Award No. 17066
Docket No. MW-17868

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE TEXAS AND PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The discipline assessed against Burro Crane Operator O. J. Watson on April 7, 1967 was without just and sufficient cause on the basis of unproven charges. (System File B-310-19)

(2) Burro Crane Operator O. J. Watson now be allowed eight (8) hours' pay at his straight time rate for each work day during the "period April 10, 1967 to May 9, 1967" because of the violation referred to in Part (1) of this claim.

OPINION OF BOARD: Claimant, a Burro Crane Operator, received a 15-day disciplinary lay-off for failure to provide protection for movement of BC-25 outside limits of Approach Order No. 657 approximately 3:10 P. M. on March 23, 1967.

The facts are that Carrier issued an Approach Order No. 657 to the effect that between Mile Post 592, Pole 16 and Mile Post 593, Pole 10 a hand signal was to be given with yellow flag or yellow light for trains approaching this area in order to protect the burro crane in operation at that point. The Foreman in charge of the crane operation, L. L. Collins, informed the General Roadmaster, J. A. Wright, that he had made arrangements with Extra Gang Foreman, J. C. Valtierra, not to permit Extra 119 East to pass until the burro crane was in the clear. Foreman Valtierra flagged the Extra 879 East and gave a proceed signal with a yellow flag. Roadmaster Wright testified that the burro crane was taken outside the protection limits of the approach order. Foreman L. L. Collins admitted that he had given orders to move the burro crane without a correct PX, and that the burro crane proceeded approximately 2½ miles outside the approach order territory.

Claimant rests his defense on two grounds, namely, (1) that he was obligated to follow the instructions of his foreman, in this instance, L. L. Collins, directing him to move the burro crane outside the approach order territory, and (2) that he was not found guilty as charged.

First, in regard to Claimant's defense that he did not have responsibility for the flag protection required to be given in this instance, nevertheless, Claimant cannot excuse his violation of such important safety rules on the grounds that the sole responsibility for said violation rested on the foreman, L. L. Collins. Such an interpretation would circumvent and permit a violation for which the rules are not intended. The Claimant was the operator of the burro crane, and it was as much his responsibility as it was his foreman's to see that he was not violating the safety rules regulating the occupancy of the main line track. These rules are promulgated for his safety, as well as others, and it is imperative that they be complied with. Thus, we are of the opinion that such contention on the part of Claimant is without merit.

Second, in regard to Claimant's contention that he was found guilty not as charged, Claimant received notice of formal investigation in regard to developing facts and place responsibility "for failure to provide protection for movement of BC-25 outside limits of Approach Order No. 657, about 3:10 P. M., March 23, 1967." Claimant received a letter from Carrier's Superintendent, D. W. Schwarz, dated April 7, 1967, informing him that he had been assessed 15 days' deferred suspension for "failure to know contents of PX Order No. 10 as prescribed by Maintenance of Way Rule 144(c-5) and moving BC-25 2½ miles outside of approach order to Badger about 3:10 P. M., March 23, 1967. "It is thus clearly seen that Claimant was found by Carrier to be guilty of "failure to know contents of PX Order No. 10 as prescribed by Maintenance of Way Rule 144(c-5)" but he was not specifically charged with this at the hearing.

The purpose of completely informing a person of a charge or charges being assessed against him is to prevent surprise and to permit the accused to properly prepare his defense to the offense or offenses as charged. An accused thus is entitled to rely on the written charge made against him. Proof at the hearing is limited to the charge or charges assessed against him and prevents an accused of being found guilty of an offense with which he is not charged. Fair play warrants such a procedure.

Carrier, in this instance, took into consideration, when it rendered its decision of assessing the 15 day deferred suspension, Claimant's guilt of the two offenses. While it could be argued that the two offenses are interrelated, nevertheless, it was mandatory for Carrier to inform Claimant of the specific and precise charges made against him. Failing to do so in this instance, dictates the conclusion that Carrier's action was unjust so as to constitute an abuse of its discretion in imposing said penalty herein.

However, in view of the fact that Carrier proved by competent evidence that Claimant failed to provide protection for movement of his crane outside the limit of the applicable Approach Order, we feel that a fair and reasonable penalty under the circumstances would be a 7 day deferred suspension.

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.

AWARD

Claim partly sustained and partly denied in accordance with the aforegoing opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of April 1969.

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