Award No. 18473
Docket No. TE-18822

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Thomas Rimer, Jr., Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION DIVISION, BRAC

ERIE-LACKAWANNA RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Division, BRAC, on the Erie Lackawanna Railway Company, T-C 5732, that:

1. Carrier violated the parties' agreement when effective June 23, 1969, it dismissed Operator Robert L. Carretto from service.

2. Carrier shall, because of violation in (1), be required to compensate Mr. Carretto for all wages lost, clear his record of charges and reinstate him in service with seniority rights unimpaired .

OPINION OF BOARD: In its review of the evidence and arguments in this case, the Board must be guided by and in fact, is restricted, by the long line of awards which establish the scope of the Board's authority. There is no purpose to be served in burdening the record of this case with a recital of the cases which have become dicta in treating with discipline cases. These are well known to the parties to this dispute and were cited to the Board by both in great detail and at length. Their careful research has been most helpful to the Board in it's deliberations.

Perhaps the limits of the Board's inquiry can best be outlined by these quotes from prior awards which have relevance in this case.

"Award 2769, Referee Jay S. Parker:

Preliminary to our consideration of the factual situation presented by the record we will briefly restate and reaffirm certain general and fundamental principles hereto fore announced by this Division, each and all of which are pertinent and applicable in our determination of the merits of the instant claim and all others disciplinary in character. Summarizing, they can be stated thus: In its consideration of claims involving discipline, this Division of the National Railroad Adjustment Board (1) where there is positive evidence of probative force will not weigh such evidence or resolve conflicts therein, (2) when there is real substantial evidence to sustain charges the findings based thereon will not be disturbed; (3) if the Carrier has not acted arbitrarily, without just cause, or in bad faith its action will not be set aside; and (4) unless prejudice or bias is dis-

closed by facts or circumstances of record it will not substitute its judgment for that of the Carrier."

"Award 3172, Referee Edward F. Carter:

We fail to find any evidence that the Carrier was arbitrary or unreasonable in the action taken. There is ample evidence, if believed to sustain the charge. Under these circumstances, this Board is not authorized to interfere with the Carrier's decision."

"Award 3342, Referee Fred W. Messmore:

In approaching a determination of this case the duty of this Board is to review the record of the investigation subject to the established rule that 'it is not the function of this Board to weigh conflicting evidence in a discipline case and if the evidence is such that, if believed, it will support the findings of the carrier, the judgment of the carrier will not be disturbed.' See Award 3321."

The Board must deal with the written record of the case at hand. It is unable to hear and observe the witnesses who testify under direct and cross examination which normally would be helpful in evaluating conflicts in testimony, omission of relevant facts, or the shading of responses to questions of major significance to the Board which are not on the record because of the failure of one party or the other to pursue a line of questioning which could have had probative value.

The facts in the case are simply stated, albeit subject to a wide divergence of opinion as to their bearing on the charges brought against the Claimant. Beginning on May 20, 1969 the Carrier established a detour by Special Order Re-cap 2-3 quoted in full below:

"SPECIAL ORDER RECAP 2-3 SUSQUE. 1st & 2nd SUBDIVISIONS

A-3-8 Effective 0601 hrs Tuesday May 20, 1969 and continuing thru Friday May 23, 1969 between the hours of 0601 hrs and 1531 hrs track 2 will be out of service between MP 221.1 located at Hayes Ave. Endicott and MP 215.4 located at West BD. During the period that this track is out of service all trains, except work trains when otherwise directed by responsible MofW forces, will operate over track 1 from a temporary facing point crossover located at MP 221.1 to a permanent trailing point crossover located at MP 215.4. Movement over the detour track will be under the supervision of an operator located at MP 221.10 and the operator at 'BD' Tower will report to the operator at the entrance of the detour to protect the movement of trains as directed. Speed thru the detour track will not exceed 45 MPH between the limits of temporary speed boards except as otherwise restricted. Movements thru the detour crossover at the entrance end will not exceed 10 MPH and movements thru the detour crossover at leaving end of the detour will be governed by signal indication. All trains will approach west end of detour prepared to stop and

proceed ONLY on hand signal or as directed by operator. Temporary signs will be erected approx. 1 mile distance from the detour limits. These signs will read 'Detour One Mile.' Be governed accordingly."

On May 23, 1969 the incident occurred which resulted in the dismissal of the Claimant for allegedly violating the Special Order and certain specified rules outlined in the notice given him to appear for investigation and hearing. Train DH-100 rammed the rear of NE-74 which had stopped before clearing the exit end of the detour. Injury resulted to several crew members, as well as costly damage to the equipment.

