

Award 19043

Docket 35406

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

39 South La Salle Street, Chicago 3, Illinois

With Referee Edward M. Sharpe

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

NEW YORK CENTRAL RAILROAD—SOUTHERN DISTRICT

STATEMENT OF CLAIM:

"CLAIM NO. 1. Claim of Engineer J. L. Mavity for restoration to service with seniority rights unimpaired; record cleared of this discipline, pay for all time lost, and vacation pay and time.

CLAIM NO. 2. Claim of Fireman J. I. Brothers for restoration to service with seniority rights unimpaired; record cleared of this discipline, pay for all time lost, and vacation pay and time."

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Engineer Mavity and Fireman Brothers seek reinstatement with their seniority and vacation privileges unimpaired, their records cleared of assessed discipline, and pay for lost time. The discipline was issued as a result of a collision at Walz Crossing located east of Danville, Illinois. Claimants were involved in the collision.

The record shows that on March 10, 1957 claimants were notified by telephone of their removal from service pending an investigation and in a letter dated March 13, 1957 they were advised that an investigation to determine facts and place the responsibility in connection with the collision would be held on March 21, 1957.

Claimants urge that the carrier was in error in removing them from service prior to a finding of guilt at a properly held investigation. They rely on Articles 35 and 36 of the respective agreements which provide in substance that discipline will not be made until the parties are given a fair and impartial investigation.

Carrier urges that claimants were not discharged or dismissed from service prior to the investigation but were held out of service pending an investigation. Carrier also relies upon the discipline rules for its authority to hold out of service.

In Award 16584 it was held that carrier's action in withholding claimant from service was justified. We concur in the holding of that award and are also of the opinion that under the facts in this case carrier was justified in withholding claimants from service pending an investigation.

Claimants also urge that they were not properly apprised of the purpose of the investigation in that Section 1 of Article 36 of the Engineers' Agreement provides:

"He will be duly apprised in writing of the charge against him within ten (10) days of the date the occurrence becomes known to his superior officer, and an investigation will be conducted within ten (10) days after such notification."

The charge upon which claimants were dismissed was in the form of a letter, a copy of which reads as follows:

"Please arrange to attend formal investigation in the Wolford Hotel, Danville, Illinois, 9:00 A.M., Central Standard Time, March 21, 1957, to determine facts and place responsibility in connection with the collision of P&E No. 95, Engines 5619-5616-5617; and CM&StP No. 77, Engines 80D-72B-75A, at CM&StP crossing, approximately 6:50 A.M., on March 8, 1957."

A hearing was had on March 21 and 22, 1957 and concluded June 25, 1957. Claimants were dismissed from the service effective March 30, 1957. We note that the notice sent to claimants fails to apprise them of any specific violation of duty. Such notice was to the effect that an investigation would be had "to determine facts and place responsibility". The above notice fails to charge claimants with any violation of duty in connection with the collision. It follows that the failure on the part of the carrier to give a proper notice nullifies the proceedings. The claims should be sustained.

AWARD: Claims sustained. .

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois, this 5th day of February, 1959.

DISSENT OF CARRIER MEMBERS

The sustaining award in this case is outrageous. It is the result of a narrow and illogical interpretation of single sentence of the Engineers' investigation rule, applicable to only one of the claimants herein; nevertheless, applied to both. It was made without any apparent consideration being given to the intent and purpose of the entire rule and without any consideration whatsoever to the circumstances here involved. The erroneous result requires this dissent.

