Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Referee Herbert I. Marx, Jr.

Award Number 3975
Docket Number 3981

PARTIES TO DISPUTE: Railroad Yardmasters of America

Consolidated Rail Corporation

STATEMENT OF CLAIM: Yardmaster John Elser be reinstated to his former yardmaster position with all rights unimpaired and that he be paid for all time lost as result of the discipline assessed March 10, 1980.

OPINION OF BOARD: This dispute concerns the disqualification of the Claimant, a Yardmaster on duty at the time a yard Brakeman was injured on a track which, according to the Carrier, had been improperly made available to a yard crew.

The Organization has raised a number of procedural objections which require consideration by the Board. The charge against the Claimant, as stated by the Carrier in its letter ordering an investigative hearing, reads as follows:

> "For your responsibility, if any, in that personal injury was sustained by Stanley Kondracky at Croxton Yard, January 29, 1980, at approximately 9:25 A.M. while you were assigned as Yardmaster at KW."

Rule 6-A-1(b) reads in pertinent part as follows:

> "(b) A yardmaster who has been in the Company's service sixty (60) calendar days or longer and against whom the Company has preferred specific charges, in writing, shall not be disqualified, suspended or dismissed without a hearing at which he shall be permitted to have a duly accredited representative or representatives of his choosing and witnesses to testify on his behalf. Copy of this notice will be furnished the Division Chairman. . . ."

The Organization argues that the notice of hearing to the Claimant fails to provide the "specific charges" as required by the rule, emphasizing the use of the word "specific". The Organization refers to numerous awards in which claims have been sustained because the charges involved did not meet the definition of being "precise", as required by various disciplinary rules applicable to these disputes. "Specific" and "precise" are sufficiently synonomous to make such awards applicable here.

Related to the Brakeman's injury, in one way or another, were the Claimant Yardmaster, the Brakeman's fellow crew members, and possibly other supervisory personnel. If the investigation was to be concerned with the "personal injury" of the Brakeman, and nothing more, it is difficult to understand why the Yardmaster was selected as the sole employe to be investigated. Alternatively, if it was an alleged action (or failure to act) involving the Yardmaster, it is entirely reasonable that the Carrier should have been "specific" in its charge. The hearing, in fact, did follow this latter course, but this would have hardly been known in advance by the Claimant or the Organization.

A dispute under review concurrently by the Board illustrates the type of charge which might have been sufficiently specific. In Award Number 3974 a Yardmaster was subject to an investigation under the charge of allowing: "Yard Assignment GA-22 to enter Class Track #13 for the purpose of coupling and pulling same on January 22, 1981, without the track being properly blocked." The contrast with the charge herein is obvious.

The Organization raises a further objection in that the Carrier refused the Organization's request to have the injured Brakeman appear as a witness. If he were well enough to testify, the Brakeman would have been able to contribute meaningful testimony to help resolve the conflicting versions of the incident, as related by the Claimant and other employes. It is highly probable that such testimony could not have been elicited, since the injured employe was in critical condition after the accident and died thereafter. This, however, does not explain the position taken by the Carrier upon the Organization's request. The hearing was originally scheduled for February 19, 1980 and then rescheduled for February 25, at the request of the Organization. Prior to the hearing, the Organization wrote to the Carrier in part as follows:

> "Confirming our telephone conversation of this date /February 19/ I am now in receipt of the above mentioned G-250 which fails to list Mr. S. Kondracky

as a witness to be present at the hearing. Since Mr. Kondracky must be considered the PRIME material witness, I request that the hearing again be postponed until Mr. Kondracky can be summoned to appear."

The full text of the Carrier's reply, dated February 20, was as follows:

"Reference your letter of February 19, 1980 regarding Notice of Hearing (Form G-250) concerning injury to S. Kondracky.

"Due to the seriousness of the injury of Mr. Kondracky, it is imperative that this Hearing be held on the time scheduled, you have already granted one (1) postponement."

While the Carrier's reply may have been inartfully worded, it does not address itself to the Organization's request. The "seriousness of the injury" (and its possible resulting affect on disciplinary penalty to the Claimant) would appear to give more rather than less reason for a postponement to see if Kondracky could be made available.

