



Award No. 18885

Docket No. MW-19140

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Clement P. Cull, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

BURLINGTON NORTHERN INC.

(Formerly Northern Pacific Railway Company)

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

(1) The fifteen (15) calendar days actual suspension of Track Supervisor L. F. Smith beginning on November 15, 1969 and ending on November 29, 1969, was unjust, improper, and on the basis of unproven charges.

(2) Track Supervisor L. F. Smith's record shall be cleared of the charge and he shall be compensated for all wage loss suffered, all in accordance with the provisions of Rule 52(g).

OPINION OF BOARD: It is well established by awards of this Board that in discipline cases the Board "may not pass upon a conflict of evidence, the credibility of witnesses nor substitute our judgment for that of the Carrier in the assessment of discipline." (Award No. 13395 and others) This does not mean that this Board is precluded from considering all the evidence in the record or that this Board is bound in every case to support the action of the Carrier in every action it takes in discipline cases. To be so bound would render resort to this Board's processes meaningless. Thus the Board in such cases must base its opinion on substantial evidence in the record as a whole to determine if the Carrier acted arbitrarily or capriciously.

There is substantial evidence in the record before us that Claimant was not negligent and was not responsible for the collision at West end of curve 168 C West of Rivulet at 2:15 P. M. on October 27, 1969 between train Extra 2514 West and the motor car in his charge.

The record reveals that Claimant, an employee with seniority dating from 1949, called the Dispatcher at 2:00 P. M. to ascertain the location of Extra 2514 West. The dispatcher informed him that the train was "just by Frenchtown about 5 minutes ago." He repeated the information given him by the dispatcher, and hung up. The record reveals that dispatcher, in order to increase the volume on the phone, had thrown a switch called a break back and had put his foot on the pedal of the machine while he turned to get more details from a graph in his office. When the machine is in this position any statement made by Claimant from the field could not be heard by the dispatcher. When dispatcher accumulated the details and tried to speak again to Claimant he was no longer on the line. Had he been able to contact him he

would have informed him that Extra 2514 West had gone by Frenchtown 25 minutes before or at 1:20 P. M.

Claimant operating on the belief that he had until 2:35 P. M. or 2:40 P. M. for the train to arrive put the motor car back on the track from the set-off, 4 rail lengths from the phone. He had placed the car on the set-off to allow another train to pass. Claimant was concerned over the breaking of angle bars in 112 lb. rail and proceeded to inspect them secure in the belief that he had enough time to do the work and proceed to the set-off at Rivulet. He was standing near the motor car when it was struck by Extra 2514 West at about 2:15 P. M. Claimant was not injured. The car suffered about \$100.00 damage.

The dispatcher, at the hearing, testified in relevant part as follows: "Yes, Mr. Smith called and asked me if Extra 2514 West was by Frenchtown. I said, yes he is by Frenchtown and should have been by Lothrop about 5 minutes ago." This would have put the train 14 miles closer to Claimant.

The essential difference in the two statements is the mention of Lothrop. Their statements agree as to the mention of 5 minutes and Frenchtown. There is no evidence that dispatcher told Claimant to stay on the phone while he checked his graph to pin point the location of the train. The dispatcher admits that phone conditions were not the best.

It is also well established that the burden is on Carrier to prove its case. In the circumstance of this case, considering among other things, the role played by the dispatcher who is an interested party, the phone conditions, the similarity of the testimony of the Claimant and dispatcher and the fact that Claimant did not agree, that the hearing was fair, the Carrier has not carried its burden. Thus the discipline was arbitrary and capricious and violative of the Agreement.

The wages lost by Claimant, who has since deceased, will be paid to his estate in accordance with applicable State laws.

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 10th day of December 1971.

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