The facts leading up to this dispute are as follows: On March 8th, 1957 a side collision occurred between P & E Train No. 95, upon which claimants

herein were employed as engineer and fireman, and CMStP&P train No. 77 at the crossing of the two lines at Walz, Ill. The accident resulted in the injury of five train service employes, derailment and extensive damage to both Diesel engines, derailment of 27 cars in both trains as well as considerable damage to the interlocking plant. On March 10, 1957, claimants were notified that they were being held from service pending an investigation of the accident. On March 13, 1957 claimants were both duly notified, in writing, of the date, time and place of the investigation which was scheduled for and was actually held on March 21 and 22, 1957. This was a joint investigation at which the involved employes of both railroads were present with their representatives; also present were inspectors representing the Interstate Commerce Commission and the Illinois Commerce Commission. This investigation was held to develop all of the facts, determine the cause, and place the responsibility for the accident. As a result of the evidence obtained the Carrier found these claimants to be responsible because of their failure to comply with signal indications, and they were subsequently, on March 30, 1957, dismissed from Carrier's service. The Carrier's determination, with respect to claimants' responsibility for failure to comply with the signal indications governing the movement of their train, was confirmed by the report of the Interstate Commerce Commission, issued May 20, 1957, wherein it was stated that "This accident was caused by failure to operate the P & E train in accordance with signal indications".

Petitioner did not challenge the guilt of the claimants as established by the investigation. Indeed, he alleged certain violations of the agreement requirements for a fair and impartial investigation and his whole original submission rests on those propositions. The Referee seizes upon one of the points raised by Petitioner, quotes one sentence of the Engineers' rules governing investigations; and, by a narrow and rigid interpretation of that sentence, sustains the claim not only of the engineer but also of the fireman.

Such casual, careless, and ill-considered treatment of the issues raised by this Docket can only be condemned, especially when the Referee's Findings upon the procedural objection are in such grievous error.

The Referee found that the notice of investigation issued to claimants was not proper and "nullifies the proceedings." It "fails to apprise them of any specific violation of duty", "fails to charge claimants with any violation of duty in connection with the collision."

The notice is thus found violative of these Referee-imposed standards which do not appear in the rule itself nor which could be interpolated into the rule by any reasonable process of agreement interpretation.

The notice in question summoned the claimants to appear at an investigation "to determine facts and place responsibility in connection with the collision * * *."

The Referee seeks support for his conclusion in the citation of a single sentence of the Engineers' rule, reading in part: "He will be duly apprised of the charge against him * * *."

The cited rule could not, of course, support the claim of the fireman. The rule governing notice in the Firemen's Agreement provides that Carrier officials "will notify the fireman (helper) of the nature of the case to be investigated." The notice in the instant case certainly met that requirement. It informed the claimants of the matters to be investigated—the date and place of the collision, the engines involved. Certainly under the controlling

agreement of the Firemen nothing more is required; but, despite the fact that this was clearly pointed out to the Referee, he simply ignores the Firemen's rule.

His interpretation of the Engineers' rule could not possibly apply to the Firemen's rule; but, beyond that his interpretation is completely in error. His Findings seem to pin the notice deficiency upon the lack of any charge of "specific violation of duty". No such requirement appears, however, in the rule he cites. The notice here warned the claimants of the purpose of the investigation; it charged them with the possibility that responsibility would be placed upon them as a result of what might be developed at the investigation. This was sufficient; this was a "charge".

The Referee's Findings would appear to construe this rule as requiring that a "charge" against the accused must specify particular derelictions of duty or particular rules that have been violated. Awards of this Division do not support any such construction. We have held that notices of investigation need not specify the particular rules that may have been violated or specify the precise derelictions of duty that may have occurred. **Awards Nos. 12157, 13207, 16266, 17215, 17350, 17609.**

Such rulings respond to the obvious realities of the situation. It is often impossible for the Carrier or its officials to know the precise failures, if any, of the employes involved in an accident. The proper purpose of an investigation is to develop the facts in order to determine if any such derelictions occurred; consequently a proper charge can only specify the possibility that an employe is "responsible" for the accident. The charge cannot delineate the precise derelictions because, in many cases, they can only be developed from the facts of the investigation.

Even if the Referee's interpretation of the applicable rule could be justified it affords no basis for the overturning of the discipline here. The alleged defect in the notice did not prejudice the claimants. That notice informed them of the matter to be investigated; they were told that they might have a representative present with them—indicating that they were principals, not mere witnesses. They did appear, prepared to defend themselves, and were ably represented throughout a long investigation of the collision. There is nothing in that investigation to indicate that they were surprised or suffered any damage because of this alleged defect in the notice. To the contrary, it is abundantly clear that at all times they were well aware of the matters under scrutiny. If there was an error in the notice, which is most emphatically denied, it was entirely non-prejudicial and the Referee does not even profess to find any such prejudice.

