Award No. 12814
Docket No. SG-14450

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Levi M. Hall, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the New York, Chicago and St. Louis Railroad Company that:

(a) The Carrier violated the current Signalmen's Agreement, particularly Rule 58, when it dismissed Leading Signalman Frank N. Memmott following an investigation held on April 26, 1963, to determine his responsibility, if any, in connection with motor car operated by him colliding with an automobile at East 305th Street, Wickliffe, Ohio, on March 21, 1963.

(b) The Carrier, at the investigation mentioned in paragraph (a), failed to prove that Frank N. Memmott was responsible for the collision.

(c) The Carrier be required to return Frank N. Memmott to service with seniority, vacation and all other rights unimpaired, and compensate him for all time lost account of being improperly removed from service. [Carrier's File: 30-21-17]

OPINION OF BOARD: The following facts are not in dispute. On March 21, 1963, the motor car which Claimant, Leading Signalman Frank N. Memmott, was operating collided with an automobile at 305th Street, Wickliffe, Ohio. On April 16, 1963, the Signal Supervisor wrote a letter to Claimant, as follows:

"THE NEW YORK, CHICAGO AND ST. LOUIS
RAILROAD COMPANY

Conneaut, Ohio
April 16, 1963 – GLT/ac

Files: Personal 'M'
832.1.500

Mr. Frank N. Memmott
3106 Godman Ave.
Muncie, Indiana

Dear Sir:

Please arrange to attend an investigation to be held in the Division Engineer's office at Conneaut, Ohio on Monday, April 22, 1963 upon the arrival of Nickel Plate Train No. 6, to determine your responsibility, if any, in connection with motor car No. 1488, operated by you, colliding with an automobile at East 305th St. (Rush Road), Wickliffe (Willowick), Ohio on Thursday, March 21, 1963.

It is your privilege under the rules to be assisted at the investigation by representatives of your choice, and to arrange for the attendance of any witnesses whom you desire.

Yours truly,

/s/ G. L. Trout
G. L. Trout
Signal Supervisor"

A hearing was held on April 22, 1963, and on May 6, 1963, the Division Engineer wrote Claimant a letter advising him that evidence had established he was responsible for the accident and that he was dismissed from the service.

Rule 58 (a) of the Signalmen's Agreement reads as follows:

"RULE 58 — DISCIPLINE AND APPEAL

(a) An employe who has been in service more than 30 days shall not be disciplined or dismissed without fair and impartial investigation, at which investigation he may be assisted by representatives of his choice. He may, however, be held out of service pending such investigation and such holding from service shall not be deemed a violation of the principle of fair and impartial investigation and appeal. The investigation shall be held within ten days after the date when charged with the offense or held from service. Decision will be rendered within 15 days after completion of the investigation."

It is the position of the Petitioner that Claimant was not being charged with any offense in the letter of April 16th from the Supervisor; that, to the contrary his letter indicated that Carrier did not know whether Claimant was responsible or not and that a fact finding investigation was being held to determine his responsibility; that, therefore, not knowing Claimant's responsibility in connection with the accident, it follows Carrier could not place a charge against him.

Carrier to the contrary contends that the only reasonable meaning of such a letter to Claimant was to advise him that he would be called upon to explain his guilt or innocence of responsibility for the accident; that the letter was specific enough to put Claimant on notice as to matters to be inquired into at the investigation. The Carrier further contends that the time to have made objection, if any, as to the form of the notice was at the commencement of the hearing. (The letter was not read at the hearing.)

It is further contended by the Carrier that in Award 6641 – Bakke, involving the same Carrier and the same Agreement, the Petitioners contention similar to the one in the instant case was denied and that this is a precedent case on this property.

The charge made there was ". . . to develop your responsibility for placing of Eng 759 in Train No. 32, Eng 755 departing East Wayne Yard, August 4, 1952, and the handling and instructions given Conductor and Engineer of Train No. 32, Eng 755, August 4, 1952."

In the denial award we find the following language. "We do not think there was lack of specificity in the charge, because immediately after the damage everyone connected with the incident knew what had happened."

