



Award No. 18647
Docket No. MW-19098

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Gene T. Ritter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DELAWARE AND HUDSON RAILWAY COMPANY

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

(1-a) The suspension of Extra Gang Foreman Blasetti for ten (10) working days was improper and on the basis of unproven charges.

(1-b) The hearing held on June 27, 1969 was not a fair and impartial hearing. (System Case No. 19.69 MW)

(2) Extra Gang Foreman Blasetti's record shall be cleared of the charges placed against him and he shall be compensated for all wage loss suffered in accordance with the provisions of Rule 35(b).

(3) The Carrier shall also pay the claimant six percent (6%) interest per annum on the monetary allowance accruing from the initial claim date until paid.

OPINION OF BOARD: On notice dated June 16, 1969, Claimant was advised of hearing to determine his responsibility for violation of Rule 3065 of Safety Rules Governing Employees of Engineering and Signal Department; Rules 2 and 3 of Instructions for the Operation of Track Cars and Rules 7 and 8 of Rules for Government of the Operating Department. Carrier contends that Claimant, who was acting as Extra Gang Foreman at 3:50 P. M. on June 13, 1969, allowed the Tie Injector, which was under his supervision, to foul Track No. 1 without authority from the Train Dispatcher, thereby causing Train WR-1 to collide with said Tie Injector. Violation of Rule 3 of the Instructions for the Operation of Track Cars appears to be the most pertinent rule allegedly violated by Carrier. Rule 3 requires the Track Foreman to obtain permission from the Train Dispatcher to foul a track unless the Employee has an "up-to-date lineup". The Organization contends that none of the rules were violated by Claimant for the reason that Claimant had requested from Carrier, but had not been provided, the adequate flagging equipment and with the proper books of forms (D&H Form 4551) in which to log train lineups. The Organization also contends Carrier did not afford Claimant a fair and impartial hearing for the reason that witnesses were not excluded from the hearing while testimony was being taken from other wit-

nesses, even though Claimant requested such exclusion. Claimant was assessed 10 working days' suspension as a result of the hearing which was held on June 27, 1969.

Under authority of Awards Nos. 5061 (without Referee), 9326 (Rose), 14391 (Zumas), and 16007 (Ives), this Board finds that Carrier's failure to exclude witnesses from the hearing room until called to testify did not deny Claimant a fair and impartial hearing. The exclusion of witnesses while not testifying is discretionary, and does not prejudice the rights of an accused.

This Board further finds that there is sufficient evidence contained in the record to find that Claimant failed to obtain permission to foul the track in question, contrary to Rule 3 of Instructions for the Operation of Track Cars. This Board further finds that the Organization has injected into the Record sufficient probative evidence of mitigating circumstances in regard to the other four charges lodged against Claimant in this dispute. However, because of the light penalty imposed by Carrier, it must be concluded that Carrier took these mitigating circumstances into consideration when assessing the penalty. Accordingly, this Board finds that a penalty of 10 working days' suspension for fouling a track without permission was not arbitrary or capricious.

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: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of July 1971.