The manifold errors of this award—the resting of a decision applicable to two claimants on a contract governing only one of them; the narrow and illogical construction of that contract; the ignoring of sound precedent awards of this Division; the reversal of a disciplinary assessment on the basis of an alleged error which no one suggests or finds resulted in any damage to the claimants—discredits the award and its author. The decision is indefensible; the award, instead of the investigation proceedings, should be considered a nullity.

/s/ H. V. Bordwell

The undersigned concur:

/s/ Geo. H. Dugan

/s/ H. W. Burtness

/s/ H. J. Reeser

/s/ E. T. Horsley

SUPPORTING OPINION OF LABOR MEMBERS

The first sentence of the Dissent states, "The sustaining award in this case is outrageous." We reply that the Dissent is outrageous because its unwarranted attack on the referee, other than giving vent to the ranting and raving of the dissenter, serves no useful purpose, and, when explored in the light of the true facts, collapses and falls of its own weight.

The matter was presented to the Board on the premise that there had been five distinct violations of Article 36 of the Engineers' Agreement, and likewise with the Firemen's Agreement. They were, as follows:

1. Claimant was disciplined by being held out of service prior to formal investigation.
2. Claimant was not properly charged with any violation of operating rules within ten days of date of occurrence, as required by Section 1 of Article 36.
3. The notice to attend investigation was not properly signed by the officer issuing the instructions to attend.
4. Management did not designate train on which claimant was to travel to and from investigation, per Article 36, Section 2 (b).
5. Claimant did not receive a fair and impartial investigation.

The foregoing is in connection with Claim No. 1, which is in behalf of Engineer Mavity.

Claim No. 2, which is in behalf of Fireman Brothers, is premised upon the following five alleged violations of Article 35 of the Firemen's Agreement:

1. Claimant was disciplined by being held out of service prior to formal investigation.
2. Claimant was not properly charged with any violation of operating rules.
3. The notice to attend investigation was not properly signed by the officer issuing the instructions to attend.
4. Management did not designate train on which claimant was to travel to and from investigation, per Article 35, Section 2 (c).
5. Claimant did not receive a fair and impartial investigation.

Therefore, the issue before the Board was whether or not the Carrier followed due process in complying with the two Investigation rules: Article 36 of the Engineers' Agreement and Article 35 of the Firemen's Agreement. Article 36 provides, as follows:

"Section 1: An engineer shall not be disciplined until given a fair and impartial investigation conducted by an official of the carrier. **Formal investigations** need not be held in minor cases where statements concerning the facts will suffice.

He will be duly apprised in writing of the charge against him within ten (10) days of the date the occurrence becomes known to the superior officer, and an investigation will be conducted within ten (10) day after such notification. . . ." (Emphasis added.)

Article 35 of the Firemen's Agreement provides, as follows:

"Section 1: A fireman (helper) will not be disciplined until after an investigation of whatever charges are made against him. . . ." (Emphasis added.)

The following letter, or notice was addressed to the Engineer, as follows: (Docket, p. 39)

"NEW YORK CENTRAL SYSTEM

Urbana, Illinois
March 13, 1957

Mr. J. L. Mavity
629 North Gladstone
Indianapolis, Indiana

Dear Mr. Mavity:

Please arrange to attend formal investigation in the Wolford Hotel, Danville, Illinois, 9:00 A.M., Central Standard Time, March 21, 1957, to determine facts and place responsibility in connection with the collision of P&E No. 95, Engines 5619-5616-5617; and CM&StP No. 77, Engines 80D-72B-75A, at CM&StP crossing, approximately 6:50 A.M., on March 8, 1957.

If desired, you may have representation in accordance with your scheduled working agreement.

