Award No 10899

Docket No. TE-9862

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert O. Boyd, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chicago, Rock Island and Pacific Railroad that:

1. Carrier improperly suspended Telegraphers R. H. Heerman and R. G. Job from service on September 7, 1956 for thirty days without just cause.

2. Carrier shall be required to clear the personal records of Telegraphers R. H. Heerman and R. G. Job of the charges for which they were improperly suspended.

3. Carrier shall reimburse R. H. Heerman and R. G. Job for all time lost by them as a result of the improper suspension.

OPINION OF BOARD: The pertinent rule is Rule 110 which requires all employes, as far as practicable, to observe passing trains for defects. Operators at intermediate stations are required to stand on station platforms when trains are passing and among the defects to be looked for are "wheels sliding". The obvious purpose of the rule is to insure the safe operation of trains.

On August 21, 1956, passenger Train No. 8 proceeding eastward was having trouble with one of its motors. Prior to arrival at Marengo where Claimant Heerman was the operator, smoke and flames were detected by the engine crew, and the crippled motor cut out. The train stopped at a point west of Marengo and the engine crew inspected the motor and then proceeded eastward to Marengo where the train was again stopped and inspected by the engine crew. Operator Heerman was on the platform when the train came to a stop a few feet west of the platform, at 4:17 A. M. The engineer advised him of the trouble with the motor and told him to report to the Dispatcher that he had 2 engines out. When the engineer completed his inspection, the train pulled on eastward. As it did so Claimant in a crouching or kneeling position observed the train. He detected nothing out of order, and gave a proceed signal to the rear end brakeman. At West Liberty, east of Marengo, Claimant Job was on duty as operator, and as the train approached the station he took up a position on the platform to observe the train. At this point there is a crossing and the train slowed to approximately 20 to 25 miles per hour. Claimant noticed the sparks flying as the brakes were applied to reduce the speed of the train. He

noticed some one in the cab of the diesel and a trainman at the rear of the train. He did not detect anything out of the ordinary and gave a proceed signal to the rear brakeman as the train proceeded eastward. About 15 feet from where Claimant was observing the train there is a rail-crossing, but he did not notice any unusual noise when the train made the crossing. This Claimant had been employed only 2 months.

At Durant, about 65 miles east from Marengo and about 20 miles east from West Liberty the train was derailed due to a false flange on a sliding wheel. There was considerable damage and personal injuries.

An investigation was duly held at which the District Maintenance Engineer and a Roadmaster testified that there was evidence of sliding wheels as far westward of the derailment as Ladora, a distance of 73 miles. Roadmaster McConnell inspected the rail from Grinnell east to a point east of Oxford. He said "At MP 274 Pole 1 west switch at Ladora found slight marks on stock rail and on wing rail of frog. Also found these marks on east switch at Ladora. Continuing east found same marks on switches at Marengo." As he proceeded eastward the marks and shearing indications became progressively more marked. In his opinion the shearing and sliding marks on switches "were caused by a pair of wheels sliding". District Maintenance Engineer Lau examined the track from the point of derailment westward to Oxford. He said that a false flange caused by sliding wheel had made deep marks in frogs at Durant and had cut deep enough to strike and make marks in the angle bars. As he progressed westward the degree of the marks lessened but were in evidence at a point just east of West Liberty; and there were marks on each frog and each stock rail westward to where he met Mr. McConnell. Mr. Lau testified that the marks were definitely caused by a sliding flat wheel.

We are thus confronted with this situation: The Claimants, each, did exactly what the rule called for except in one particular. They did not observe the sliding wheel, if, in fact there was such. On the other hand the physical evidence led experts to express the positive opinion that the wheels were sliding from a point near Ladora to the derailment. There is nothing in the record to show that the Claimants could not have, in any event, seen the sliding wheels. It is just, that they did not, if the wheels were sliding. We do not mean to say that Rule 110 places an absolute duty to detect defects, but it is a safety rule and places a high degree of care on those bound to perform under it.

We have examined the record very carefully and it may well be that had we been the trier of the facts we would have reached a different conclusion from that reached by the Carrier. But as it has been said many times, we do not weigh the evidence. If there is valid evidence brought out by the investigation to support the conclusion that Claimants did not exercise that degree of care imposed on them under the then existing circumstances and reasonable discipline is imposed, we are powerless to disturb it. In this dispute there was physical evidence of sliding wheels at or near the point where the Claimants observed the train. In each instance the Claimants knew that something was wrong on a unit of the engine. There was a good light at Marengo and train was moving up slowly from a stop and at West Liberty it was day light and the train was moving at 25 mph. The Claimants point out that they looked but did not see any sliding wheels or detect any evidence of such as peculiar noise or odor from heat. But looking and seeing may not be the degree of care required under the circumstances.

