

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19282
Docket Number TE-19336

Clement P. Cull, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
((Formerly Transportation-Communication Division, BRAC)
PARTIES TO DISPUTE: (
(J. F. Nash and R. C. Haldeman, Trustees of the Property
(of Lehigh Valley Railroad Company, Debtor

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Division, BRAC, on the Lehigh Valley Railroad Company, that:

1. Carrier violated the Agreement between the parties when and because it improperly disciplined Mr. Charles W. Merwarth on November 6, 1969 as a result of a hearing held on October 30, 1969.

2. As a result of the above violation, Carrier is required to clear Claimant's record of such charge and to pay him for all time lost and/or consumed, outside of his regular assignment, at the pro rata rate of the position occupied (2nd shift Towerman at Easton Tower, \$3.7911 per hour) and actual necessary expenses, in addition to mileage allowance as listed below:

Time lost and/or consumed amounted to:	10 days pay	\$303.28	(\$30.328 per day)
Actual necessary expenses	2 meals	3.00	(1.50 each)
Mileage Home to Hearing Office & return	24 miles	<u>2.16</u>	(.09 per mile)
	Total	\$308.44	

OPINION OF BOARD: The dispute herein involves the discipline meted out to Claimant following an investigation on a charge that his admitted failure to complete Form TC covering "instructions transmitted to driver of track car at West Portal Interlocking" was a violation of Rule 80.

Petitioner relies on Rules 9 and 28 of the agreement. It contends that Carrier's letter of October 27, 1969 notifying Claimant of the investigation did not comply with Rule 28 in that it did not specify the "precise charge" against him. This Board has held that such Rules are for the purpose of apprising the employee of the charge against him so that he can prepare his defense and are not for the purpose of providing technical loopholes to avoid otherwise proper discipline. In this connection, the Claimant was interviewed by the Rules Examiner on

the day in question, October 23, 1969, concerning Form TC and from the undenied colloquy between them as reflected in the record, Claimant was put on notice as to the basis for the hearing which followed. The failure of Carrier to specifically mention Form TC in its letter of October 27, 1969 did not, in and of itself, render the proceedings improper as we find that the Claimant was aware of the purpose of the investigation and could properly prepare himself. We have, by the foregoing, tacitly found that the proceedings which followed the letter of October 27, 1969 were fair and regular. Accordingly, we find no merit to Petitioner's further contentions that (1) he (Claimant) was not accorded due process and (2) discipline was assessed on a ground not suggested in the charge.

We have considered carefully the transcript of the hearing and the arguments of both parties and are of the opinion that the penalties assessed against Claimant are not commensurate with the offense. We find that Claimant was acting in accordance with instructions received from the Assistant Chief Dispatcher to permit extra train LV-2 to follow the maintenance of way equipment into the block between West Portal and Pattenburg. The Assistant Chief Dispatcher testified in part as follows:

"I asked him whether Godino understood his instructions which he assured me he had and I permitted and ordered LV-2 to proceed east of West Portal behind this equipment. Towerman Merwath followed out my instructions regarding the movement of this train....."

The Assistant Train Dispatcher testified concerning the form as follows:

"Mr. Finnegan - Yes, a few. Mr. Kresge, as an experienced operator and as an experienced dispatcher, would the fact that Mr. Merwath did not put information on form TC have any effect, or contribute in any way, to this accident that occurred on October 23rd.?"

Mr. Kresge - I would say it didn't. It did not contribute any. It was only a matter of record. It would be only a matter of record to verify what instructions were transmitted."

In this connection, the Rules Examiner, who had suspended the Claimant on October 23, 1969 when he learned that Claimant had not filled out Form TC, testified as follows:

"Mr. Finnegan - In your opinion, if Mr. Merwath would have filled out this form, would that have prevented the accident?"

"Mr. Taubar - The failure of Mr. Merwath to properly fill out the form would in no way contribute to the accident that occurred. The only problem that existed at Easton was the fact that there were no written records of the movement available and I had no way of knowing, other than the verbal information which I obtained from Mr. Merwath, as to what instructions he issued to Area Foreman Godino."

Thus the record reveals that Carrier has assessed penalties against Claimant for the mere failure to perform the ministerial act of completing and retaining Form TC. Carrier does not prove that Claimant was responsible for the accident nor does it find Claimant guilty of anything other than failure to complete the form, the completion of which, the record reveals would not have prevented the accident. Moreover Carrier did not prove that Claimant acted improperly in following the instructions of the Assistant Chief Dispatcher. We do not hold that employees can with impunity fail to comply with rules. What we find here is simply that the discipline assessed was improper under the herein circumstances. Accordingly, we shall find that the discipline was arbitrary and capricious and we shall sustain the Claim. As to the expense claim we hold that it is allowable under Rule 9(b) and note that Carrier did not raise any question concerning the claim for expenses on the property. Finally as to the question raised by Carrier concerning the alleged changing of the Claim by Petitioner on the property, we find that the claim before this Board is the same claim that was handled on the property.

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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

E. A. Killian
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of June 1972.