Award No. 8714
Docket No. TD-10163

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Harold M. Weston, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that:

(a) The Missouri Pacific Railroad Company, hereinafter referred to as "the Carrier" violated the currently effective Agreement between the parties to this dispute, particularly Article 8, when it dismissed Mr. G. R. Martin from his regularly assigned position of Assistant Chief Dispatcher effective August 25, 1957 at Wynne, Arkansas, as a result of deficient and unsustained charges, such action being unjust, unreasonable, arbitrary and in abuse of the Carrier's discretion.

(b) Mr. G. R. Martin shall now be reinstated to the position of Assistant Chief Dispatcher to which he was assigned August 24, 1957 with all rights under the Agreement unimpaired.

(c) Mr. G. R. Martin shall now be compensated for all wage loss sustained as a result of Carrier's improper and unwarranted action.

OPINION OF BOARD: Claimant, at the time of his dismissal on August 25, 1957, was an Assistant Chief Dispatcher with about 21 years continuous service and almost 44 years aggregate employment with the Carrier. He was dismissed on August 25, 1957, because of alleged responsibility for the derailment of Train No. 363 after a portion of tracks near Gainesville, Arkansas, had been washed out by heavy rains at about 2:10 A.M., on August 14, 1957. The accident is alleged to have caused the Carrier a financial loss amounting to approximately $100,000.

The dismissal decision was not handed down until after an investigation had been duly held by the Carrier pursuant to Article 8 (a) of the applicable Agreement. Nevertheless, Petitioner contends that Claimant's dismissal violates the terms of the Agreement and in support of its position raises a number of procedural and substantive objections. Three of the objections made on the property—(1) that the safety requirements of Circular 44-D do not apply to Assistant Chief Dispatchers, (2) the hearing was held at hours unfair to

Claimant and (3) he was denied right to counsel—are frivolous and not supported by the record. More serious contentions are urged with respect to the merits of the case and Carrier's alleged failure to comply with prescribed procedural time limits.

As to the merits, Petitioner claims that the accident was caused by an "Act of God" and that the testimony of the witnesses, including members of the train crew involved, called at the hearing as well as the entire record support that conclusion.

It appears that applicable safety rules in force at the time in question required train dispatchers, "when heavy rains are reported," to "give train and engine men notice of same by train order" and to solicit frequently operators for weather data. The Carrier points out that Claimant admitted receiving a report of "heavy rain" but did not solicit operators frequently for weather data or have a train order issued although he had the report more than one hour before the train left Knobel, Arkansas, some 13 miles from the derailment point, where a message would have reached the crew of Train 363.

On the other hand, Claimant testified that he kept in touch with the train dispatcher and telegrapher then on duty, did not consider conditions abnormal and had taken all reasonable precautions on the basis of the information which he had developed. The Engineer of Train 363 stated that he had never known of a washout at the derailment site in thirty-five years and did not observe water running through the ties until 4 or 5 car lengths from the washed out track. There is other testimony in the record to the effect that the situation just prior to the derailment did not appear to call for emergency measures.

While we have considerable doubt as to whether Claimant is not being held to an over strict accountability, we are not prepared to upset the Carrier's findings on the question, particularly where safety, a prime responsibility of the Carrier, is concerned. We are disposed to give Carrier broad latitude in determining responsibility for accidents and the appropriate remedial and disciplinary measures to be taken in that regard.

However, Petitioner maintains that we are precluded from considering the merits of this case since the Carrier has failed to comply with essential procedural requirements of the Agreement. In support of this contention, it points to Article 8, subparagraph (b), which prescribes that within ten days after completion of the investigation required in discipline cases, both the employe involved and his representative will be given a written copy of the decision in the case. That the General Chairman, who assisted Claimant as his representative, did not receive a copy of the decision until twenty-one days after it had been rendered is undisputed. Subparagraph (b) of Article 8 is definite and clear in its language and conditions regarding the point in question and there is no doubt that the Carrier failed to comply with one of its plain requirements. Petitioner at no time expressly or, in our view, impliedly waived this requirement which, it is reasonable and fair to assume, must have been included for a definite purpose.

We would very much prefer not to base a finding on a procedural technicality. Nevertheless, as we had prior occasion to point out in a similar situation (see Award 8564), each of the parties is responsible for the inclusion of this language in the Agreement and what we may think of its wisdom, relative importance or soundness is not at all material. It is our function to interpret the Agreement as it now stands and not to rewrite it in accordance with our

own theories of labor-management relations. We are not disposed to strain interpretations in order to escape the technicalities of a plain meaning. Nor is it proper or desirable to resort to fictions and distortions to spell out a waiver, where none exists, in an effort to award a decision based on procedural defects rather than on the merits.

