Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30999
Docket No. MW-31475
95-3-92-3-523

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Bessemer and Lake Erie Railroad Company

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

(1) The discipline assessed Track Foreman J. R. Churchill on June 24, 1991, ten (10) days' actual suspension from service, for alleged failure to provide proper flagging protection for Track Gang No. 2 performing work at Track No. 10 at Pittsburgh Junction on March 22, 1991, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement.

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. R. Churchill's record shall be cleared of the charges leveled against him and he shall be made whole for all wage and fringe benefit loss suffered."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On March 26, 1991, Claimant was instructed to appear for an Investigation on April 5, 1991. The letter charged Claimant with violating Rule 101(a), "when on Friday, March 22, 1991, as Foreman in charge of Track Gang No. 2, Calvin, PA, you failed to obtain permission or provide proper flagging protection while performing work on Track No. 10 at Pittsburgh Junction...." Following postponements, the Hearing was held on April 30, 1991. It did not conclude on April 30, and was reconvened and concluded on June 17, 1991. On June 24, 1991, Claimant was notified that he was suspended for ten days.

On March 22, 1991, Claimant was in charge of Track Gang No. 2, which was replacing ties on Track No. 10 in Carrier's yard in Pittsburgh Junction. A train operated by the Buffalo and Pittsburgh Railroad Company entered the yard on Track No. 10. The train made an emergency stop short of the place where Claimant's gang was working.

The Organization contends that the Claimant was not provided a fair Hearing. The Organization argues that the notice of charges reflected a prejudgment of Claimant's guilt by the Carrier. The Organization further objects to Carrier's Hearing Officer entering evidence at the Hearing, to the use of written statements from the Yardmaster and the crew of the Buffalo and Pittsburgh train instead of presenting live testimony, and to the Hearing Officer having met with Carrier's sole witness during the period between the first and second days of Hearing.

On the merits, the Organization contends that the evidence failed to prove the charge that Claimant violated Rule 101(a). The Organization maintains that Claimant acted in accordance with customary practice to protect his gang. Claimant flagged at the work site and, upon seeing the train approach, cleared the track and gave the crew a highball sign to proceed. Furthermore, the Organization observes, the crew was properly protected because the restricted speed in the yard required that the train be able to stop within half its range of vision and, in no event, exceed 15 miles per hour.

The Organization contends that the train was proceeding at an excessive speed. The Organization urges that the emergency stop was the result of the train crew's excessive speed and inattention.

Carrier contends that Claimant was afforded a fair Hearing. Carrier argues that the charges were framed in the customary manner on this property and did not reflect any prejudgment. Carrier maintains that it was customary practice on this property to have the Hearing Officer introduce exhibits. Carrier further observes that it has no subpoena power and, therefore, its reliance on written statements from the Buffalo and Pittsburgh crew was proper. Carrier contends that its reliance on the Yardmaster's written statement was proper because Claimant did not contest the facts

contained therein. In Carrier's view, had Claimant questioned the facts, the Yardmaster would have been brought in to testify. Carrier maintains that the Hearing Officer treated Claimant fairly and impartially.

On the merits, Carrier contends that it proved the charge by substantial evidence. Carrier relies on testimony by the Supervisor Structures and Track to the effect that to properly protect the job, Claimant should have notified the Yardmaster or flagged at a manual switch rather than at the work site. Carrier also relies on the statements from the train crew to the effect that they were not given the highball sign until after they were into their emergency stop.

The Board has reviewed the entire record developed on the property. We conclude that the Organization's procedural arguments lack merit. Despite the absence of the word "alleged" to modify the description of the charged behavior, the notice of charges made it clear on its face that these were charges which would be investigated, not facts already found. There is no evidence of prejudgment.

The use of written statements by the train crew was proper. Carrier is not responsible for producing witnesses who are employees of other carriers. The use of a written statement by the Yardmaster did not deny Claimant a fair Hearing. The Yardmaster's statement merely attested to Claimant's having not advised him that his gang would be working on Track No. 10. Claimant agreed with this fact. Therefore, there was no need to call the Yardmaster for live testimony. We also find nothing inherently improper in the Hearing Officer introducing exhibits into the record. The ministerial act of introducing the exhibits does not necessarily mean that the Hearing Officer will credit those exhibits to a greater extent than the other evidence.

We find the discussion between the Hearing Officer and the Supervisor Structures and Track during the period between the first and second days of Hearing somewhat more troubling. However, the discussion was limited to the meaning of Rule 101(a). It did not involve any of the facts of the incident under investigation and there is no evidence that the Supervisor changed his testimony as to any of the facts under investigation.

Turning to the merits, our review of the record finds that Carrier failed to prove, by substantial evidence, that Claimant violated Rule 101(a). Rule 101(a) provides, in relevant part:

> "Work on or adjacent to a track which might interfere with the safe passage of trains must be properly protected before such work is undertaken."

It is uncontradicted that the work may be properly protected by informing the Yardmaster or by flagging. It is also undisputed that Claimant did not inform the Yardmaster. Claimant flagged at the work site, while Carrier maintains that Claimant should have flagged at the manual switch.

The Supervisor testified that Claimant should have flagged at the switch, which was approximately 900 feet away from the work site. However, there was no evidence of limitations on visibility, curves, or other characteristics that would have obstructed the vision of an on-coming train's crew. On the contrary, the Supervisor testified that there were 1,422 feet of vision, extending from the work site to the point where the train would have crossed Kittaning Street. Yard rules required that trains operating within the yard limit their speed so as to be able to stop within half their range of vision. Had the train adhered to yard rules, it would have stopped short of the point at which it went into emergency.

Although the Supervisor at some points testified that Claimant did not provide proper flagging protection because he should have flagged at the switch, at other points he testified that the track was safe and that Rule 101(a) had not been violated. At another point, the Supervisor, when cross-examined concerning the Engineer's statement, concluded that the train was not adhering to the requirement that it be able to stop within half its range of vision. The Supervisor was the only live witness to testify against Claimant and his testimony was internally inconsistent with respect to crucial facts.

Although it would have been safer to flag at the switch rather than at the work site, there was no rule or supervisory direction expressly requiring Claimant to do so. Claimant was charged with violating Rule 101(a) which speaks only generally about the need to properly protect the work. Claimant testified that the combination of flagging at the work site and the restricted yard speed properly protected the work. The Track Laborer who worked on Gang No. 2 who testified stated that he did not feel unsafe. The Supervisor's testimony was inconsistent as to whether the work was properly protected and whether Rule 101(a) was violated. Considering the record as a whole, we are unable to find that substantial evidence supports the finding on the property that Claimant violated Rule 101(a).

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of July 1995.