The Carrier assessed responsibility against the Claimant for the incident after a hearing held June 9-10, 1969 (postponed from June 2 for reasons on which the parties are not in agreement but which is not material). A series of appeals and denials of the appeals, confirmed by an exchange of letters by and between appropriate levels of authority in the Organization and the Carrier, established the position of each party as to the issues raised and cogently argued by various representatives of the Organization and denied by the representatives of the Carrier.

Some ten or eleven points were advanced by the Organization in support of its position, some procedural, some substantive. It is the opinion of the Board that, while none of these could be termed frivolous, there are but a few which are pivotal in the case. These must be examined with care and the entire record exhausted with respect to these issues to determine the sufficiency, or lack thereof, to support the action taken by the Carrier to dismiss the Claimant from its service.

First, a series of procedural errors were alleged to have been committed by the Carrier during the processing of the case which were violative of the Agreement considered by the Organization to be controlling. It was alleged that the rules with which the Claimant was charged with violation were "improper" when measured against the so-called "standard rules", and finally, that the real blame for the collision of BH-100 and NE-74 should be shifted to others, or at the very worst shared with the Claimant.

The Carrier in its Ex Parte Statement and in the panel discussion, dealt with, or attempted to dispose of each charge made by the Organization, seriatim. However, the Board does not consider it necessary for it to do so in rendering its Opinion and Award. From the record, it is clear that the decision here reached turns on but a few issues which are at the heart of the case. Was there serious procedural neglect of the Claimant's rights to fair and impartial treatment as guaranteed by the applicable Agreement? Was his conduct on May 23, 1969 clearly negligent and of such magnitude as to warrant dismissal? The Board will treat with those basic issues alone, which it considers dispositive of the case. As to procedure. The Carrier relies first on a Memorandum of Agreement of September 11, 1961 (Article 11, Section 2):

"Employes exercising rights to or while performing work on positions located on the former Erie Railroad will be governed by the Erie Railroad Agreement with the Order of Railroad Telegraphers, and employes exercising rights to or while working on positions located on the former Delaware, Lackawanna and Western Railroad will be governed by the Delaware, Lackawanna and Western Agreement with the Order of Railroad Telegraphers."

This provides quite clearly that the appropriate Agreement in the instant case was the Erie Agreement applicable in all its parts. It is not exclusionary in any respect and it must be concluded that, had the parties intended that some rights or privileges of the Carrier, the Organization, or the employe were to be altered or withheld by operation of the 1961 Agreement such limitations would necessarily have been spelled out. The phrase "will be governed by" one or the other Agreement is all-embracing. It is, therefore, the opinion of the Board that, since the Claimant was assigned to a position located on the former Erie Railroad, a fact undisputed, all terms and conditions of that Agreement apply. Under that Agreement, no procedural defects are discernable.

In support of its contrary view, the Organization relies heavily on Award 15453, which found that, under the circumstances there existing, the Claimant, a supervisory employe holding seniority under both the Erie and DL&W Agreements, must be accorded a hearing which "must meet the minimum requirements of both Agreements." Careful study of that award reveals a distinction which renders it inapplicable to this case, in the judgment of the Board.

At the outset of the hearing in Award 15453, R. E. Matthews, General Chairman of the Union, pointed out to the Investigating Officer of the Carrier that the Claimant in the case had been improperly charged under the Erie Agreement and was entitled to the protection of the former DL&W Agreement as agent at Owego, New York. After "several hours" the Investigating Officer agreed with the General Chairman. As a result, another notice was issued the Claimant setting a hearing some two weeks later. The reason advanced by the Union (Award 15453) was that the Claimant "was covered by the Scope and Union Shop Rules of the former DL&W Railroad as set forth in the Memorandum of Agreement dated August 22, 1962." Pertinent parts of this Agreement appear in Award 15453, confirming the position of the Union as having been based on the terms of a specific agreement between the parties. Accordingly, it is the opinion of the Board in the instant case that the sentence in Award No. 15453 cited by the Organization as having great weight here, as quoted above, was indeed a gratuitous statement by the Referee in that case, since the matter of procedure under the DL&W Agreement had been agreed to by the Carrier at the outset of the proceedings, was not at issue, and was covered by the Memorandum of Agreement executed by the parties on August 22, 1962.

