

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISIONAward Number 4057
Docket Number 3956

Referee George E. Larney

PARTIES Railroad Yardmasters of America
TO
DISPUTE: Consolidated Rail Corporation

STATEMENT OF CLAIM: Yardmaster Arlen O. Bottorff be paid for time lost in attending the investigation and for five (5) days lost in actual suspension as assessed discipline. Also that his record be cleared.

OPINION OF BOARD: Claimant, Arlen O. Bottorff, a Yardmaster at Detroit, Michigan was cited for an investigation along with Kenneth H. Andrews, a Retarder Operator, in connection with an accident that occurred in and around 9:45 PM on December 15, 1979, wherein two (2) cars were humped into Track 32, which was occupied at the time by a diesel engine. Hearings in the matter to determine the responsibility of both the Claimant and Andrews in the same proceeding were held on January 2 and 7, 1980. As a result of the evidence adduced, Carrier adjudged Claimant to have been culpable and accordingly imposed discipline of a five (5) day actual suspension.

Merits aside, the Organization vehemently alleges Claimant was denied his due process rights at the investigatory hearing as a direct result of misconduct by the Hearing Officer, Trainmaster, N. E. McGraw. The Organization maintains that from the very outset, Carrier prejudged Claimant's guilt in connection with the subject accident and that such prejudgement is blatantly reflected by the wording of the Notice of Investigation issued Claimant. In pertinent part this Notice, dated December 17, 1979, reads as follows:

"This notice is issued in connection with the charge outlined below:

Your violation of Rule 400N-7, Rules for Conducting Transportation, whereas two cars were allowed to be humped into track occupied by a diesel unit at approximately 9:45 P.M. on December 15, 1979, W.B.C., Detroit, Michigan. This is a joint hearing-investigation."

It is noted from the record evidence that the Notice of Investigation issued to employe Kenneth Andrews is worded differently, and reads in pertinent part as follows:

"Please appear at Room 103, Conrail Station, 2405 W. Vernor, Detroit, Michigan, at 2:00 P.M. on Thursday, December 20th, 1979, for an investigation to determine the responsibility, if any, in connection with your alleged failure to divert cars from track No. 32, which was occupied by diesel unit."

The Organization alleges McGraw's misconduct of the Hearing is evidenced by his withholding of pertinent information during the proceedings, thereby blocking an attempt to develop relevant facts regarding the occurrence of the accident, by disallowing reasonable questions to be put to witnesses, thereby preventing the right of Claimant's representative to conduct competent examination and cross-examination of all witnesses, and in a general way comporting himself as an adversary, rather than maintaining an impartial demeanor.

The Organization takes the position that the claim in this dispute is not of gigantic magnitude and that whatever financial difficulties were experienced by the Claimant from the five (5) day suspension, have no doubt been overcome long ago. However, the central point in contention, the Organization submits, is that Hearing Officer McGraw not be permitted to continue functioning in this prejudicial manner. The Organization notes that McGraw was once before advised of his wrongful conduct of a hearing by Referee Eischen in Awards 5 and 6 of Public Law Board 2287, and as a result the claims were sustained. Referee Eischen stated in pertinent part the following:

"Finally, the Organization protests that the hearing was not conducted in a fair and impartial manner. Specifically, it is asserted that the wording of the charge indicates a prejudgment of guilt on the part of the Carrier and that the subsequent conduct of the hearing by Hearing Officer N. E. McGraw substantiated Carrier's predisposition. We agree with the Organization that the wording of the charge suggests a possible prejudgment on the part of the Carrier. Yet, in the face of a fairly conducted hearing, such wording would not be a fatal procedural defect. In the instant case, however, the hearing was not carried on in a fair and impartial manner.

Early on in the hearing the Organization requested sequestration of witnesses. The request was refused despite the Organization's protest, citing the 'Manual for Supervisors in Handling Hearings and Investigations', which suggests that sequestering should be the rule rather than the exception unless the employee or his representative request otherwise (TP-8). Shortly thereafter (TP-10), the Hearing Officer interrupted a question by Claimant's representative dealing with Carrier's apparent prejudgment of the accused. The Organization again cited the Manual for Supervisors, quoting, 'the framing of questions so as to assume the fact; or statements by the officer conducting the proceeding which might be construed as prejudgment, should be avoided.' The Hearing Officer overruled the Organization's objection and instructed the witness not to answer the question put to him.

In view of this hearing conduct, coupled with the prejudicial wording of the charge leveled against Claimant, we find that Claimant was not afforded a fair and impartial hearing.

Accordingly, the claim is sustained on that procedural basis, with no ruling made or implied upon the merits."

Carrier in its defense of the charges advanced by the Organization merely states that review of the investigation transcript by the Board will prove Claimant was dealt with fairly and without prejudice. Carrier asserts the Organization's attempt to discredit the investigation is merely a low, under-handed tactic employed to cloud the central fact of the Claimant's guilt with respect to the charge. Carrier argues that Claimant as the Yardmaster on duty, was responsible for the safe movement of the train and as a result of his negligence and off-handed attitude to his duties, the accident occurred. Carrier contends Claimant cannot be allowed to shirk his responsibility for the collision.

Our review of the entire record evidence leads us to conclude the Organization's allegations with respect to the denial of Claimant's due process rights, as a result of the wording of the charge, and the Hearing Officer's conduct of the investigation have merit and must prevail. We are appalled at the manner in which McGraw presided over the hearing and we find the wording of the charges in the Notice issued to Claimant to constitute a prejudgment of guilt especially when compared to the wording of the charges involving the very same incident which was issued to employe Andrews. We suspect from our reading of the investigation transcript that Claimant was not altogether free of responsibility for the resultant subject accident, yet we must give greater consideration to the protection of his due process rights. To this end, we rule to sustain that portion of the claim covering payment for the five (5) days lost as a result of the suspension and that his record be cleared of this discipline.

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 Employes 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.

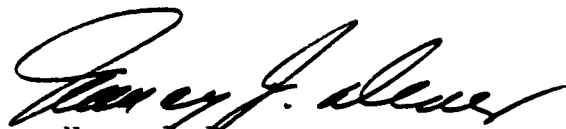
The parties to said dispute waived right of appearance at hearing thereon.

A W A R D

Claim sustained as per Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:



Nancy J. Bever
Executive Secretary

Dated at Chicago, Illinois, this 18th day of August, 1983.