The Carrier's reply does not indicate any knowledge that Kondracky was, at the moment, so critically ill that his testimony would be impossible. If this had become apparent, the question of proceeding with the investigation without him would have properly been considered in another light. But, on February 19 -- only three weeks after the incident -- the request for postponement was not unreasonable, at least for a fixed period. Failure to grant such request under the circumstances at the time deprived the Claimant of a full and fair hearing.

It should be noted that objections as to the form of the charge and the failure to call the injured employe were both set forth by the Organization at the outset of the investigative hearing and thus are entirely timely and proper for the Board's consideration.

The Organization also raises other objections as to rule-required copies of notices and furnishing of hearing transcripts. These may have merit but do not require detailed analysis in the face of the Board's findings on the two objections reviewed.

These findings are sufficient to require that the claim be sustained, as provided in Rule 6-A-2(d), without comment on the testimony and evidence as to the events of January 29, 1980.

FINDINGS:

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

The Carrier and the Employes involved in this dispute are respectively Carrier and employe 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.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute waived right of appearance at hearing thereon.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:

Nancy J. Dever
Acting Executive Secretary

Dated at Chicago, Illinois, this 17th day of March 1983.

Carrier Members' Dissent
to
Docket No. 3981, Award No. 3975 - RYA v. Conrail
(Referee Marx)

The decision rendered by the Majority in this case is both a travesty and a tragedy. It is a travesty because it corrupts the decisional process by injecting imagined due process deprivations where none existed. It's a tragedy because it reinstates an employe who, based on this record, was at least partially responsible for the death of a fellow employe. The decision does not purport to exculpate the claimant nor does it endeavor to show any correlation between the so-called due process wrongs, and the weight of the evidence proving his neglect. There was absolutely no attempt made to show, assuming arguendo, a failure to give the specific charge called for by the contract or a failure to call the injured employe as a witness, that claimant's rights were prejudiced thereby. In short, the harmless-error doctrine applies where prejudicial error cannot be proven. The Majority would hold the Carrier's disciplinary trials to higher standards than those applicable to criminal cases. In Harrington v. California (395 U.S. 250) Justice Douglas, speaking for the Supreme Court, held:

> "We said that . . . not all trial errors which violate the Constitution automatically call for reversal."

Moreover, even where the appellate Courts decide that prejudicial error was committed in the lower court, the case is remanded for a new trial, the Defendant is not exonerated, as he is in this instance.

In reference to alleged procedural technicalities, the Majority is well aware that railroad trials do not suffer with the problems founded upon constitutional restrictions imposed by the courts. Apropos to this discussion,

the Majority's attention is invited to a book entitled "The Price of Perfect Justice" written by the respected jurist Judge Macklin Fleming. His thesis was succinctly described by a reviewer in a rather vivid manner:

> "The highest appellate courts in the nation have become so obsessed with 'the perfect trial' that they have lost sight of the fair trial. As one consequence, our system of criminal law is bogged down in a swamp of legalisms, technicalities and judicial booby traps. In this morass, the fundamental question of guilt tends to disappear. The goddess of justice finds herself holding a pair of cockeyed scales and an impotent sword.
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> "It is from this vantage point, as an appellate judge required to interpret the mandates of his judicial superiors that Judge Fleming has witnessed the maddening deterioration of our criminal law. He and his colleagues have become, in effect, umpires for the games defendants play. Daily they are compelled to give practical effect to the bizarre theories handed down from above.
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> "Judge Fleming dryly describes the delaying tactics that impede criminal justice. These he terms 'sidetracking' and 'main-lining.' The defense lawyer who elects to sidetrack a prosecution may begin by attacking the arrest warrants, or the composition of the grand jury, or the qualifications of the judge. A lawyer may then attack the constitutionality of the law itself, or contend that excessive publicity prevents a fair trial, or appeal from preliminary rulings. Once a case gets back on the main line, the prosecution can be slowed to a crawl by a dozen other delaying motions.
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> "Conviction and sentence no longer mark a terminal point. A defendant found guilty in a state tribunal needs only to cry 'due process' or 'equal protection' or 'retroactivity' in order to leap into the federal courts for review. Defense lawyers have been given great balls of twine, and they have learned to tie justice into knots."