An examination of the record in Docket No. TD-6598 — (Award No. 6641) discloses that on August 11, 1952, Carrier conducted a formal investigation of the incident with the members of the crew of train 32. The Assistant Chief Train Dispatcher (the Claimant) was present at that hearing and appeared as a witness. Claimant was not charged with any offense at that time. Two days later on August 13, 1952, the Claimants received the notice herebefore stated.

That presented an entirely different picture than the one presented in the current matter. There is no indication in this record of any prior fact investigation having been conducted by the Carrier.

In Rule 58 (a) we find the following language "The investigation shall be held within ten days after the date when **charged with the offense . . .**", and in Rule 58 (a) we note the following: —"If the **charge** against the employe is not sustained . . ." (Emphasis ours.)

It cannot be seriously urged that a specific charge of some kind is not contemplated by the Agreement. Webster's New Collegiate Dictionary defines a charge as "an accusation of a wrong or offense". The letter addressed to the Claimant by the Supervisor contains the following: ". . . to determine your responsibility, **if any,** in connection with motor car No. 1488 . . ." (Emphasis ours). In view of the fact that the record discloses no prior investigation by the Carrier of the circumstances surrounding the accident and in light of the qualification in the letter "your responsibility, if any," just what offense was the Claimant charged with?

Was he charged with the violation of a company rule? Was he charged with negligence in the operation of the motor car? Was it charged his negligence was the cause of the accident? From the mere happening of an accident you have no right to presume that the operator of a motor vehicle or motor car involved in the accident was negligent. It is significant that the record is entirely silent as to the manner in which the driver of the automobile involved in this accident was operating his vehicle — the speed of the automobile, whether or not the automobile driver slowed down for the crossing. The record also fails to indicate the distance either motor vehicle was from the crossing when Claimant first saw the automobile that was involved in this collision.

In Award No. 11019 — Ray there was an accident involved and a charge there made similar to the one made in the instant case. Rule 26 with which they were concerned in Award 11019 is similar in effect to Rule 58 with which we are concerned here. It was also contended in that matter as it is here that Claimant waived any objection he may have had to the notice because

it was not made at the time of the hearing. The following language in the award is significant:

> "Carrier takes the position that there was no violation of Rule 26. As to the notice, Carrier says it was sufficient to apprise Claimant that he was being investigated in connection with the collision of the motor cars. It argues that Claimant was not surprised, had time to prepare his defense, and at the investigation made no objection concerning the lack of a specific charge and admitted receiving proper notice. In short, it says the notice met the requirements of the Rule. We do not agree. The rule requiring written notice to an employe of the charge against him is a fundamental rule negotiated by the parties for the protection of employes and should be strictly construed. The notice given in this case did not specify any charge. It merely said that an investigation was to be held to determine cause and place responsibility. We hold that it was not the equivalent of the charge required by Rule 26 (b). The Carrier argues that since Claimant knew he was involved in the accident and was advised that he could have a representative and witnesses present he should have known the nature of the charge. This begs the question, does not excuse the Carrier from compliance with the Rule, and cannot be considered as equivalent to the written notice required. . . . Furthermore, we do not agree that failure of Claimant to state at the hearing that he was unaware of the charge against him can be considered as a waiver of his rights under 26 (b)."

We adopt the reasoning cited in Award No. 11019 — Ray as a part of this opinion. We must hold, therefore, that the Carrier failed to properly apprise Claimant of the charge against him and thus violated Rule 58 of the Agreement and that Claimant was denied due process. Having disposed of this claim on procedural grounds we find it unnecessary to consider other contentions made by Claimant in the record.

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 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 has been violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of July 1964.

DISSENT TO AWARD NO. 12814,
DOCKET NO. SG-14450

Award 12814 is in palpable error because, from the beginning of this Board's existence, the vast majority of our Awards have recognized that notices of charge of the kind involved in the instant case are adequate and within the meaning and intendment of discipline rules, such as Rule 58 in the instant case, and that they comply with the requirements thereof, for the following reasons:

1. That the formation of a charge and the giving of notice thereof need not be in the technical language of a criminal offense. For illustration: see Awards 3270, 4749 (Carter) and 12322 (Rock).

