Public Law Board No. 6584

Parties to Dispute

United Transportation Union Yardmaster Division	)	
vs	)	**Case 5/Award 5**
Soo Line Railroad Company Canadian Pacific Railroad	)	

Statement of Claim

Request that Yardmaster J. A. Murphy have the ten (10) day suspension removed from her record; that her discipline record be brought back to step one; and that she be paid for all lost time including payment for attending the investigation on August 13, 2002.

Background

The Claimant was advised on July 24, 2002 to attend an investigation in order to determine facts, and place responsibility if any, for allegedly failing to perform her duties properly on Monday, July 22, 2002. According to the Carrier this resulted in the derailment of one train car and damage to another. The accident occurred while the Claimant was working her assignment as the hump yardmaster at the St. Paul Hump Yard which is located in St. Paul, Minnesota. Concurrently a fellow switchman and engineer were also advised to attend the same investigation and were charged with responsibility for the same accident. The instant case does not deal with those other employees. It only deals with the charges filed against yardmaster J. A. Murphy. After postponement an investigation was held on August 13, 2002 at the Carrier's facilities located St. Paul,

Minnesota. On August 23, 2002 the Claimant was advised that she had been found in violation of Rules 1.6 and 1.46 of the Carrier's General Code of Operating Rules. She was assessed a ten (10) day suspension to run from August 23, 2002 through September 1, 2002.

This discipline was appealed by the Organization. This appeal was denied by the Manager of Yard Operations at the Twin Cities' Terminal. Absent settlement of the claim on property after it had been appealed properly up to and including the highest Carrier officer designated to hear such the appeal involving Ms. Murphy was docketed before this Board for final and binding adjudication.

Discussion

The rules referenced by the Carrier in this case are the following which are cited here in pertinent part.

Rule 1.46 Duties of Yardmasters

> The yardmaster is responsible for and shall directly supervise yard crews, clerks, and all other employees working in the yard. The yardmaster must see that they work in a safe, efficient, and economical manner, according to the rules, regulations and instructions of the railroad. Yardmasters must ensure the prompt and regular movement of cars, especially the proper makeup of trains and their movement into and out of the yard.
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> At locations where yardmasters are on duty, employees in train, engine and yard service must comply with the yardmaster's instructions. At locations where no yardmaster is on duty, these employees will work according to the instructions of designated employees.

Rule 1.6 Conduct

Employees must not be:

.....

2. Negligent.

The record shows that at about 1:30 AM on Monday, July 22, 2002 rail car IMRL 110069 derailed and rail car CP 80838 was damaged in the vicinity of the east end of tracks 18 and 19 at the Carrier's St. Paul, Minnesota hump yard. The yardmaster on duty on the 11:00 PM shift was the Claimant who was holding assignment 4745.

According to the Organization the investigation itself was not conducted in accordance with due process principles and a true and accurate record of the proceedings was not kept as required by the labor Agreement. At issue here, according to the Organization, is the proper meaning and application of Article 19(h) of the parties' Agreement which states the following, in pertinent part.

Article 19 (h)

> True and correct stenographic records will be taken at all investigations held under this Article and a complete transcript of all proceedings in all cases shall be given to the representative upon request. The General Chairman of the Railroad Yardmasters of America may have his own stenographer at any investigation if he so desires. In the event a question arises concerning the transcript of testimony, that taken by the Carrier's stenographer will be official transcript.

According to the Organization there is arbitral precedent supporting its argument here and Award 5810 of SBA 140 concluded that language comparable to that found in the Yardmaster's Agreement ought to be followed to the letter.

In response to the procedural objections raised by the Organization the Carrier observes that it has used "...electronic recording devices for many years..." on this property when conducting investigations and that a "...stenographic record is then made from that recording...". The Carrier does not deny that there are inaudibles on the recorded version of the investigation in this case but it states that this is the result often of two people speaking at the same time. All in all, however, the Carrier argues that the small amount of information either missing or undecipherable in the transcript does not detract from the evidentiary status of the record as a whole. Further, according to the Carrier, the labor Agreement does permit the Organization to record or use a stenographer if it wishes at any investigation in order to have a duplicate record of the proceedings.

