

PUBLIC LAW BOARD NO. 4500

AWARD NO. 10
CASE NO. 19

PARTIES MANUFACTURERS RAILWAY COMPANY
TO
DISPUTE and
 UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM

Claim of Engineer D. K. Wuerz that he be paid for all time and benefits lost that he would have earned or received on the Manufacturers Railway Company for the period December 15, 1983 through January 13, 1984, and that he be paid for attending the hearing held on December 1, 1983, and that his record be cleared of all charges arising from the alleged incident occurring on November 3, 1983 while working as engineer of the 3:00 p.m. Crew.

FINDINGS AND OPINION

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are the Carrier and Employee respectively within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted under Public Law 89-456 and has jurisdiction over the parties and dispute involved herein; and, that the parties were given due notice of the hearing thereon.

Claimant was the engineer on the Carrier's 3:00 p.m. Job on November 3, 1983. Several hours into their assignment, the crew on this Job pulled off the Hi-line onto the Brewery Main with nineteen carloads of beer that were to be shoved into Track No. 6 River Yard. During the process of shoving into Track No. 6, five cars in the middle of the train derailed. Before the Claimant stopped the train, however, the derailed cars were shoved over five hundred feet on the ground (one of the derailed cars was shoved sideways for over a hundred feet) causing damage to the rail and ties which necessitated repair. On November 12, 1983, nearly two weeks after the incident, the Carrier's Superintendent preferred charges against all members of the 3:00 p.m. Job crew for their "alleged negligence, carelessness and failure to properly perform [their] duties ... [on] November 3, 1983, which resulted in an accident/derailment that occurred at or about 8:45 p.m. on the evening of November 3, 1983, at the north end of the River Yard on the Brewery Main Track.***"

* In addition to the Claimant, the other crew members subject to this investigation were the foreman, fieldman and headman. The foreman was also charged with an alleged violation of Rule 14 of Bulletin No. 102 and Bulletin No. 71 of the "Bulletin of Special Instructions Applicable to Employees in the Operating Department".

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The hearing on the charges contained in the notice of investigation was held on December 1, 1983. Following the hearing, the Superintendent rendered a decision on December 13, 1983. Based on his review of the testimony and related evidence, he determined that the Claimant and foreman of the crew were responsible for the derailment of five cars and the resultant damage to the track after the derailed cars were shoved a considerable distance on the ground. In the same breath, he found no evidence implicating the other crew members and absolved them of any blame in this accident. Since the Superintendent held the Claimant and foreman "equally guilty", they both received suspensions of thirty days.*

In appealing the Claimant's suspension, the Organization was unable to resolve the instant claim on the property. Subsequently, the Organization progressed the contested claim to this Board for final adjudication.

Here, the Organization attacks the Carrier's disciplinary action on procedural and substantive grounds. On the question of procedure, the Organization focuses on certain irregularities in the investigative process which purportedly denied the Claimant his contractual rights to a fair and impartial hearing. The Organization initially contends that the Carrier improperly used two officers to conduct the hearing in the Claimant's case. This occurred, according to the Organization, when the Superintendent actively participated in the investigation by passing notes to the designated hearing officer notwithstanding the objection voiced by the Claimant's representative. Moreover, the Organization argues that the hearing officer compounded this procedural irregularity by denying the Claimant's representative's request that he be allowed to review those notes. It is the Organization's position that this aspect of the investigation deprived the Claimant of his due process. Coupled with this complaint is the Organization's assertion that the Superintendent's multiple roles as the "original charging officer", "co-conducting officer", "witness", and ultimately the "judge" who determined the Claimant's guilt and assessed discipline, subverted well established adjustment Board authority relative to a fair and impartial investigation. The Organization submits that the combination of such inconsistent roles assumed by the Superintendent similarly prejudiced the Claimant's rights.

Another procedural defect observed by the Organization concerns the actual conduct of the hearing officer. The Organization specifically maintains that "his actions, when reviewed carefully, demonstrate bias, a tendency to ignore

* Despite their shared guilt, the Claimant and foreman filed individual claims disputing the Superintendent's determination and assessed discipline. Each claim is dealt with in separate Board awards. The foreman's claim, therefore, is discussed in Award No. 11, Case No. 20.

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essential facts, expression of his own ideas, preconceived opinions, ... argumentative attitude (and) favoritism for the Carrier on every issue" (Organization Submission, p. 7) The Organization opines that the hearing officer was primarily interested in establishing the amount of damage caused by the derailment than in developing the facts and conducting a hearing within the parameters of fairness and impartiality. Insofar as the Organization is concerned, he prejudged the charges against the Claimant in deprivation of his entitled right to an objective and unblemished inquiry of the November 3, 1983 incident. The Organization believes that the Claimant's thirty days' suspension should now be set aside with pay for time lost because the Carrier's determination of his guilt was the product of a procedurally flawed and unfair investigation.

