

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20238  
Docket Number MW-20095

Dana E. Eischen, Referee

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

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

(1) The thirty (30) day actual suspension of Sectionman M. R. Bahr was improper and in violation of the Agreement because

- (a) Charges were not filed as per Rule 40(c).
- (b) The Organization's representative was not furnished a copy of the notice of investigation.
- (c) The claimant was not proven guilty of any offense (System File MW-20(b), 12/3/71)

(2) The record of M. R. Bahr be cleared and that he be compensated for wage loss suffered (Rule 40G).

OPINION OF BOARD: Claimant M. R. Bahr appeals a 30-day suspension for alleged violation of certain Carrier operating rules in connection with an accident on August 13, 1971 when a motor car he was operating was struck by Train 85, identified as Extra 6422 West. The basic facts underlying this dispute are not in contention.

On August 13, 1971 Claimant, a regularly assigned sectionman at Connell, Washington, reported for work at 7:30 a.m. About 10:30 a.m. Claimant prepared to travel some five miles west to Cactus, Washington to perform work there. He secured from the agent-telegrapher at Connell a current train lineup listing Carrier's train activity that morning. That lineup indicated, inter alia, that Train 85 was some two hours overdue into Connell and headed west. Claimant nonetheless placed his track motor car on the main line and headed west out of Connell. Approximately one mile west of Connell, Claimant's motor car developed mechanical difficulty and stalled. Claimant did not protect his incapacitated motor car by setting out fuses or torpedoes. Rather, he attempted to re-start the vehicle and when this proved impossible he attempted to push it toward the nearest set-off. Before he was able to remove the car from the main track, Train 85 bore down upon him and collided with the motor car at 10:58 a.m. Fortunately, Claimant escaped injury but the motor car was demolished totally by the collision.

On August 16, 1971 Carrier sent the following notice of investigation to Claimant:

"Mr. M. L. Bahr, Sectionman  
Box 331  
Connell, Washington

"Attend investigation in the Assistant Superintendent's Office at Pasco, Washington, Wednesday, August 25, 1971, at 10:00 A.M. for purpose of ascertaining the facts and determining your responsibility in connection with your motor car being hit by Extra Train 6422 West on or about 11:00 A.M., August 13, 1971 at Mile Post 112. Arrange for representative and/or witnesses if desired, in accordance with governing provision of prevailing schedule rules.

"Please acknowledge receipt by affixing your signature in the space provided on copy of this letter."

The investigation was held on August 25, 1971 and Claimant was represented thereat by the Organization's Assistant General Chairman. On September 22, 1971, Claimant was assessed discipline as a result of the investigation pursuant to the following letter:

"Portland, Oregon  
September 22, 1971

Mr. M. R. Bahr, Sectionman  
c/o Mr. J. S. Mootz, Roadmaster  
Pasco Depot

You attended formal investigation held in connection with your motor car being hit by Extra 6422 West at M.P. 112 on August 13, 1971.

This investigation develops violation of Rule 40, General Notice, General Rule 'M' and Rules 101, 108, 700 and 702 of the Rules of the Maintenance of Way Department on your part.

For the above indicated violation of the Maintenance of Way Rules, you are hereby actually suspended from service for a period of thirty days, effective Monday, September 27, 1971. You will return to service on October 27, 1971.

/s/ R. O. Hammerstrom  
R. O. Hammerstrom  
Superintendent"

It is the contention of the Organization that Claimant did not receive a proper notification of investigation in accordance with Rule 40(c) of the Agreement, that the local representative of the Organization did not receive notification as provided in Rule 40(c), and that Claimant was not proven guilty of any offense. Rule 40(c) reads as follows:

"RULE 40. INVESTIGATIONS AND APPEALS

\* \* \* \* \*

"C. At least five (5) days advance written notice of the investigation shall be given the employee and the appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for presence of necessary witnesses he may desire. The notice must specify the charges for which investigation is being held. Investigation shall be held, as far as practicable, at the headquarters of the employee involved."

We have examined the notice in question, the applicable contract language and numerous awards cited by the parties. We adhere to the well established principle that the fundamental purpose of the notice is to provide the employee with an opportunity to prepare his defense against the accusations of his employer. Awards 11170, 11783, 13969, 16154 and others. In this connection we have said that the formulation of a charge and the giving notice thereof need not be in the technical language of a criminal complaint. It is sufficient if it appears that the one charged understood that he was being investigated for the dereliction of duty set forth in the notice. See Awards 3270, 12898. By these standards we must conclude that the notice was precise and comprehensive enough to place claimant on notice as to the matter under investigation, and was not in error as alleged by the Organization.

As to the issue of notice to the local representative, Carrier admits that he was not furnished a copy of the notice and ascribes this dereliction to administrative oversight. There is no doubt that this is a violation of the precise language of Rule 40(c). In some circumstances, this procedural shortcoming may well constitute reversible error. Carrier disregards the contractual mandates in this regard at its peril. Careful consideration of the record in the instant case, however, demonstrates that the local representative had actual knowledge of the investigation, appeared and represented claimant and presented no indication of undue surprise or lack of preparation. In these circumstances there was no demonstrable prejudicial effect upon claimants' case by Carrier's procedural defect. Accordingly we conclude that Carrier's violation does not in the facts of this case constitute reversible error.

Finally, analysis of the record indicates that Claimant by his own admission failed to clear Train 85 by 10 minutes nor did he set out fusees or torpedoes to protect his stalled motor car. This constitutes substantial evidence of violation of Carrier rules governing motor car safety. Thirty days suspension in these circumstances cannot be said to be so arbitrary, unreasonable or capricious as to constitute an abuse of Carrier's disciplinary discretion. Consequently, we shall not disturb the assessment of discipline in this case.

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 to the extent indicated in the Opinion.

A W A R D

Part 1(a) of the claim is denied.

Part 1 (b) of the claim is sustained to the extent indicated in the Opinion.

Part 1 (c) of the claim is denied.

Part (2) of the claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

*A.W. Paul*  
Executive Secretary

Dated at Chicago, Illinois, this 17th day of May 1974.