The Organization also argues with great force that the hearing given the Claimant was not "fair and impartial", that he was denied an effective avenue of appeal, and that the case was pre-judged. A careful reading of the extensive transcript, the contract between the parties, together with a Memorandum of Agreement, dated 12/5/63, dealing with the handling of grievances and claims, brings the Board to the conclusion that these charges are without merit.

The substance of the charge of negligence and the violation of the rules and the Special Order by the Claimant on May 23, 1969 are clouded only by the conflicting testimony of the Claimant himself. The Dispatcher testified that, "DII-100 was given the permissive block account NE-74 not clear", and "I instructed the operator to put DH-100 in on a permissive block". In his later testimony, the Dispatcher stated, in answer to a question as to whether he had a conversation with the Claimant after the collision "I had a conversation

with Mr. Carretto as soon as I knew that DH-100 had stopped, then I asked him if he had given a permissive block and he notified me that DH-100 and NE-74 were in there on a permissive block."

Elsewhere in the transcript Carretto testifies otherwise. He stated that the Dispatcher told him simply to "let it go" (DH-100) wih no further instructions; that he had not inquired of the operator at the exit end of the detour, directly or indirectly, whether NE-74 had cleared the detour; that he assumed that the detour was clear because of the time lapse since NE-74 had entered the detour. He further acknowledged in his testimony that the responsibility for the determination of the position of NE-74 in the detour was his, without reliance on information from the Dispatcher, or lack thereof.

The testimony of the crew of DH-100 is inconclusive on all but one point. They testified that either Carretto said nothing or that he gave them a go ahead signal described by one or more witnesses as a "hi-ball". It seems clear from the record of their testimony, however, that Carretto, neither by word or action, indicated that the train was to move into the detour on a permissive block, which he had been instructed to do.

Taken in its entirety, the record shows that the Carrier has met the burden of proof in supporting the discharge of the Claimant, Carretto, and that the dismissal should stand.

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 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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1971.

DISSENT TO AWARD 18473, DOCKET NO. TE-18822

This Award is palpably erroneous, revealing either an almost complete incomprehension of the essential points in controversy or a predeliction on the part of its author to give effect only to the arguments made by and on

behalf of the Carrier. In either event the result is improper and not in keeping with the purpose for which this Board was created.

The most obvious error lies in the Referee's utter failure or refusal to understand the import of Award 15453. His characterization of the basic finding of that award as "a gratuitous statement by the referee in that case" raises serious questions as to the competence or neutrality of the present Referee.

In the case decided by Award 15453 the accused employe held seniority under both schedule agreements, as did the claimant here. He was first improperly charged by the Carrier's reference to only one of the agreements. Carrier admitted its error and issued another charge in essentially the same form as was used in the present case. But it failed to meet the time limits of the schedule rule most favorable to the employe — precisely as it did in the present case. And it was that failure which resulted in the statement which the present Referee rejects as being "gratuitous."

This is not merely a case of poor workmanship. The Supreme Court of the United States has held the procedures of the National Railroad Adjustment Board to amount to compulsory arbitration in its limited field of operation (Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Co., 353 U. S. 30). The decision in Award 15453 was a final and binding settlement of a dispute between these parties concerning the application of time limits to disciplinary actions against employes who hold seniority under both agreements involved.

No referee has a right to upset such a decision on a mere personal idea that the decisive point was only a gratuitous statement. His action of brushing aside a binding precedent in favor of the employes, together with his opposite holdings in cases where the precedent was in favor of a Carrier, leads us to seriously doubt his neutarility. For example, we quote from Award 18522, with Opinion by the same Referee:

> "It should be noted that Awards 18496 and 18497 (Referee Devine) approved April 9, 1971, involved disputes between the same parties on the same fact situations. Both Awards held for the Carrier and denied the claims on the same predicate as the Board has concluded in the instant case. No new evidence or arguments have been introduced here to differentiate this case from those which preceded in Awards 18496 and 18497. This Board has been asked to overturn and reverse these prior Awards, which would require substantial and compelling reasons for so doing. The Petitioner has failed to provide any such reasons."

But here, the only reason given by the Carrier to deviate from Award 15453 was not mentioned. It was so obviously without merit that the Referee — to find for the Carrier — had to invent one of his own, accusing the prior Referee of making a gratuitous statement on the decisive point of the case.

On this ground alone — not to mention other areas of the case — Award 18473 is patently erroneous, and I dissent.

C. E. Kief
Labor Member

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