Between the two positions taken by the parties, we cannot find that the Carrier had no reasonable ground upon which to base its conclusion.

Any discipline can seem severe; but we do not find here circumstances that would justify us in finding the 30 day suspension as harsh. We therefore must conclude that the claims 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 Agreement was not violated.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of November 1962.

DISSENT TO AWARD 10899, DOCKET TE-9862

I feel obliged to dissent from the Opinion of the majority and their award in favor of the Carrier, on the grounds that evidence favorable to the claimants was not properly considered, and that well established principles of this Board were not properly applied.

The principles that employes are presumed innocent until proven guilty and that the burden of establishing facts sufficient to support the imposition of discipline lies with the Carrier, are so well established that no citation of authority is necessary.

This Board also is on record for the proposition that imposition of discipline must be based upon violation of one or more of the Carrier's rules. This is obviously a correct principle in an industry which promulgates an elaborate body of rules for the government of its employes. See Award 6827.

In this case the claimants were never charged with violating any rule. And the majority recognizes that "The Claimants, each, did exactly what the rule called for except in one particular". This "one particular" referred to—a requirement to detect the sliding wheel, if, in fact there was such—is not particularized by the language of the rule. The rule requires inspection and action if defects are noted. Of course the rule requires close attention and imposes a duty to detect any obvious defect. But it does not express an absolute requirement to see a defect under any and all conditions. Such a requirement would have to assume human infallibility. The majority thus has incorrectly inferred a rule requirement that does not exist.

The reason given by the Carrier for suspending these employes was stated as follows:

> "Because of your failure to detect sliding wheels on Unit 656 Train No. 8, Aug. 21, 1956 between Ladora and point of derailment at MP 201 pole 24."

This is a distance of 73 miles.

The employes were not on the train; they were at the two stations, on the ground, and could have observed the unit in question for only a few feet of travel at most. Neither the notice of discipline nor any portion of the evidence shows that the wheels were sliding at the precise few feet coming under the scrutiny of the telegraphers.

The Carrier's action was based entirely upon an assumption that since there was evidence of sliding wheels at various switches and other track appurtenances all the way from Ladora to the point of derailment, the wheels must have been sliding at the places where the two telegraphers were located.

I think this is too thin an assumption on which to base the suspension of these two men for thirty days each, even if there had been no evidence tending to contradict that of the Carrier officers who made the track inspection after the derailment.

The transcript of the hearing contains numerous statements by railroad men, including the crew members themselves, which clearly express doubt that the wheels could have been sliding every foot of the 73 miles. Common sense tells us that they would have become red hot from friction long before sliding that distance.

There was testimony from the engineer that when the train was stopped at Marengo the wheels in question were not hot. The fireman also testified that the wheels were not sliding at Marengo, where Claimant Heerman, who was found guilty of not detecting sliding wheels, was located and made his inspection.

No mention of these points is made by the majority in its Opinion, although the testimony of the Carrier officers is discussed.

I disagree with the majority observation that "we do not weigh the evidence", and with the conclusions it draws therefrom. The purely circumstantial evidence provided by the Carrier officers was weighed here, and incorrectly weighed in my opinion. Examination of our numerous awards in discipline cases will conclusively show that the Board quite often, and of necessity, weighs the evidence in order to determine the issues involved.

Such a requirement was present here, but was not properly observed. The evidence, in my opinion, not only failed to provide the Carrier with justification for the discipline imposed on either of the claimants, but positively showed that the "probability" of sliding wheels did not exist at the place where Heerman made his inspection.

This award has not changed my opinion that the Carrier, in order properly to take disciplinary action against these employes must have first charged them with violation of one or more rules, then must have shown by evidence of

probative value that the rule was in fact violated. To do this the Carrier would have to show that without doubt a visible defect existed at the places where the observations were made, and that the accused employes did not see it. The Carrier did not make the necessary showing. It follows that these employes were improperly disciplined, and since the award allows the injustice to stand, I must register dissent.

J. W. WHITEHOUSE
Labor Member