Here the Agreement is clear and unambiguous with respect to the immediate point in issue and it is entirely certain that the Carrier has not complied with a requirement expressly made by the Agreement essential to the imposition of discipline. In Award 8564, where a Carrier made a similar procedural objection, we sustained that Carrier's objection and disqualified the claim. We are not persuaded that a contrary principle should be applied here. Carrier's dismissal decision is not valid since it was not made in accordance with the terms of the Agreement.

While we are in sympathy with some of the language and views expressed in Awards 4781, 2945 and 1497, we are impressed with the manifest inconsistency of emphasizing in one case the necessity of limiting all consideration to the plain language of the agreement involved without considering the equities and then in another case insisting that principles of equity require the agreement to be ignored. As heretofore noted, our understanding of this Board's procedures and authority is that, in deciding the cases that come before us, we are limited to a consideration of the agreement and record involved. See Awards 8564, 8315 and 6907.

In the light of the foregoing discussion, we have no alternative but to find the Carrier's dismissal decision of no effect and to sustain the claim.

Claimant is entitled to be compensated for wages lost, less any compensation received in other employment.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived hearing on this dispute; and

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;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the applicable Agreement was violated.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 4th day of February, 1959.

DISSENT TO AWARD NO. 8714, DOCKET NO. TD-10163

The majority of the Board at the very outset recognized the gravity of the offense which eventually resulted in the dismissal of Assistant Chief Dispatcher Martin effective August 25, 1957.

With commendable candor the second paragraph of the majority's opinion stated:

> "The dismissal decision was not handed down until after an investigation had been duly held by the Carrier pursuant to Article 8 (a) of the applicable Agreement."

and then proceeds to set forth in three separate parts the procedural and substantive objections raised by the Employes on the property in an effort to have the action taken by the Carrier overturned. The majority recognized and clearly stated that these procedural and substantive objections raised by the Employes

> "* * * are frivolous and not supported by the record."

The majority then stated:

> "More serious contentions are urged with respect to the merits of the case and Carrier's alleged failure to comply with prescribed procedural time limits."

The majority seized upon these latter "procedural time limits" in order to overturn the action taken by the Carrier in removing from its service an Assistant Chief Dispatcher following an investigation "duly held by the Carrier pursuant to Article 8 (a) of the applicable agreement" as specifically found by the majority.

Although the majority made the observation:

> "While we have considerable doubt as to whether Claimant is not being held to an over strict accountability, we are not prepared to upset the Carrier's findings on the question, particularly where safety, a prime responsibility of the Carrier, is concerned."

It then hastened to explain its sympathy with some of the language and views this Board expressed in Awards Nos. 4781, 2945 and 1497, but nevertheless also hastened to follow certain general statements made by this Board in Awards Nos. 6907, 8315 and 8564, which are not clearly in point with the procedural time limit question here alleged to be involved.

No discipline was involved in the dockets covered by Awards Nos. 6907 and 8315. Obviously, what was said there has no specific application to the action taken by the Board in this discipline case involving responsibility for a serious accident.

The majority purposely saw fit to ignore sound authority pronounced by this and other Divisions of the National Railroad Adjustment Board involving the specific question which allegedly caused the majority to conclude that the discipline here found proper should be abated.

Award No. 1497 involved a request that a signalman helper be returned to his former position and paid for wages lost due to improper discipline and suspension from service. In dismissing the action, this Board stated:

"The Committee claims that because the decision was not rendered within 15 days after the investigation was completed as prescribed by the rule, the Carrier was therefore without power to take any disciplinary action. We cannot agree with this contention in this case. In coming to this conclusion we need only suggest that discipline is not simply a matter which concerns the employes and the Carrier. The interest of the travelling public is directly involved; and it is the duty of the Carrier to take such measures to prevent negligent action by employes as will insure the safety of those who ride on its trains. No rights of this employe were prejudiced by the delay."

Clearly, it was the burden of the Employes to prove that substantive rights of Assistant Chief Dispatcher Martin were prejudiced by the Carrier's failure to furnish the General Chairman with a copy of the notice of discipline within the ten-day period prescribed by Article 8 (a) of the effective agreement. This burden they neither attempted nor satisfactorily discharged. The Record clearly shows no prejudicial effect which flowed from the failure to perform a minor clerical function when it is admitted that the General Chairman had prompt knowledge of the disciplinary action taken by the Carrier.

