completed its run to the Neosho Yard, so that he was aware of its possible appearance. Secondly, the track north of the crossing curves westward thereby limiting visibility of the set-off to about five hundred feet down the track. These factors in combination should have indicated the potential danger of leaving the car on the track. Removing a one thousand pound car is quite apparently not the quick work of a moment. It was not to be anticipated that it could be accomplished if the Dodger were sighted only a few hundred feet away.

Even if the bout with the wasps was the crucial delay, it seems to us that this shows that there was no margin for error in Claimant's handling of the situation. But it is not at all clear that even without the wasp incident this collision would have been averted. Possibly Claimant would have seen the

Dodger soon enough to flag it down in time. But this is a matter of surmise. His entry into the phone booth from which he saw the Dodger might still have been too late to sight and flag down the Dodger in time.

In addition, the situation at the crossing and set-off seems to have been somewhat cluttered. According to the engine crew, cars on the Frisco line obscured and confused the scene. Claimant perhaps should have been alert to take that into account in determining how safe it was to leave his motor car at a point where it could be seen clearly only a few hundred feet to the north.

Rule 19 (a) also is alleged to have been violated. It provides in part:

"Care and Caution: In the operation of motor or other track cars, Foremen and others must move at all times with care and caution necessary for safety, expecting trains and other motor cars at any time, without notice, and must use prescribed signals for protection when necessary. * * * * Before moving on a curve, where vision is obscured, operators of motor cars must assure themselves that no train is approaching and must resort to flagging, if necessary, for protection. * * *"

There was some controversy about the duty and ability of one man operating a motor car to flag before "moving on a curve". This latter sentence seems inapplicable to **stopping** on or before a curve.

However, the setting of signal devices before and behind a stopped car seems to be contemplated by the first sentence of Rule 19 (a) and perfectly possible to perform. Claimant did not use signal devices to protect his car from a train which did not have long range visibility of the place he chose to park his vehicle.

One other part of Rule 19 (a) is assertedly pertinent. It provides:

"Transportation Department Yard Limit Rule governing movement of trains within yard limits must never be depended upon for protection by Foremen or others when operating motor or other track cars within yard limits."

As applied to this situation, the fact that Rule 93 was not being observed by the Engineer and Fireman of the Dodger does not absolve Claimant from the responsibility of guarding against possibilities of collisions.

In sum, Claimant took three chances not sanctioned by the rules when he: (1) omitted to obtain line-ups in timely fashion; (2) did not remove his car at the set-off where visibility was limited due to the curve and the telephone booth; and (3) did not set out some signal device north of the crossing to signify the presence of his motor car on the track.

The Degree of Claimant's Responsibility for the Collision—Adequacy of Carrier's Rules

It can be seen that Claimant's omissions and acts were a major factor in causing the collision. It can also be seen that other employes had major responsibility for the collision. Further, the Carrier had some negligence on its part because of the defective locomotive brakes. The placement of the tele-

phone booth (which is made of wood and hence cannot be seen through) was a factor as well. If it were on the east side of the crossing it would not obscure the crossing from the head of the curve to the north. The parked freight cars on the Frisco track near the crossing also may have increased the hazard at the crossing.

Further, it was argued that the Carrier's rules place the whole burden of accident prevention upon the employees, and that the system is inadequate. That subject is beyond our province.

It is conceivable that if Claimant had observed the information Rule 19 (c) and obtained line-ups at about 9:00 A. M. and 10:30 A. M., he might not have received the information that the Dodger was to depart from Joplin when it did. He might have observed the information rule and been no better informed than he was. Suffice it to say, he did not observe the rule and is not entitled to any assumptions as to what might have taken place if he had abided by them. The failure to seek the information colors his actions at the set-off and demonstrates that he was taking risks, risks not sanctioned by the rules.

We find that Claimant failed to observe pertinent rules of the Carrier and contributed to the collision between the Joplin Dodger and the motor car he had left parked at the set-off near the crossing.

The Remedy

The discharge is challenged as too severe discipline in the light of the fact that others shared responsibility for the accident.

Carrier contends that Claimant has been involved and responsible for four other motor car accidents. Claimant concedes that he was involved in them but denies responsibility. The record, therefore, only shows that there were four motor car accidents to which Claimant was a party. There is no evidence of any kind—beyond accusations—to show Claimant's culpability in any of them. Nor do we know of any permissible inference which can be based on the number of accidents. There may be other significant factors operative which cannot be known to the Board in the absence of the record in each case.

We must determine the appropriateness of the discipline in the light of the record before us. We believe that Claimant's multiple failure to observe safety regulations and contributing to a collision between a train and a motor car are sufficiently serious to be adequate grounds for discharge.

For our purposes the test is whether the discipline imposed is arbitrary and an abuse of discretion. In a discharge case the purpose of the discipline is not to punish wrongdoing but to separate an employee whose actions indicate unreliability in some essential area. Failure to observe safety rules certainly indicate such unreliability even if in a given case others, including the carrier, contribute to the accident and the degree of damage. Merely because others share responsibility and are not disciplined to the same degree does not transform otherwise appropriate discipline into an abuse of discretion.

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 Employee involved in this dispute are respectively Carrier and Employee 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.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 25th day of May, 1960.