Unfortunately, the Majority's decision lends credence to the belief that justice can be hobbled and Carrier's disciplinary efforts crippled by the utilization of such tactics. In U.S. v. Garsson, 291 F. 646 (U.S. D.C. S.D. of N.Y.) Judge Learned Hand stated:

> "Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. * * * Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime."
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> (Emphasis Supplied)

It is clear to the Dissentors that the Majority permitted "watery sentiment" to obstruct and defeat the imposition of a proper and legitimate penalty upon an employe who had seriously failed in the performance of his duties.

Following its usual format, the Organization had listed a number of procedural objections as the basis for overturning the discipline in this case. They contended the charge was not specific and for that reason Claimant was denied a proper defense. The trial record consisted of 72 pages. The Trial was postponed from February 15 to February 25, 1980 at the request of Claimant's representative. At the onset of the Trial, the Claimant was asked if he had received "proper notice" and he replied in the affirmative. The notice of charge contained the time, date and place of the involved incident and specific notification as to Claimant's alleged responsibility in the matter. The exhaustive nature of the testimony given coupled with the prepared statements read by Claimant's representatives at the conclusion of the Trial was abundant proof that Claimant and his several representatives came well prepared to answer the charges. Based upon these facts, the conclusions of the Majority are in fundamental error.

Award 2219 (Coburn):

> "* * * The essential element of notice to an accused is that it be sufficiently precise to enable him adequately to prepare his defense. On the record in this case we find that the notice served on the Claimant met that requirement. A reasonably prudent man receiving such notice would anticipate being questioned on matters relating to his responsibility for what happened at the time and on the date specified and would be prepared to defend himself."

Award 3253 (Zumas):

> "With respect to the allegation that Claimant was not charged as required under the rule, the Board finds that the notice to appear for investigation was sufficiently precise so as to enable Claimant to prepare his defense. The better reasoned awards on this issue do not require that Claimant be specifically charged with an offense in order to comply with the rule."

Award 3445 (Dolnick):

> "Charges need not identify the Rules which the Claimant is alleged to have violated. It is not necessary to cite the many awards of this and other Divisions supporting this principle. Claimant was adequately advised of the charge, he was not misled, nor was he deceived. The charge, as described in the February 19, 1976, letter is sufficiently specific to comply with Article XIII (b) of the Agreement.
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> "The assessed 60 day suspension penalty is predicated on a finding that the Claimant switched four (4) cars 'against SP 245283 knocking said car off spot at Houston Warehouse Service track 17 damaging building and tow motor at approximately 9:20 A.M., 2/12/76' and for vilating some Uniform Code of Operating Rules and Superintendent's Special Instruction #44 dated January 1, 1976.
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> "* * * Carrier was not required to specifically mention that instruction in the investigation notice of February 17, 1976. It is sufficient that the specific charge implied a probable violation of that instruction."

Award 3678 (Mesigh):

> "From a review of the record and the hearing transcript, this Board concludes that the Notice to appear for investigation was sufficiently precise to enable Claimant to prepare his defense. Certainly, he could anticipate being questioned on the matter relating to his playing cards or gambling on the date specified and his responsibility for what happened at the time alleged, thereby being prepared to defend himself as to those allegations. From the testimony by the charging officer, Claimant, on the date in question, was told that he was being cited for violation of alleged gambling on the Carrier's property while on duty. (See Awards, Fourth Division 3253 and 2219)."

The Organization also asserted and the Majority concluded that Carrier failed to call certain witnesses, including Brakeman Kondracky, who suffered fatal injuries. This argument was frivolous in the extreme. Even if the employe had survived, common knowledge would indicate that his attendance at a trial as a witness would have to be postponed for many months. As facts later proved, Carrier's judgment in this matter was sound. In reference to other witnesses demanded by the Organization, the Claimant's representative stated at the hearing that:

> "if anything is developed at this hearing that I feel their presence is necessary I will arrange for it."
> (Emphasis Supplied)

We submit that Carrier called all necessary witnesses and the Organization was unable to prove that any witnesses not called could have supplied any additional information not brought out in this very complete record.