Award No. 1513 of this Division denies request for the restoration to service, with pay for lost earnings, of a ferry collector who had been dismissed on a charge that he had deserted his post of duty, it being urged by the Employes that the Carrier had violated a rule which required that "A decision in writing shall be rendered within 10 days to the employes, * * *." This Board stated:

"Had the Carrier's non-compliance with its agreed undertakings violated Claimant's right to a full, fair and impartial trial and a fair and impartial decision, support for Petitioner's proposition could be found in prior awards. But no such or other injury to claimant is shown or claimed, so there is nothing for which a compensating is due claimant."

See reference to Award No. 1497, previously discussed.

In other cases claimants have sought to escape disciplinary action taken against them by contending that the notice or charge preferred against them was not precise. In Award No. 4781 this Board denied such a contention and stated:

"The purpose of the rule (requiring notice) patently was not to provide a technical loophole for escape from deserved discipline, but to enable the employe to prepare his defense."

Where the defense is based upon an alleged failure to afford the accused a fair and impartial trial, the fundamental rights of the accused are obviously involved. Not so in the instant case.

But even where the fundamental right of an employe accused of wrongdoing is involved, this and other Divisions of the National Railroad Adjustment Board have consistently held that any defect in the procedural requirement involved in a disciplinary investigation must be shown to have been prejudicial to said fundamental rights. In Award No. 2945 (Edward F. Carter, Referee) this Board denied a request for the reinstatement of a Pullman porter with pay for time lost, and in the Board's findings it is stated:

"Complaint is made that Allen was not afforded a fair and impartial trial in that the Carrier refused to divulge the address of the complaining passenger. There is no indication that the rights of Allen were prejudiced thereby.

* * * * *

"Truth and not technicality should be the controlling factor in the making of decisions of this kind."

Again in Award No. 4169 this Board denied a claim in behalf of a train dispatcher from a disqualification by the Carrier, and in considering the technicality interposed by the Employes under a rule identical to Article 8 (b) of the present rule, this Board held:

"Paragraph (c) of Article 8 does not state that decisions on appeals shall be 'rendered within fifteen days from close of hearing.' The decision here was rendered on the sixteenth day. The Claimant had been responsible for some delay in the hearing on appeal. The purpose of this portion of the rule, of course, is to secure prompt action in order that an employe charged with an offense may not be indefinitely kept under a cloud and suspended from his position. This rule does not provide that in the event the decision is not rendered within fifteen days it is void and an employe charged with the offense shall be cleared of the charge and reinstated. In this particular case we fail to see how the Claimant was in any manner prejudiced by the delay in the decision on his appeal."

This Division further stated:

"* * * 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 the duty of not reinstating, on purely technical grounds, a Train Dispatcher who has admitted making such a mistake. Award No. 1513."

In the instant case there was, of course, NO failure to notify Assistant Chief Dispatcher Martin; merely a failure to furnish his General Chairman with a copy of said notice, a minor clerical or administrative function which did not in any manner prejudice any fundamental right of the claimant.

This Division in its late Award No. 8503 stated:

"* * * the Board does not operate with the strictness and rigidity of criminal courts in respect to possible technical defects in procedure on a carrier's property. Where such defects may exist, the compelling question is: Were the accused's rights actually prejudiced thereby? Was he thereby really denied due process of law, his 'day in court,' or other substantive rights properly his as a citizen in an industrial democracy?"

Awards of other Divisions of this Board have been to the same tenor and effect. See First Division Awards 13845, 15370, 15579. In the instant case all of these questions could properly and should have been answered in the negative.

The same question was before the Court in **Atlantic Coast Line R. Co. vs. Brotherhood of Railway and S.S. Clerks** 210 Fed (2nd) 812-(P.815). That

action involved claim for wrongful discharge by reason of investigation not held within ten days as prescribed by rule. In its decision the Court held as follows:

> "The purpose of the ten day provision is to expedite the proceedings for which the rule provides, not to serve as a limitation upon their being held; and the remedy for violation of that provision is damages for delay that may have occurred, not reinstatement with an unassailable record or damages for an indeterminate period on the theory that the proceedings otherwise regularly held were a nullity. Collective bargaining agreements like other contracts are to be given a reasonable construction, not one which results in injustice and absurdity."

The majority erred in substituting technicality for truth as controlling here and thereby concluding that a mere delay or failure in the performance of a strictly clerical function which was not and could not be prejudicial to any fundamental rights of the claimant rendered the claimant's dismissal a nullity. Injustice and absurdity are the results.

For the foregoing reasons we dissent.

/s/ J. E. Kemp
/s/ J. F. Mullen
/s/ R. M. Butler
/s/ W. H. Castle
/s/ C. P. Dugan