PUBLIC LAW BOARD NUMBER 3445

Award Number: 70

Case Number: 70

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

And

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM

Claimant, A.L. Cooley, P.O. Box 85, Vossburg, MS 39366 allegedly charged with Rule B GR-3, 99, 825, and MW-Standard procedure Rule 140., improper flagging at Hattiesburg, MS on February 8, 1989. Claim was filed in accordance with Railway Labor Act and agreement provisions. Employes request that he be reinstated with pay for all lost time with vacation and seniority rights unimpaired.

FINDINGS

Claimant entered the Carrier's service on March 24, 1979. At the time of the incidents in question, he was working near Hattiesburg, Mississippi.

By letter dated March 3, 1989, Claimant was ordered to attend a formal investigation on charges that he violated Rules B, GR-3, 99, 825 and Maintenance of Way Standard Procedure No. 140. The investigation was held on March 10, 1989 at which time evidence was adduced which led to Claimant's dismissal on March 28, 1989.

The issue to be resolved in this dispute is whether Claimant was dismissed for just cause under the Agreement; and if not, what should the remedy be.

On February 8, 1989, Claimant was assigned to flagging duties with Gang TM-527 in the vacinity of the crossing at MP 85.4. Claimant had worked as a flagman in the past and had been instructed regarding his flagging duties that day by Foreman H. T. Ray. Claimant also had flagging equipment and a radio.

As Train No. 219 approached the crossing, Road Foreman W. L. Cottingham, who was travelling by car, came upon Gang TM-527 at the crossing. Cottingham had not seen Claimant on duty and advised Gang TM-527 to get clear. It was unsafe for Train No. 219 to proceed through the crossing because there was neither ballast nor ties supporting the track at the time, only bare rails and Cottingham was so advised. Suddenly, the train appeared and was bearing down on the bare track and the Gang when one member of the Gang flagged the train to a halt with a hard hat. The train stopped a mere 5 car lengths from the crossing.

Upon investigation, it was determined that Train 219 had encountered no torpedoes nor had the crew seen Claimant. Finally, Claimant appeared and it was determined that he had been in the bushes relieving himself at the time the train passed his position.

Rules B and GR-3 provide:

Rule B
Employees must be conversant with and obey the rules and special instructions. If in doubt as to their meaning, employees must apply to the proper authority for an explanation. If bulletin instructions conflict with special instructions, the instructions bearing the later date will govern.

Rule GR-3
All employees must follow instructions from proper authority, and must perform all duties efficiently and safely.

Rules 99, 825 and Maintenance of Way Standard Procedures No. 140, found in the record, are the precise rules and procedures for flagging.

The position of the Carrier is that Claimant was dismissed for just cause under the Agreement because Claimant failed to put out torpedoes and flag as he was directed to do and as is required by the rules. The Carrier contends that these lapses of performance have been proven conclusively. Claimant's failure of performance was extremely serious; but for the quick thinking and flagging of the train with the hard hat, the train might have derailed and the crew and the Gang injured or killed in the process. The Carrier maintains that Claimant was negligent of his duties; it asserts he should have ascertained the train's location before becoming indisposed. The Carrier argues that Claimant's failure of performance constitutes a violation of the cited rules and that the seriousness of the situation warrents dismissal.

As to the Organization's procedural argument, the Carrier maintains that it was waived.

The position of the Organization is that Claimant was unjustly dismissed based on arguments as to procedure and on the merits.

As to the procedural question, the Organization maintains that Claimant must be reinstated because the investigation of Claimant's alleged violations was conducted more than 10 days after the written notice of the investigation as required by the Agreement.

On the merits, the Organization contends Claimant should not be found in violation because he was unfamiliar with the flagging procedures, did not have a rule book, may not have been qualified to flag and was confused as to the instructions he had received from Ray. The Organization also maintains that Claimant was unable to contact Ray by radio once the train got passed Claimant. The Organization admits that Claimant made a serious mistake, but contends that the discipline is not justified by the offense.

After review of the entire record, the Board finds that Claimant was properly dismissed under the Agreement.

The Carrier has established by substantive credible evidence in the record that Claimant was not on duty as he was required to be, that he failed to properly perform his flagging duties and that his nonperformance nearly had grave consequences. These negligent actions also constitute violations of the several rules related to flagging as well as the more general rules regarding following the rules and safe performance of duties.

There is insufficient evidence in the record to support the contention that Claimant was unaware of his duties or how to perform them. He had flagged before and presented no credible evidence of genuine confusion or lack of capacity to perform the flagging job. Claimant was negligent of his duties and it was only good fortune and quick thinking that saved lives and property.

The serious nature of the offense warrants dismissal. The Carrier was

neither arbitrary, capricious nor discriminatory. The alleged procedural violation did not impair the fundamental fairness of the proceedings and in light of the offense, and does not justify reinstatement.

AWARD

Claim denied.

Neutral Member

Carrier Member

Organization Member

Date: FEB. 22, 1990