

PUBLIC LAW BOARD NO. 2287

AWARD NO. 5

CASE NO. 5

PARTIES TO THE DISPUTE:

Railroad Yardmasters of America

and

Consolidated Rail Corporation

STATEMENT OF CLAIM:

System Docket No. CR-5  
Northern Region

Appeal from discipline of fifteen (15) days' actual suspension assessed E. F. Carr, on the following charge:

"Your violation of Rule 400N-7, Rules for Conducting Transportation, whereas you failed to protect offtrack crane set up on tracks No. 1 and 2, Departure Yard, rerailling car in track No. 32, WBC, which resulted in damage to crane during your tour of duty as Yardmaster, Train Yard, between 11:55 AM and 4:00 PM on December 12, 1978."

OPINION OF BOARD:

At the time the claim arose Claimant was working as a Yardmaster at Carrier's Train Yard, Detroit, Michigan on the first trick. On December 12, 1978 Claimant was relieved after his shift at or about 2:15 PM by Yardmaster E. E. Pegg. Subsequently, at or about 4:00 PM that same day, a yard crew, under Mr. Pegg's supervision, while shoving cars into Track No. 2 in the Departure Yard, collided with an offtrack crane set up at Tracks No. 1 and 2. As a result of this incident Claimant was notified to attend a hearing to investigate:

Your violation of Rule 400N-7, Rules for Conducting Transportation, whereas you failed to protect offtrack crane set up on tracks No. 1 and 2, Departure Yard, rerailling car in track No. 32, WBC, which resulted in damage to crane during your tour of duty as Yardmaster, Train Yard, between 11:55 AM and 4:00 PM on December 12, 1978.

Following the hearing Claimant was notified that he was being disciplined fifteen (15) days actual suspension. R. Y. A. Division Chairman L. R. Hinds appealed the discipline on behalf of Claimant. After denial of the initial appeal, further appeals were handled by R. Y. A. General Chairman J. C. Thomas and were in turn denied at each level.

The Organization bases its appeal on procedural grounds and on the merits of the case. The procedural objections raised include: 1) failure to notify the Division Chairman in accordance with Rule 6-A-1(b) of the Agreement; 2) failure to give sufficiently specific notice of the charges; 3) failure to permit Claimant to "face his accuser"; and 4) failure to provide a fair and impartial hearing.

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

6-A-1(b) A yard master 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 accused yard master or his duly accredited representative shall be permitted to question witnesses insofar as the interests of the accused yard master are involved.

While failure to notify the Division Chairman in accordance with the above-cited rule is not a "technical" failure, the Organization waived such notice as a result of its failure to bring the matter up at the Hearing and Investigation. It should be noted that it is this omission by the

Organization and not the fact that the Division Chairman appeared at the Hearing and Investigation even absent proper notice, which inveighs against the first procedural objection.

With respect to the specificity of notice, we do not find that the charges were so vague or ambiguous as to prevent Claimant and his representative from preparing an adequate defense. Although the specific incident in question did not occur "during [Claimant's] tour of duty", events precipitating the incident spanned Claimant's and Mr. Pegg's contiguous tours of duty.

In addition, the Organization protests that at the Hearing and Investigation Claimant was not afforded the opportunity to "confront his accuser". The charge against Claimant was signed by Mr. A. F. Duncan, but Mr. Duncan was not present at the hearing. On this record it is evident that Mr. Duncan, as representative of the Carrier, simply served a ministerial function. Accordingly, his absence from the hearing was not per se a fatal defect.

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. This 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 employe 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.

AWARD

Claim sustained.

J. C. Thomas  
 Employe Member

W. J. Welch - Dissenting  
 Carrier Member

Dana E. Eischen  
 Dana E. Eischen, Chairman

- A. Supvr. Manual NOT an agreement.
- B. Agreement does NOT bar group hearings.
- C. Charge was specific NOT prejudicial.

Date: 9-25-81