With respect to the merits of the case, the Organization contends there was no substantiating evidence that the Claimant was careless or negligent while performing his duties when the accident occurred on Track No. 6 River Yard. The Organization declares that he did not cause the derailment, nor should he be held accountable for the damage to the track after the derailed cars were shoved over five hundred feet on the ground before he stopped the train. As noted by the Organization, Claimant shoved the train into Track No. 6 River Yard with the engine throttle in the fourth position at a speed of six miles per hour, which was well within the ten miles per hour speed limitation in the yard. It is further indicated by the Organization that in the process of shoving the nineteen cars into Track No. 6 River Yard, the first seven cars passed over the switch point (where the derailment actually occurred) without incident, but that the middle five cars of the consist climbed the switch point which caused them to derail. On this very point, the Organization maintains that the Claimant should not be blamed for what happened since all the witnesses, including the Carrier's Roadmaster and Chief Engineer, testified that the derailment was the result of equipment climbing the switch point. The Organization specifically refers to the Roadmaster's testimony which also indicated that a combination of other factors may have caused the derailment; e.g., the flatness of a wheel of a certain car will get on a point and possibly drop off, or where a car is shifting from side to side when being shoved and derails when a certain amount of pressure hits one side. Such factors, the Organization asserts, were not within the Claimant's control.

The Organization avers that the Carrier failed to sustain its burden of proof since there was no demonstrable evidence to prove the Claimant guilty of the alleged offense. Despite the absence of negligence or a rule violation on the Claimant's part, the Organization stresses that he was unjustifiably punished merely because a derailment occurred. Alternatively, the Organization, on the merits, seeks the Board's reversal of the Claimant's thirty days' suspension.

In denying the claim, it is the Carrier's overall position that the Claimant was properly charged, given a fair and impartial hearing, and found guilty as charged on the probity of the evidence. The Carrier rejects the Organization's

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notion that the Claimant's guilt was prejudged or that its hearing officer acted with bias toward him during the investigative proceeding. From a procedural standpoint, the Carrier thus disputes the Organization's assertion that the hearing officer conducted the investigation in an argumentative and manipulative manner. In defending the role of the hearing officer, the Carrier believes that it was his responsibility to develop all the facts in search of the truth regarding the causes of the derailment and the Claimant's involvement in that incident. The Carrier maintains that he properly carried out his responsibility without compromising the Claimant's contractual due process rights. Stated otherwise, the Carrier holds to the view that no procedural errors were committed by the hearing officer in the conduct of the Claimant's investigation.

Despite the apparent difficulties the hearing officer encountered during his probe of some of the witnesses at the investigative hearing (whose testimony, in the Carrier's judgment, was less than credible), the Carrier submits that he was able to adduce sufficient probative evidence on the Claimant's guilt. Such evidence, the Carrier avers, proved that he was inattentive to his assignment while shoving the train into Track No. 6 River Yard. Insofar as the Carrier is concerned, the Claimant's purported failure to properly perform his duties was a factor which contributed to the derailment and damage to the track.

To support the finding of guilt in the Claimant's case, the Carrier refers to uncontroverted proof revealing that the five cars which derailed at the switch connection were subsequently shoved over five hundred feet on the ground; and that one of the five cars was shoved on the ground sideways for a distance exceeding one hundred feet "with the trucks on both ends of the car digging deeply into the ground burying one complete set of trucks all the way down to the carframe." (Carrier's Submission, p. 4) In addition, the Carrier notes that several hundred feet of rail and ties were extensively damaged. This particular evidence, according to the Carrier, discredits the Claimant's version that he was shoving the train with the engine throttle in the fourth position and that the train came to a smooth, gentle stop. Contrary to the Claimant's plea of innocence, the Carrier argues that the extent of the derailment can be traced to his "lackadaisical" handling of the train at the time of the occurrence. Under the circumstances surrounding this incident, the Carrier firmly believes that the discipline he received was neither harsh nor unjust.

On the merits, therefore, the Carrier asserts that it met its burden of proof with competent evidence substantiating the Claimant's guilt upon which his disciplinary penalty was fixed. Consequently, this Board is urged by the Carrier to affirm his thirty days' suspension.

The Board has carefully reviewed the record in this case vis-a-vis the objections raised by the Organization questioning the procedural regularity of the Claimant's investigation. Since other members of the November 3, 1963 3:00 p.m. Job crew were charged with the Claimant in the same notice of

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investigation and involved in the same proceeding as he, the Board's procedural inquiry must treat with the investigation record in its entirety rather than confine its scope to that portion dealing only with the Claimant. Should there be any quarrel with the Board's position, the parties are reminded that the Claimant's guilt as determined by the Carrier was not limited solely to his testimony but drawn from evidence contained in the whole record.

