

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19998
Docket Number MW-20007

Irving T. Bergman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(Burlington Northern Inc.

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

(1) The suspension of Track Inspector M. W. Brecht from August 7, 1971 to September 6, 1971 was improper and in violation of the Agreement because

- (a) Charges were not filed as per Rule 40(C).
- (b) The hearing was not fair and impartial.
- (c) Alleged "preliminary information" resulted in pre-judgement on the part of the Carrier's officers.
- (d) The Carrier refused to consider the fact that the claimant's conduct in relation to the incident involved was wholly consistent with a long practice known to and condoned by the Carrier. (System File 376 F/MW-20(b) 9-11-71)

(2) The record of M. W. Brecht be cleared of these charges and that he be compensated for wage loss suffered (Rule 40 G).

OPINION OF BOARD: Claimant is a track inspector and had been working in that capacity for almost two years on the day of the accident. His motor car was struck by a train, which he did not know would be approaching. The objection to the decision and to the 30 day actual penalty was based upon the failure of the Carrier's notice of hearing to specify the Rule which he violated, failure to send copy of the notice to his local representative and failure of the Carrier to produce the train engineer as a witness. In addition, Petitioner contended that on the Saturday the accident occurred and on all previous Saturdays, Sundays and Holidays the train dispatcher did not issue a line-up during the time claimant had worked as a track inspector.

The Carrier has argued that the notice was sufficient in that it stated that the purpose of the hearing was to investigate the facts which led to this accident, on a specified date, at a specified location in order to determine responsibility for the accident. Further, the Carrier responded that it offered to adjourn the hearing to give the local representative who did appear at the appointed time, an additional opportunity to prepare for the hearing. The Carrier also stated to the local representative that the engineer was not needed but that the hearing would be recessed to give notice to the engineer to be present at the hearing if the Petitioner so desired. As to the merits,

the Carrier's position is that the claimant violated Operating Rule 35.

There have been conflicting opinions as to the requirements of the Rule that the notice shall specify the violation. In this case, the hearing has disclosed that there was no prejudice to the employee which resulted from the form of the notice. Since the purpose of the hearing is to develop the facts in order that employees' rights may be preserved, the element of possible prejudice to the employee may be considered.

The claimant testified that he had received the notice and that he was represented by his General Chairman, Transcript p. 1 (page references of the transcript hereafter will be noted as Tr.p.). The opportunity to recess was provided to allow for adequate notice to the representative; also that the Carrier would write to request the engineer to be present, if the representative requested it, Tr.p.4. The representative stated that he would proceed, Tr.p.5. We find that the claim of procedural defects interposed by the Petitioner are not sufficient to bar consideration of this case upon the merits,

Claimant testified that he was examined concerning Maintenance of Way Operating Department Rules about one month before the accident and also that he was very familiar with train movements on this subdivision, Tr.p.7. Circular Number 19, dated approximately three months before the accident was introduced and appears in the transcript at p.7. It stated that line-ups, "must be issued, and received by track car operators, in accordance with Safety Rules and Admonitions for the General Guidance and Protection of Employees and the Public;". Claimant did not deny receipt of the Circular, and also testified that he did not ask for or receive a line up, Tr.p.9, 10. Operating Rule 35 was read into the record of the hearing. It states: "A copy of the current line-up must be obtained---: Before placing track car or on-track equipment on main track; before operating any off-track equipment foul of a main track; before working on or obstructing a main track." Claimant testified that he did not comply with this Rule, Tr.p.27. Claimant also testified that he knew very well that he could expect train movements at any time on this subdivision, Tr.p.28.

The sum total of the defense was that the claimant should be absolved because the train dispatcher did not issue the required line-ups on Saturdays. However, this case deals with the responsibility of claimant. The testimony clearly spells out and it is admitted that he knew what he should have done. He did not do what he was specifically directed to do by a Circular issued three months before the accident. He demonstrated in a test given to him only one month before the accident that he knew the operating rules. His failure to obey a specific safety rule cannot be excused.

In measuring the penalty assessed, we cannot condone a conscious violation of a rule which is designed to protect the employee and the public. To accept a practice over a period of time which is destructive to safety, without complaint, displays a disregard for a fundamental rule of the railroad industry. A penalty to impress this upon claimant is 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 claim should be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 31st day of October 1973.