

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

**THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY**

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

(a) The New York, New Haven and Hartford Railroad Company, (hereinafter referred to as "the Carrier"), violated the existing schedule agreement between the parties, Article 6 thereof in particular, by its action in demoting Train Dispatcher G. W. Miller to the status of Telegrapher, following hearing held on February 9, 1965, for alleged violation of Operating Rules 108 and 762, which hearing failed to establish the alleged rules violation.

(b) The Carrier shall now be required to reinstate Claimant Miller to the status of Train Dispatcher with all rights unimpaired.

OPINION OF BOARD: This is a discipline case in which the Claimant was found guilty by the Carrier for violation of its operating rules, 108 and 762. Claimant was disciplined to the extent of eleven days suspension without pay and disqualified from further service as a Train Dispatcher. He continued in service, exercising his seniority as a Telegrapher.

Petitioner argues that the charges against Claimant were not proved by a preponderance of evidence and if they were proved, the discipline assessed was not warranted, being excessively severe, unjust and harsh. Petitioner makes it clear, the claim here before the Board, as on the property, is merely for reinstatement of Claimant, not for compensation.

Carrier asserts that the transcript of the hearing is replete with evidence of guilt, and that the seriousness of the failure to properly perform the duties of a train dispatcher fully justifies the discipline assessed Claimant.

We have carefully examined the entire record including the transcript of testimony and although there is a sharp conflict in the testimony that was adduced at the investigation, we find that substantial competent evidence was presented to support the charges to sustain a finding of guilty.

As Train Dispatcher, Claimant was directly responsible for the movement and safety of all train operations. Claimant admitted he was familiar with operating rules 108 and 762. In his position of responsibility, he had no right to "assume" anything, but take every precaution necessary as required by the operating rules. That no serious accident occurred due to a three-inch track pull apart does not minimize Claimant's responsibility in the instant case. Under the circumstances, disciplinary action was warranted in disciplining Claimant for the responsibility that was properly his.

We must now determine if the discipline assessed by the Carrier was excessively severe, unjust and harsh. The record shows that Carrier took Claimant's past record into consideration in disqualifying him as a train dispatcher, Claimant was promoted to spare train dispatcher March 20, 1947 and on December 30, 1948 he was disqualified as a train dispatcher for issuing irregular train orders. He was reinstated as a train dispatcher on November 3, 1949. We find no alleged dereliction of duty on part of the Claimant for the past 17 years, therefore, we feel that although there was competent evidence, denied by Claimant and other witnesses, but yet of substantial probative value to support the finding of guilty, the discipline assessed by the Carrier should have been less severe than disqualification, particularly in view of the sharp conflict in testimony found in the transcript of the investigation.

We recognize that this Board has consistently held that it will not interfere with the discipline of the Carrier or substitute its judgment for that of the Carrier, but in view of the circumstances in the instant case, we find that disciplinary action was warranted but disqualification was excessively severe. Claimant has been disqualified as a train dispatcher since February 15, 1965, which we believe is an adequate penalty to insure future compliance by Claimant to the operating rules.

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

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 disciplinary action was warranted but disqualification as a train dispatcher was excessively severe.

AWARD

Carrier shall be required to reinstate Claimant to the status of Train Dispatcher with all seniority rights unimpaired, he having waived any right to claim recovery of compensation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of February 1967.

**CARRIER MEMBERS' DISSSENT TO AWARD 15373,
DOCKET TD-16150**

In Award 15373 the Referee properly found that there was substantial competent evidence to support the charges and sustain a finding of guilty; that Claimant failed to take necessary precaution as required by the Operating Rules and "assumed" something that he had no right to assume; and that disciplinary action was therefore warranted.

Although recognizing that this Board has consistently held it will not interfere with discipline assessed by the Carrier or substitute its judgment for that of Carrier, the Referee proceeded to do exactly the opposite and reinstated Claimant to a position of responsibility for the movement of all train operations on the "assumption" that disqualification as a train dispatcher since February 15, 1965, is an adequate penalty to insure future compliance with operating rules. The Referee seeks, in part, to justify such action on the basis of a sharp conflict in testimony at the investigation. But once there is "substantial competent evidence" to support Carrier's finding of guilt the fact that there may have been conflicting testimony cannot properly be used to mitigate the discipline assessed.

The Claimant proceeded on "assumption" and fortunately no serious consequences resulted from his proceeding on such basis. It is to be hoped that the "assumption" by the Referee will likewise be without serious consequence.

Furthermore, since the claim was for reinstatement as a Train Dispatcher only, with no request for reimbursement for any monetary loss sustained, the claim was, of necessity, one for leniency. (Awards 8991 and 14800.) Awards of this Board to the effect that we do not have the power to grant leniency are too numerous to require citation here.

Because the Award is erroneous for the foregoing reasons and because it flies in the face of precedent which was cited to and acknowledged by the Referee, we dissent.

G. C. White
R. E. Black
P. C. Carter
G. L. Naylor
T. F. Strunk