Very truly yours,

D. A. Larson
Trainmaster-Road Foreman

Employes' Exhibit A-1"

A like letter was addressed to the Fireman, (Docket, p. 45) as follows:

"NEW YORK CENTRAL SYSTEM

Urbana, Illinois
March 13, 1957

Mr. J. I. Brothers
5809 Cressview
Indianapolis, Indiana

Dear Mr. Brothers:

Please arrange to attend formal investigation in the Wolford Hotel, Danville, Illinois, 9:00 A.M., Central Standard Time, March 21, 1957, to determine facts and place responsibility in connection

with the collision of P&E No. 95, Engines 5619-5616-5617; and CM&StP No. 77, Engines 80D-72B-75A, at CM&StP crossing, approximately 6:50 A.M., on March 8, 1957.

If desired you may have representation in accordance with your scheduled working agreement.

Very truly yours,

D. A. Larson
Trainmaster-Road Foreman
Peoria & Eastern Railway

Employes' Exhibit A-2''

Neither of the two aforestated notices contained a signed signature. The signature of D. A. Larson, and his title, were typewritten.

With respect to contention No. 1, the Referee found in favor of the Carrier, and so stated in his Findings.

The investigation as referred to in the aforestated notice letters was held on March 21 and 22, 1957, and concluded on June 25, 1957.

A fair and realistic appraisal of the very first portions of the two Investigation rules will clearly reveal that under their terms, before the Carrier could administer discipline, two requirements had to be met:

1) In the case of Engineer Mavity, he could not be disciplined until given a fair and impartial investigation; and that he be duly apprised in writing of the charges against him within ten (10) days of the date the occurrence became known to a superior officer, and the investigation would then be conducted within ten days.

2) Under the clear terms of Article 35 of the Firemen's Agreement, the very first Section, a fireman will not be disciplined until after an investigation of whatever charges are made against him.

By no stretch of the imagination can it be said that the notices directed to the claimants with respect to time and place that the investigation would be held contained anything relative to charges being placed against them.

On page 3 of the Dissent, it is implied that the Engineers' rule is the only one that contemplates charges being filed against the claimant and therefore would have no application insofar as Article 35 of the Firemen's Agreement is concerned. Nothing could be further from the truth. As aforestated, the very first Section, or paragraph, of the Firemen's rule provides that the charges will be made against him and the investigation will follow in the wake of same.

On page 4 of the Dissent, it is contended that, "The notice here warned the claimants of the purpose of the investigation; it charged them with the possibility that responsibility would be placed upon them as a result of what might be developed at the investigation. This was sufficient; this was a 'charge'." Such contention is nothing more than a far-fetched and very feeble attempt to uphold the Carrier in its failure of non-compliance with the express provisions of the two Investigation rules.

Claimants were dismissed from the service effective March 30, 1957 in accordance with the following letters: (Docket, pp. 2 and 3)

"March 30, 1957

Mr. J. L. Mavity
629 North Gladstone
Indianapolis, Indiana

Dear Sir:

As a result of investigation conducted at the Hotel Wolford, Danville, Illinois, March 21-22, 1957, to determine the facts and place responsibility in connection with collision of P&E Train 95, engines 5619-5616-5617, and CMStP&P Train 77, engines 80D-72B-75A, at CMStP&P Crossing, at approximately 6:50 A.M. (C.S.T.), March 8, 1957, you are hereby notified that for your responsibility in connection with this accident you are dismissed from the service for violation of Rule 285A, contained in Peoria & Eastern Railway timetable No. 108, dated October 30, 1955, and Rule 292, of the Rules for the Government of the Operating Department. (Emphasis added.)

Yours truly,

/s/ T. W. English
General Manager"

"March 30, 1957

Mr. J. I. Brothers
5809 Crestview Avenue
Indianapolis, Indiana

Dear Sir:

As a result of investigation conducted at the Hotel Wolford, Danville, Illinois, March 21-22, 1957, to determine the facts and place responsibility in connection with collision of P&E Train 95, engines 5619-5616-5617, and CMStP&P Train 77, engines 80D-72B-75A, at CMStP&P Crossing, at approximately 6:50 A.M. (C.S.T.), March 8, 1957, you are hereby notified that for your responsibility in connection with this accident you are dismissed from the service for violation of Rule 285A, contained in Peoria & Eastern Railway timetable No. 108, dated October 30, 1955, and Rules 292 and 943, of the Rules for the Government of the Operating Department. (Emphasis added.)

