

NATIONAL RAILROAD ADJUSTMENT BOARD  
FOURTH DIVISION

Form 1

Award No. 4880  
Docket No. 4867  
93-4-91-4-43

The Fourth Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

(The American Railway & Airway  
(Supervisors Association: A  
(Division of TCU

PARTIES TO DISPUTE:

(  
(Norfolk Southern Railroad  
(Company

STATEMENT OF CLAIM:

- "1. Carrier has violated the Agreement, and in particular Addendum Number 4 dated July 1, 1987 when as the result of a hearing held June 26, 1990 on charges of "Failure to perform your duties---.", Mr. C. Toles - Foreman was disciplined in the form of a Three (3) Day Suspension. Said discipline is unjust, unwarranted and an abuse of Carrier's discretion.
2. Because of this violative action, Carrier be required to make Mr. Toles whole for lost wages and clear his record of all reference to this incident."

FINDINGS:

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

The carrier or carriers and the employe or 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.

Parties to said dispute waived right of appearance at hearing thereon.

At 4:00 A.M. on April 28, 1990, two Service Attendants working under Claimant's jurisdiction moved a 3-locomotive consist out of the Macon Shop. The Attendants traveled out of the shop and reached speeds of 12 mph in an area with a speed limit of 5 mph. When the Attendants reached the south end of the engine terminal, they were unable to stop the consist before it reached a derail. As a result, one locomotive was derailed and a Service Attendant was injured when he leaped off the unit.

On May 10, 1990, Claimant was issued a letter directing him to attend an Investigation in connection with the following charge:

"Failure to perform your duties as a supervisor, specifically, not supervising Service Attendants during switching operation to ensure sufficient brakes were operating on controlling engines and speed limit (5 MPH) was being observed per bulletin instructions."

At the outset of the Investigation, Claimant's representative objected to the letter of charges, stating it did "not contain a statement of the date, time, place that this occurrence was supposed to have happened." The objection was noted by the Hearing Officer and the following exchange with Claimant ensued:

"Q. Now that we have noted Mr. Austin's objections, do you understand the charges, Mr. Toles?

A. No, sir, I do not.

Q. What is it you don't understand about it?

A. I don't think any, I am just here to answer the charges about so many things.

Q. You don't understand it. Okay, maybe you will as we go along. Will you state your full name, address and occupation?"

After preliminary questioning, the Hearing Officer and Claimant had the following exchange:

"Q. Are you ready for this investigation to begin?

A. No, sir, I am not ready.

Q. Will you elaborate on why you are not ready?

A. Because I do not understand the charges.

Q. Well, they will develop as you go along. You will understand them then. Mr. Austin, are you agreeable to representing Mr. Toles in this investigation?"

When the first witness was called, the Hearing Officer immediately asked him what he knew "about the incident of April 28, 1990, about 4:00 A.M. at the Engine Terminal?" The witness then began to describe the derailment and the injury of one of the Service Attendants. Claimant's representative then made the following objection:

"Mr. Sims, I have made an objection to the letter of charges, in that we were unaware of the, in that the letter of charges does not state the precise circumstances that Mr. Toles is charged with and therefore, violates the agreement. And it is my contention that you are now bringing forth new charges against Mr. Toles and I want to ask for a short recess to confer with Mr. Toles to see what he knows what you are talking about. We were not prepared to answer questions, because we did not know what the charges were."

The Organization argues Carrier violated the Agreement by not issuing a proper notice of charge to Claimant. It relies upon Section B, paragraph 1 of Addendum No. 4 (Agreement of May 7, 1987), which provides, in part, as follows:

"The notice shall contain a precise statement of the date, time, place and nature of the occurrence or incident that is to be the subject of the investigation."

There is no question that the Carrier did not comply with this provision. The Carrier has admitted the letter of charges "was technically flawed." The charge makes no reference to the date, time or place of the occurrence. Claimant and his representative made timely objections. The question is whether Carrier's failure to abide by the Rule mandates that the Investigation and resultant discipline be declared null and void. As Addendum No. 4 does not specifically require such, the Board must look to the "common law" of the industry.

We have often held that the notice of charge must be of sufficient specificity so as to put the employee on notice as to the subject matter of the hearing. If we were to look only at the portions of the record summarized thus far, we might be inclined to state the charge had not met that purpose, and sustain the Claim.

The charge did not advise Claimant as to when he might have been derelict in his duties, and there is no clear indication in the charge the Carrier intended to investigate this specific incident. Furthermore, it is not the purpose of the Investigation to clarify the charge, as suggested by the Hearing Officer.

However, in Third Division Award 16344, the Board stated:

"The Board has held in numerous awards that the purpose of rules such as 9(a) (requiring a precise charge) is not to create technical loopholes to permit an employe to escape discipline, but to enable him to prepare his defense so that he is not misled, deceived, or taken by surprise."

Although Claimant professed ignorance as to the subject matter of the Investigation, his actions show this not to be the case. Most significantly, Claimant's representative introduced a letter written by the injured Service Attendant to the Master Mechanic. That letter, dated May 13, 1990, stated:

"This is to inform you that Mr. Clarence Toles instructed me and all other machinist operators on several occasions to check the brakes on locomotive in the shop or in any other switching operation to make sure they were in working order.

This is written in reference to the derailment which occurred April 28, 1990 at Norfolk Southern Railroad involving myself and Mr. Curtis Langston."

This letter was written in the five days between the Notice of Charge and the Investigation. Obviously, it was written in response to the Notice of Charge for the purpose of assisting Claimant in his defense. Notwithstanding Claimant's objections to the contrary, he cannot claim he was misled, deceived or taken by surprise.

We note it is unusual for a discipline rule to enumerate what must be contained in the charge, as is the case herein. The fact that the Rule is specific does not change the purpose, however. The parties have merely codified what this Board has always stated should be contained in a notice of charge. When those elements have been missing, we have looked at the circumstances to determine if the employe was properly notified of the charge against him.


Turning to the merits, we do not find there is substantial evidence to support the charge. Claimant's job is to supervise, not to do all the work. The record indicates he had given instructions to check brakes prior to the movement of locomotive consists. The Service Attendants were qualified to make the move, but failed to comply with Claimant's directives. The failure of subordinates to follow a supervisor's instruction is not necessarily proof of a failure to supervise. The three day suspension assessed Claimant, therefore, was unwarranted. The Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Fourth Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of February 1993.