In reference to the question of specificity of the charge Third Division Award 11775 (Hall) would appear to be directly on point, where it was held:

> "Claimant was represented by those of his own choosing and given an opportunity to cross examine witnesses called by the

"Carrier. Claimant knew he was charged with the responsibility of causing a collision between a motor car in his charge and the engine of a train. He was charged generally with failure to follow safety rules. In Award 1310 (Wolfe) it was said:

> "'In these matters of discipline for infractions of rules made for the safety of the public and fellow employes, the action of the railroad management cannot be lightly interfered with. It has the obligation and responsibility for the safe operation of its road.'"

In connection with non-prejudicial errors Third Division Award 9637 (Johnson) cites earlier Award 4169 holding:

> "In our dealing with such a disciplinary case as this it would seem clear that in addition to our being charged with the responsiblity of seeing to it that the Claimant has had a fair hearing on a proper charge, all pursuant to the provisions of the Agreement, we must also bear in mind the fact that in such a case our decision is important to the safety of the traveling public and that we owe that public they duty of not reinstating, on purely technical grounds, a Train Dispatcher who has admitted making such a mistake."

Award 2564 (Weston):

> "Claimant's own testimony shows a flagrant disregard of the trust and duty owed Carrier by an employe in his position and amply establishes the case against him, even though a complete transcript of the investigation has not been furnished the Board. That Claimant recognized full well that the yard crew was engaged in wrongful activity is demonstrated by his testimony that he did not report the incident immediately 'Out of fear of reprisal to my personal safety, and also due to the fact that I was supposed to be in the confidence of Mr. Lloyd and Mr. Fetchko of Safety and Security.'
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> "Claimant's own testimony establishes the charges against him and persuades us that no valid basis exists for substituting our judgment for that of Carrier in this matter. (See Fourth Division Award 2309 where the Carrier did not sustain its burden

"of proof.) We agree with Awards 12424 and 16952 of the First Division and might find Carrier's case wanting since it failed to submit a complete transcript of the hearing if again it were not for the fact that Claimant himself has testified to the facts that are controlling in this situation.

"The record does not disclose any material procedural defect. The fact that Claimant was required to attend a preliminary investigation without a representative is not reversible error in view of Claimant's testimony and the difficulties involved in combatting pilferage. Strict rules of criminal procedure do not apply to these disciplinary proceedings and we are satisfied that there was no prejudicial violation of elementary principles of fair play or of the Agreement.

"The claim will be denied."

(Emphasis Supplied)

Award 2922 (O'Brien):

"It is obvious that claimant was in charge of the crews working in the Chevrolet plant on the claim date, and, as such, it was his responsibility to see that all work required of the crews had been completed. Yet all the work of the Chevrolet assignments had not been completed at the time he released the crews as evidenced by the fact that Chevrolet Traffic Dep't requested placement of a car during the crews' tour of duty. Claimant however, requests that he be exonerated from his responsibility because Carrier has in the past condoned early quits. We disagree. Claimant must bear full responsibility for any consequences of his releasing the crews. So when work required by Chevrolet was unable to be completed he must be held responsible. Certainly Carrier has not condoned 'early quits' when work has not been completed on a released crew's tour of duty as was the case here. It is immaterial that the Chevrolet plant later ordered a car which was not originally on the ordering list. Claimant had responsibility to see that all the work required at the plant during his tour of duty was completed. This he failed to do. Claimant made a mistake in judgment for which he was duly disciplined. By releasing the crews he acted at his own peril.

"It was not reversible error that Mr. Prince, the GM employee, failed to testify in person at the hearing. Claimant's case was not prejudiced by his statement. Carrier has clearly sustained the burden imposed upon it."

(Emphasis Supplied)

First Division Award 16343 (Daugherty):

> "* * *. As a general rule, we are of the opinion that, in the absence of compelling evidence of abuse, for us to attempt to modify carrier-imposed discipline in particular cases like the one at hand would launch us on to an uncharted and unchartable sea. In virtually every such case we should be driven in the end to substitute our judgment for that of the carrier. This we decline to do here."

For the reasons shown above, the Majority's decision in this case performs a grave disservice to the disciplinary process in the R.R. industry, and more important it rewards a serious dereliction of duty by reinstatement of an employe proven to be unfit for the service. For the reasons stated, we vigorously dissent.

W. F. Euker

D. M. Lefkow

P. V. Varga