2. That the matter being investigated was known to claimants, and that they were not misled, taken by surprise or prejudiced by the form of notice given them. For illustration: see Awards 48 (Samuell), 1513 (Richards), 2974 (Douglas), 3270 (Carter), 4169 (Swaim), 4239, 6590, 6992 (Rader), 5026 (Parker), 6641, 8829 (Bakke), 6919 (Coffey), 8502 (Daugherty), 11783 (Seff) and 12322 (Rock).

3. That claimants knew that their involvment in the matter covered by the notice was the subject of the investigation, the notice having so advised them, and that they were to report at the investigation with their representative and any witnesses they might desire to have present. For illustration: see Awards 2974 (Douglas), 3270 (Carter), 4169 (Swaim), 4239, 6590 (Rader), 5026 (Parker), 6641, 8829 (Bakke), 6919 (Coffey), 8502 (Daugherty), 11783 (Seff) and 12322 (Rock).

4. That claimants appeared at the investigations with their representatives and made no objection to the legality of the investigation. For illustration: see Awards 3270, 4591 (Carter), 5026 (Parker) and 11783 (Seff).

5. That, at the opening of the investigations, claimants were asked if they had been properly notified of the investigation and if they were willing to proceed therewith, to which questions claimants gave affirmative answers. For illustration see: Awards 2974 (Douglas), 3270 (Carter), 4169 (Swaim), 4239 (Rader) and 11783 (Seff).

6. That claimants were given every opportunity to make their defenses. For illustration: see Awards 3270, 4591 (Carter), 4169 (Swaim), 6919 (Coffey) and 8502 (Daugherty).

7. That, under the facts of record, as above, claimants waived any and all defects in the notices. For illustration: see Awards 4239 (Rader), 5026 (Parker) and 11783 (Seff).

8. That, in such a situation, there is no merit to the contention that such notices vitiate the entire discipline proceedings. For illustration: see Awards 1513 (Richards), 5026 (Parker), 11783 (Seff) and other Awards cited.

All of the foregoing elements were present in the instant case and the overwhelming majority of awards of this Division on the subject of notice recognize the propriety of the notice given by the Carrier in this case. Ac-

cordingly, there was no reason for the Referee's failure to follow the philosophy which he himself expressed in Award 11653, to wit:

> "* * * It is our Opinion that Award 11473 is plainly in error in failing to follow the overwhelming majority of awards in this Division on the subject presented. We do this in furtherance of maintaining consistency in the awards of this Division and so as to avoid conflict and confusion in them.
>
> In accordance with the vast majority of awards rendered by this Division we believe the claims herein should be sustained."

In addition, Award 12814 is in palpable error in holding as follows:

> "* * * It is significant that the record is entirely silent as to the manner in which the driver of the automobile involved in this accident was operating his vehicle — the speed of the automobile, whether or not the automobile driver slowed down for the crossing. The record also fails to indicate the distance either motor vehicle was from the crossing when Claimant first saw the automobile that was involved in this collision."

This is immaterial; compliance with Carrier's rules would have avoided a collision regardless of how the automobile was operated. In a similar case involved in Award 10880, we held in this respect as follows:

> "The fact that the automobile failed to stop before entering the crossing did not excuse the Claimant from complying with the rules of the Company as to the operation of motor cars."

In the instant case, Claimant was dismissed for his "failure to operate the motor car in accordance with motor car rules and safe practice." Rule 25 of Carrier's Rules provides as follows:

> **"RULE 25**
>
> Motor car must be brought under complete control, prepared to stop, when approaching workmen on or near the track, when entering interlocked territory, and when approaching highway crossing at grade. Motor car must not be operated over grade crossings unless it is safe to do so, and, if necessary, flag protection must be provided. (Revised 4-1-54)."

At the investigation, Claimant admitted that he had previous accidents involving motor cars, at least one of which also involved highway vehicles.

The element of public safety is a controlling consideration. In Award 1513, this Division followed Award 1497 and confirmed "* * * that discipline is not simply a matter that concerns the employe and the Carrier, but involves as well the interest of the traveling public, to insure whose safety it is the duty of the carrier to take measures to prevent negligent actions by employes."

For the foregoing reasons we dissent.

W. H. Castle
D. S. Dugan
P. C. Carter
T. F. Strunck
G. C. White