According to the Organization the Carrier erred when it cited rules that the Claimant allegedly violated, upon assessment of discipline, when such rules were not cited when the notice of the investigation was issued. The Carrier's response to this objection is one of silence.

Further, according to the Organization's appeal on property, yardmaster Murphy was also "...disciplined for her alleged violation of Timetable No. 3 of special instructions which deals with job briefings albeit the transcript of the investigation shows that she did do a job briefing with the crew...".[1] Response to this argument by the Carrier is that the Claimant did do a job briefing at the beginning of the shift on July 22, 2002 but she did

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[1]Employees' Exhibit E @ p. 3 of 3.

not rebrief the crew when circumstances changed which is why the accident happened. By assuming that the conductor was aware of what was happening on tracks 18 and 19 and by further assuming that he would handle the situation safely amounted to a delegation of authority by the yardmaster. In the event of a mishap, however, which is what happened, the responsibility for the mishap fell on the shoulders of the yardmaster, and not on the shoulders of the conductor.

Findings

The Board will address first of all the procedural objections raised by the Organization in this case. A review of the language found in Article 19 (h) of the labor Agreement does appear to support the position of the Organization. Boards such as this are often guided in their interpretations of Agreement language by prior practice of parties. There can be no doubt that there is a long-standing practice on this property, and on most railroad properties, of taking an electronic recording of an investigation which is then converted to a written record. The reason for this is quite clear: the use of court stenographers is quite expensive and the parties to investigations in this industry, not to mention this particular property, have generally and mutually concluded that due process is appropriately served by means of a recording of investigations which are then transcribed into written records. The long experience of the neutral member of this Board also suggests that the most common practice in the industry as a whole is to take a recording of an investigation and then have it reduced to writing. After issuing a myriad

of Awards the neutral member of this Board has never been able to conclude that the use of an actual stenographer produces superior results with respect to the application of the principle of due process. The objection raised in this case is highly idiosyncratic and the Board is somewhat uncomfortable dismissing it out of hand and it is aware of precedent cited by the Organization that takes a more stricto dicto approach to the issue at hand. The Award cited is a relatively old one, however, which was issued some 20+years ago and if there are other Awards which have taken the same position on this type of issue this Board has never been apprised of them. Thus that Award is not only quite outdated in its thinking, but it represents a minority position as far as mutually accepted procedures for recording investigations in the industry. The experience of the neutral member of the Board has also led him to conclude that transcripts produced by professional court reporters also suffer gaps when two persons at a hearing or an investigation talk at the same time. So that feature uncovered in the transcript of the instant case is not so uncommon. Lastly, as the Carrier observes, the language of Article 19 (h) does permit the Organization to also have it own record of an investigation albeit the Board is unaware of any instances where both a Carrier and an Organization have actually engaged in such duplicative type of behavior.[2] In view of all of the above considerations the Board

[2]Actually, there are examples available of practices whereby both parties do keep separate records of hearings dealing with appeals of discipline or alleged rule violations of labor agreements in a union-management relationship. Arbitrations stemming from unresolved grievances filed under the National Bituminous Coal Operators' Agreement in the coal industry in the U.S. are electronically recorded by means of recording devices brought by both parties to the arbitration hearings. There has never been such a practice, however, to the knowledge of the neutral member of this Board, in the U.S. railroad industry.

believes that it is but following the most common and by far the majority practice in the industry when it concludes, with respect to the objection raised here, that language dealing with "...stenographic records..." means a record that is electronically generated and then converted to a written transcript. In view of these considerations the Board will dismiss the procedural objection raised in this case on this matter.

The Board has studied the objection by the Organization which states that the Claimant was found guilty of violation of certain rules and that these rules were not cited in the notice of investigation. On this type of issue Boards such as this have generally ruled that failure to cite a rule per se when issuing charges is not, in and of itself, a violation of a Claimant's due process rights as long as the statement of the charge itself is specific enough to provide sufficient evidence of the rules implied. A review of the notice of investigation in this case does show that the Claimant was charged with failure to perform her duties "...in an appropriate manner..." under very specific conditions and that reasonable minds could but conclude that the rules at bar would include those dealing with the responsibilities of a yardmaster which are the subject-matter of Rules 1.46 and 1.6. Implicit in Rule 1.46 are the special instructions found in Timetable No. 3 dealing with job briefings given the responsibilities of yardmasters outlined in Rule 1.46. Although there may indeed be instances wherein not citing rules when filing charges provides insurmountable obstacles for defense against the charges, the Board is not persuaded that this is one of those cases. All parties to the investigation were aware of the issues in this case and they were a fortiori aware of what rules may or may not have been

