

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

Paul C. Dugan, Referee

**PARTIES TO DISPUTE:****BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES****NORFOLK AND WESTERN RAILWAY COMPANY  
(Lake Region)****STATEMENT OF CLAIM:** "Claim of the System Committee of the Brotherhood that:

(1) The Carrier improperly disciplined Section Laborer James McCord on the charge that he failed to 'use good judgment in clearing trains shown on the line-up' on November 4, 1965. (Carrier's file 30-20-146)

(2) The hearing held on the above mentioned charge was not a fair or impartial hearing.

(3) The charge against Mr. McCord be stricken from the record and payment be allowed for the assigned working hours actually lost as per Rule 22(c)."

**OPINION OF BOARD:** Claimant was suspended for 15 calendar days for violating Rule 1279, which provides in part: "Motor Car Operators must use good judgment in clearing trains shown on the line up. \* \* \*" Claimant was operating a motor car when it was struck and damaged by Train No. 41 on November 4, 1965 in the vicinity of Mile Post 139-15, near Warren, Indiana.

The Organization raises a procedural defect that Claimant was not afforded a "fair and impartial" hearing as required by Rule 22 of the Agreement, for the following reasons: (a) Claimant was notified in writing concerning the charges, time, place and location of the hearing, thus not giving Claimant sufficient time to prepare his defense to said charge; (b) Claimant objected to the absence of the train crew of Train No. 41 as well as the Foreman, who inspected the motor car, at the hearing thus preventing Claimant from developing all facts material to the charge.

Rule 22(a) provides in part as follows:

(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 date for the investigation shall be fixed within ten days after the date charged with the offense or held from service.

The record clearly shows that Claimant appeared at the hearing with his chosen representative, Carl L. Mulford; that Claimant was asked the following:

Q. Mr. McCord, are you ready to proceed with this hearing?

A. I would say yes.

Claimant, by electing to proceed with the hearing, thereby waived any objection that he may have had in regard to not having sufficient time to prepare his defense. No request for a continuance was made by either Claimant or his representative at the hearing. Claimant thus cannot now complain that he was not afforded sufficient time to prepare a defense to the charges against him.

Further, in regard to the Organization's objection to the fact that the train crew or the foreman were not present at the hearing, neither the Claimant or his representative requested the hearing be postponed or continued until these witnesses were present at the hearing and no specific request was made that the train crew and foreman be produced for the hearing. The fact that the Claimant's representative made a general objection to hearing on the ground that "all persons involved" were not present, did not relieve the Claimant of requesting a continuance or postponement of the hearing in order that these witnesses could be produced. Having thus elected to proceed with the hearing without the witnesses present alleviated any defect in the hearing in regard to Claimant being prejudiced thereby. See Award 13672. Further, if Carrier made a prima facie case against Claimant, it was the duty of Claimant to call these witnesses if he felt it was necessary to provide himself with an adequate defense. Having failed to ask for an adjournment for such purpose and electing to proceed with the hearing, Claimant cannot now be heard to complain that he did not have a fair and impartial hearing. See Award 13643.

Further, concerning the train crew not being present at the hearing, Claimant himself by the following testimony absolved said crew of any responsibility:

Q. Isn't it evident then that the crew men on the train were doing everything possible to avoid this accident — having stopped the train within ten pole lengths from the point of accident in 45 MPH territory?

A. I would say yes.

In regard to the merits of the case, the record shows that previous to the accident Claimant had continued difficulty with the motor car in question; that he didn't check with the dispatcher as to the location of Train No. 41 prior to the accident as shown by the following testimony of Claimant:

Q. Did you stop in Warren and check your line up?

A. No. I didn't.

Q. You said you stopped at a telephone booth and heard two operators talking as to the whereabouts of Train No. 41. You didn't check with the dispatcher at this time?

A. No. I didn't.

Q. And this would mean approximately one hour from the time you received your line-up until you stopped at the telephone booth?

A. Yes.

The record further discloses that the accident occurred on a curve and the Claimant admitted that he had limited sight conditions and could not see in either direction down the track from where he was because of weeds on the south side of the track; that his motor car had been stopped for about 30 minutes at the east end of Milo curve; that Claimant didn't afford any flag protection until he saw the train.

It is thus clearly seen that the Carrier met its burden of proving the charge against Claimant by substantial evidence adduced at the hearing. This Board has held on numerous occasions that our function is but to pass upon the question whether, without weighing it, there is some substantial evidence in the record to sustain a finding of guilty. See Award 16074 (Perelson).

Therefore, for the above stated reasons, we must deny this claim.

**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 26th day of April 1968.

Keenan Printing Co., Chicago, Ill.

Printed in U.S.A.