Here, the Organization's complaint alluded to several procedural errors, the gravity of which concerned the propriety of the Superintendent's and hearing officer's conduct in the course of the investigative process. These objections, which take precedence over the substantive aspects of the controversy, adversely affect the Carrier's determination of the Claimant's guilt.

Initially, the Organization objected to the sheets of paper or notes the Superintendent passed to the hearing officer during the direct examination of the foreman of the crew who, like the Claimant, was under investigation for his role in the November 3, 1983 derailment. The objection dealt with the hearing officer's refusal to allow this employee's representative (who also represented the Claimant at the hearing) to inspect these sheets and/or notes after he asked to see them. In the Board's opinion, the hearing officer erred when he arbitrarily refused the representative's reasonable request to see this material. As a matter of procedure, where written memoranda, notes or other documentation is submitted to the hearing officer in the course of a formal investigation, such material is subject to examination by the parties involved in the proceeding. The hearing officer in the instant investigation gave the accused employees' representative the opportunity to review memoranda written by the Carrier's Roadmaster and Chief Engineer which were presented at the hearing. It was of little consequence that the latter documentation (relative to the November 3, 1983 derailment) was later introduced into evidence, whereas the Superintendent's notes were not. The accused employee's representative was still entitled to inspect any and all material brought to the hearing officer's attention irrespective of its relevancy or lack thereof to the investigation. Suffice it to say, the error committed by the hearing officer in this instance was an inexcusable mistake in procedure.

In the same vein, the Organization objected to the Superintendent's active participation in the investigative hearing. According to this objection, the Superintendent's participation in the hearing elevated him to the status of "co-conducting officer". While the Board understands the reasoning behind this objection, the note passing incident referred to herein cannot be broadly construed as placing him in the capacity of a "co-conducting officer". Yet, the Board finds his involvement in the hearing, albeit of limited duration, improper conduct perceived as prejudicing the rights of those subject to the investigation which embraced the Claimant. Collateral to this objection, the Board finds another flaw in the investigation where the hearing officer allowed the Superintendent to be present during the examination of witnesses (including the Claimant). In this instance, too, the hearing officer procedurally erred

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since he sequestered all witnesses except the Superintendent who later testified. Simply put, he should not have been allowed in the hearing room until he was summoned to testify. Moreover, this error in procedure was grievously strained when the same Carrier officer, who originated the charges against the Claimant, attended the hearing and then briefly testified, ultimately determined his guilt. The Superintendent's conflicting roles caused a glaring defect in the accusatorial process which proved detrimental to the Claimant's right to a fair and impartial investigation. On this precise point, First Division Award No. 8259 held: "The position of witness with examiner and judge are not compatible. Likewise if an official unexpectedly is required as a witness for the carrier he should therefore not further participate in the investigation, save as a witness." (Emphasis added) Consistent with this authority, the Superintendent was required to recuse himself from further involvement in the investigative process by delegating the authority to decide the Claimant's fate to another Carrier officer (e.g., the Assistant Superintendent). As already mentioned, his failure to do so compromised the Claimant's contractual due process rights.

Due to the disturbing effect these particular procedural irregularities had on the Claimant's rights, there can be no other ruling but to nullify the Carrier's determination of his guilt and the discipline he received as a consequence thereof. Both were the product of a fatally flawed investigation.

In view of the foregoing, it is unnecessary to dwell on the remaining procedural objections raised by the Organization. The Board, ever cognizant of those objections, is persuaded to make a final comment. While the hearing officer's concern for the truth cannot be faulted, his overzealous endeavors in trying to ascertain the truth was quite dubious. Unfortunately, in his quest he lost sight of the fact that the role of presiding officer at an investigation was not of an adversarial nature but akin to an unbiased neutral.

Since this dispute has been decided on procedural grounds, there is no need to discuss the factual merits. For the reasons stated herein, the Claimant's discipline shall be set aside. Accordingly, the Carrier shall pay him for all time and benefits lost for the period of his thirty days' suspension (i.e., from December 15, 1983 through January 13, 1984). He shall also be paid for having attended the December 1, 1983 investigation. Such compensation will be based on the applicable rate of pay that was in effect at the time of the Claimant's suspension. Further, the Carrier shall expunge from his employment record any and all reference to the aforementioned disciplinary action.

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AWARD

Claim sustained.

ORDER

The Carrier will comply with the terms and conditions set forth in this Award within thirty (30) days of the date hereof.



Charles P. Fischbach
Chairman and Neutral Member


William J. Lamb, Carrier Member
Charles L. Little, Employee Member

Dated at Chicago, Illinois,
this 31th day of August, 1989