

NATIONAL RAILROAD ADJUSTMENT BOARD**THIRD DIVISION****(Supplemental)**

Bernard J. Seff, Referee

PARTIES TO DISPUTE:**TRANSPORTATION COMMUNICATION EMPLOYEES UNION**
(Formerly The Order of Railroad Telegraphers)**THE NEW YORK, CHICAGO AND ST. LOUIS**
RAILROAD COMPANY
(Nickel Plate, Lake Erie & Western, and Clover Leaf Districts)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York, Chicago & St. Louis Railroad, that:

1. Carrier violated Rules 4, 17 and 31 of the parties' Agreement when it suspended N. D. McClure for a period of thirty (30) days beginning July 21, 1961.

2. Carrier shall, because of the violation set out in paragraph 1 hereof, clear N. D. McClure's personal record of all charges, pay him for all time lost, plus travel time and mileage expense incurred.

OPINION OF BOARD: This is a discipline case. Claimant, N. D. McClure, was the regularly assigned occupant of the 6:00 A.M. 2:00 P.M. Operator-Leverman's position at the "XN" Tower, Leipsic Junction, Ohio. The record shows that he held this position for eleven (11) years.

At about 9:00 A.M. on July 3, 1961 B&O Extra South 4530 with 122 cars entered the approach circuit at Leipsic Tower. Carrier's westbound train No. 21 with 32 cars arrived at Leipsic Junction in the running track known as 'Yellow Creek.' When train No. 21 arrived Carrier's train No. 32 was standing on the main track west of Leipsic Junction while train No. 32 was delivering to the DT&I and had left one car of their train in the Yellow Creek extension track.

After No. 32's engine had been coupled onto its train, it is alleged that Claimant lined the interlocking plant for No. 21 to set five cars to the B&O interchange (Nos. 65-76). As soon as No. 21 backed into the B&O connection (Nos. 65-76) clearing the westward home signal a southbound B&O train entered the circuit and Claimant lined the plant for this southbound train.

Train No. 21 cut off the five cars in the B&O connection, the engine, with rider caboose and two cars, pulled ahead westward and stopped at the westward home signal, after which, the engineer, not realizing the plant had been lined for the B&O, whistled for the block. The engineer allegedly whistled on three separate occasions; Claimant walked outside onto the tower platform with a flag and gave a signal which both Engineer Forney and Fireman Kelker on Train No. 21 took to be a "proceed" signal and started a westward movement. The said movement fouled the interlocking plant about an engine length, at which time it is alleged the Claimant gave a violent "stop" signal and the movement was stopped. This movement into the interlocking plant caused the home signals on the B&O southbound track to immediately change to "stop." Although Train No. 21 backed off the circuit promptly the B&O time release had started to function and the B&O home signal did not change to "proceed" in time to prevent the B&O southbound train from stopping.

The B&O train, with 122 cars was able to stop short north of the southbound home signal and was delayed at this point about 9 minutes waiting for the time releases to run out.

After a delay of about 20 minutes the B&O crew attempted to start its train but was unable to do so because the brakes were sticking. The B&O train was delayed a total of one hour before it finally departed and NKP Train No. 21 was also delayed 47 minutes as a result of the above described incident.

The transcript of the hearing that took place on the property in the instant case contains a number of conflicts in the testimony given at said hearing.

These inconsistencies will not be dealt with in depth because of the long line of well reasoned cases which have spoken on this point; of which, the following quotations, are dispositive of such matter:

Award 3125, Referee Luther W. Youngdahl:

"As we have stated so many times we cannot weigh evidence or pass upon the credibility of witnesses. Our duty rather, is to determine whether the discipline has been meted out arbitrarily or upon an unlawful or unreasonable basis."

See also Award 3127, wherein Referee Youngdahl had this to say on the same issue:

"There is a sharp conflict in the evidence as to what occurred. Our duty is not to weigh the evidence and determine which story has the greater probative value but rather to determine if there is reasonable basis in the record for the discipline."

Based on the facts of record the Organization takes the following position:

- (a) Carrier failed to furnish Local Chairman with a copy of the written notice of the charges against the Claimant.
- (b) The hearing was not altogether fair and impartial.
- (c) The Claimant gave the proper signal.

- (d) The hearing officer prejudged the case by interrogating the Claimant prior to the hearing.
- (e) The Carrier's suspension notice to McClure made no reference to any operating rule that Claimant allegedly violated.

The Carrier's position may be summarized as follows:

"For using an unnecessary hand signal contrary to the rules, the Claimant was assessed 30 days actual suspension; the Engineer was assessed 30 days for his responsibility; The Fireman was assessed 15 days for his responsibility."

With respect to the procedural questions raised by the Organization which go to the question of a fair trial this Board is satisfied that the minimum requirements for a fair trial were met in accordance with the standards set forth by the U. S. Supreme Court in *Re Oliver* (333 U. S. 257):

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense — a right to his day in Court — are basic in our system of jurisprudence;

* * * * *

It would appear from the record that the Claimant certainly should be required to accept some penalty for whatever responsibility was properly his in the premises. Under the circumstances of the instant case, it would seem that this Division should not substitute its judgment for that of the Carrier and, in reaching this conclusion, we rely on a long line of adjudicated cases; see Award No. 891 which, in pertinent part, holds as follows:

"Our function in this case is not to substitute our judgment for that of the carrier or to determine what we might or might not have done had the matter been ours to handle. We are entitled to set aside the carrier's action only upon a finding that it was so clearly wrong as to constitute an abuse of the discretion vested in the carrier.

* * * * *

We have concluded, under the above limitations set forth by Referee Lloyd K. Garrison, with which this Board concurs, that the Carrier did not impose a penalty which amounts to an abuse of its discretion. The Claim is therefore denied.

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 Employees involved in this dispute are respectively Carrier and Employees 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 28th day of February 1966.