Yours truly,

/s/ T. W. English
General Manager"

Attention is directed to the fact that the charges that should have been included in the notice letters of time and place of the investigation are fully set forth in the notice letters of dismissal to the two claimants.

On page 4, there are several awards cited in support of the dissenter's contention that notices of investigation need not specify the particular rules that may have been violated, nor specify the precise derelictions of duty that may have occurred. We will touch on those awards in the order cited:

Awards 12157 and 13207 are the only ones that have an Investigation rule similar to those involved here.

Award 13207: The rule, there, reads:

"When an investigation is to be held the employe shall be given written notice as to the specific charge. . . ."

There, the claimant was charged with responsibility which may involve "Rule G." It was stated in the Findings:

". . . The notice of hearing was sufficient. The time and place and the alleged infractions were clearly brought to claimant's attention in writing, in compliance with Article 61, Section (b)."

Award 16266: In that case the rule did not require that the notice charge the specific offense or rule violation. A like rule prevailed in the dispute covered by **Award 17609**.

Award 17215, cited in the Dissent, has no relevancy, whatsoever, because it involves a claim for an additional day's pay at yard rate.

Award 17350: The rule, there, read:

"No Switchman shall be dismissed or disciplined without just cause. Before dismissed or otherwise disciplined, full investigation of the case will be held. . . ."

The notice to the employe contained:

". . . your responsibility in going on spot."

On page 5, dissenter states:

". . . Even if the Referee's interpretation of the applicable rule could be justified it affords no basis for the overturning of the discipline here. The alleged defect in the notice did not prejudice claimants. . . ."

No better answer to that can be found than what was stated in the Findings of **Award 14469**:

". . . The carrier contends further that the claimant in any event was not prejudiced. As pointed out herein, he was not granted a fundamental requirement of the rule; because he was not charged, he was not in a position to take advantage of the rights that flow to an accused employe; and he has had discipline imposed in violation of the rule. Those things constitute prejudice.

These rules providing for charges, full investigations, opportunity to be heard, sustaining charges by proof, etc., before discipline is imposed are for the benefit of the employe. Without them and without

compliance with their requirements, the employe is subject to the arbitrary action of the carrier. They are designed to prevent such action. The failure of the carrier to comply with the requirement of the rule as herein discussed nullifies the action taken and the penalty imposed."

This Board has consistently held in a long line of awards that when the Investigation rules were flagrantly flouted, as in the case before us, such action on the part of the carrier justified vacating or setting the discipline imposed aside. Such awards are, Nos. 2157, 2397, 5197, 5555, 6329, 8260, 9561, 11601, 11929, 14469, 16688, 16699.

Rules such as Articles 35 and 36 were designed to protect the substantive rights of employes under their contracts of employment. The Rule is part of that contract and there must be substantial compliance with its terms before the carrier is permitted to impose discipline. Here, Articles 35 and 36 were violated to the extent that the discharge of the claimants was, and properly so, held to be void. These rules were not met by this Carrier in the notice letters sent to the two claimants advising as to time and place investigation would be held. The claimants were entitled to know with what offenses they were charged; they were not advised to that effect until after the investigation was held.

This Board does not make nor negotiate the rules; its duty and responsibility under the law is to interpret them; that was properly done in this case. Nevertheless, we find, through the medium of the Dissent, a bold and daring attempt to cast ill reflection upon the Referee. The Dissent is nothing more than a travesty on justice.

(Page references relate to original document.)

/s/ C. W. Kealey

/s/ Don A. Miller

/s/ J. K. Hinks

/s/ B. W. Fern

/s/ C. E. McDaniels