violated. There was furthermore an idiosyncratic factor in this case which also provided challenges when filing charges since not all of the employees to whom the notice of investigation was directed were yardmasters covered by the yardmaster's Agreement. Only the Claimant to the instant case fell under that aegis. In view of the full record before it, therefore, the Board will dismiss the objection raised here. The claim in this case will be decided on its merits which is what the Board will address next.

On merits the Board observes that the record shows the following. Findings by the Carrier that the Claimant was in violation of the special instructions of Timetable No. 3 dealing with job briefings are substantiated in part. During her testimony at the investigation the Claimant states that she was aware of who the crew was on the date in question when the accident happened because "...we had job briefings at the beginning of the shift...". There is nothing in the record to contradict this statement by the Claimant. But the argument by the Carrier is that after the shift began conditions changed and under the special instructions of Time Table No. 3 the Claimant ought to have rebriefed the crew and she did not do. She should have told the crew about the cars fouling the switch. This she also did not do. What she did, according to the Carrier, was depend on Mr. Schneider who was the conductor/switchman to know what to do in order that the cars could have been handled correctly. Yardmaster Murphy knew that track 19 was "...out to foul..." as the manager of operations put it, and she should have handled the situation differently. In view of what she knew, and the manner in which the move of the cars was handled, the Board is persuaded that as yardmaster she was responsible for the movement

of the cars under Rule 1.46 which states that "...the yardmaster is responsible for and shall directly supervise yard crews, clerks, and all other employees working in the yard. The yardmaster must see that they work in a safe, efficient, and economical manner, according to the rules, regulations and instructions of the railroad. Yardmasters must ensure the prompt and regular movement of cars, especially the proper makeup of trains and their movement into and out of the yard...". Further, and as a factual matter, Schneider testified at the investigation that he did not "...recall..." knowing that there was any problem with track 19 fouling track 18 which was the genesis of the problem which subsequently caused the accident. What it appears happened is that the Claimant did delegate authority to conductor Schneider to handle the move of cars and he did not actually have the full picture albeit she may have thought he did. When asked at the investigation whether she checked with the conductor to be sure that he knew whether the cars on track 19 were in the clear of track 18 the Claimant answered in the negative. It was the Claimant's choice to have made an assumption about what Schneider knew or did not know. But since an accident occurred, the responsibility for the accident lay with the Claimant. It did not lay with employee Schneider who was the conductor.

The Board has examined the argument by the Organization that the accident which happened on July 22, 2002 was the fault of the new pro-yards system installed by the Carrier and that the Claimant had not been properly trained in the use of the new system. This is the second case before the Board wherein the issue of improper training of

yardmasters on the new pro-yards system has been raised.[3] With respect to this issue the Carrier states the following. The pro-yards system became operative in August of 1999 and at that time the old system of using retarder operators was formally if not factually abolished. The retarder operators were kept on duty for about 6 months after the pro-yards system because operative in order to allow personnel to make the transition from the one system to the other. The Claimant did train, according to the record, for the pro-yards system while retarder operators were still working, but she was familiar with the new system, according to the Carrier, since she had been working with it from about the beginning of 2000 without retarder operators at all.

The Carrier argues that the cause of the accident on July 22, 2002 was the result of negligence and the use of bad judgment. It was not the result of improper training. Upon the record as a whole, the Board is not persuaded that this is incorrect. The fact of the matter is that the switching operations on July 22, 2002 were not conducted in a safe manner and an accident occurred. After all was said and done the person responsible for the accident was the yardmaster who was the Claimant. The Carrier's determinations in this case, therefore, will not be disturbed.

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[3]See Case No. 4, Public Law Board No. 6584.

Award

The claim is denied.

Edward L. Suntrup, Chairman & Neutral Member

Larry E. Nooyen, Carrier Member

J. R. Cumby, Employee ~~Member~~

Date: 10/21/2004