NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19523
THIRD DIVISION Docket Number TD-19650

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
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(St. Louis-San Francisco Railway Company

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

(a) The St. Louis-San Francisco Railway Company, hereinafter referred to as "the Carrier" violated the Agreement in effect between the parties, Article V thereof in particular, by its action in assessing discipline in the form of thirty (30) demerits upon Train Dispatcher E. W. Wyatt following formal hearing on March 31, 1971. The record of said formal hearing fails to support Carrier's charges of rules violation by the Claimant, thus imposition of discipline was arbitrary and unwarranted.

(b) Carrier shall now be required to clear Claimant's Employment Record of the charge which provided the basis for said action.

OPINION OF BOARD: This is a discipline case in which Train Dispatcher E. W. Wyatt alleges that Carrier improperly assessed thirty (30) demerits against his Employment Record in connection with a train order which he issued on February 1, 1971.

The alleged improprieties of Carrier are as follows:

1. The notice of formal hearing indicated prejudgment of Claimant by the wording "all of which is in violation, etc."

2. Claimant's procedural due process rights were violated in that a single Carrier official preferred the charges, heard the evidence on the charges, and assessed the discipline.

3. The finding of guilt is not supported by substantial evidence.

FACTS OF RECORD

The notice of charge, dated March 25, 1971, and issued by Superintendent of Transportation F. E. Wait, stated as follows:

"Please report to Office of Superintendent Transportation, General Office Building, Springfield, Mo., 10:00 A.M., Wednesday, March 31, 1971, for hearing to develop the facts and determine

"your responsibility, if any, in connection with the report you issued Train Order No. 7, 9:34 A.M., Feb. 1, 1971, to Trains No. 236, No. 134 and No. 60 at Springfield, Mo., and No. 235, No. 133 and No. 61 at Ft. Scott, Kans., and to First and Second NWF at Greenfield, Mo., reading as follows:

> 'No. 235 eng 904 meet first and Second NWF engs 729 and 835 at Liberal has right over No. 236 No. 134 and No. 60 Edward to Nichols and wait at Ash Grove until 1130A for No. 142 eng 549 No. 133 and No. 61 have right over No. 236 No. 134 and No. 60 Edward to Nichols and wait at Edward until 201P No. 61 wait at Edward until 430P'

which (1) is a combination of Orders and (2) two times were shown for Train No. 61 to wait at Edward, one of which was in advance of scheduled leaving time of train No. 61, all of which is in violation of Rules "B", 5, 92, 108, 201, 983 Paragraph 2, and 987 Paragraph 12 of the Transportation Department effective March 1, 1957.

You may have representative as specified by agreement rules, if desired."

Following formal hearing on the charge, conducted on March 31, 1971 by Superintendent Wait, and after findings by Superintendent Wait of Claimant's having committed violations of Transportation Department Rules, Superintendent Wait assessed thirty (30) demerits against claimant for such violations. The Rules found to have been violated are as follows:

"Rule 983, Paragraph 2

They (Dispatchers) will direct the movement of trains, issue train orders in a clear and concise manner, so that there may be but one interpretation, and will transmit and record them as prescribed by the rules. They will guard against hazardous conditions and the issuance of unsafe combinations of orders."

"Rule 987, Paragraph 12

Dispatchers must avoid issuing a combination of orders or unnecessarily long orders that may not be easily understood by train men and engine men."

Superintendent Wait's action was appealed to Division Manager R. A. Rorie who declined to modify or remove the disciplinary action.

As set forth in the March 25, 1971 notice, the substantive charges were that Claimant issued a train order which contained (1) an improper combination of orders and (2) two times for Train No. 61 to wait at Edward, one of which was in advance of the scheduled leaving time of Train No. 61.

At the hearing neither Carrier nor Organization offered evidence, direct indirect, from any member of the train crews to which Order No. 7 was addressed. As regards the two waiting times in the order, the primary evidence was Claimant's acknowledgement that he issued Train Order No. 7 at 9:34 A.M. on February 1, 1971. The two waiting times for No. 61 at Edward, 2:01 PM and 4:30 PM, are shown on the face of this order and the earlier waiting time is in advance of No. 61's scheduled departure at 3:40 PM. Though the existence in the order of two waiting times was not contradicted or explained by Claimant at the hearing, Claimant's representative elicited evidence showing that none of the involved trains left a station in advance of scheduled leaving time.

The hearing evidence on improper combination of orders established that Train Order No. 7, involving a meet, right of track, and wait order, combined Carrier's Train Order Forms SA, SC, and E. It was also established that combining these forms (SA, SC, and E) was not prohibited by Carrier's rule book although certain combinations of forms were expressly prohibited by the book. The testimony on these facts came from Carrier's expert witness, Chief Dispatcher J. D. Williams.

Carrier's expert also testified to the effect that the last sentence of paragraph 2, Rule 983, Rule 987, paragraph 12, and related verbal instructions operate in combined fashion in their application. His testimony in this regard is as follows:

"* * *Q. Did the dispatcher guard against hazardous conditions and issuance of unsafe orders?

A. I would have to say no.

Q. Have there been any written instructions as to what constitutes hazardous conditions or unsafe combination of orders?

"A. We have a rule in the book that outlines the requirements and there have been verbal instructions issued.

Q. Mr. Williams would you specify that rule by number?

A. Rule 987 and especially Paragraph 12.

Q. Mr. Williams for ready reference will you read Rule 987 Paragraph 12 into the record again?

A. 'Dispatchers must avoid issuing a combination of orders or unnecessarily long orders that may not be easily understood by train men and engine men'.

Q. Have instructions been issued as to what constitutes an unnecessarily long order?

A. One that would tend to be confusing to those receiving such an order.

Q. Under what date were these instructions issued?

A. I couldn't say, but verbal instructions to this effect have been given at various times in the past.

Q. Mr. Williams which train man or engine man was confused by this order?

A. That I can't say except that there was no exception taken to me personally about this order and I am assuming, personally, that if they had understood the order clearly they would have questioned it.

Q. Mr. Williams is it customary for crews understanding an order to personally question you about it.

A. If the meaning, as written in an order, is clearly understood as it should be, as written, and it is not correct, exception certainly should be taken.

* * * * * * * * *

Q. If a train order is not understood by train men and/or engine men are they required to so notify the dispatcher before proceeding?

A. Yes, I would say so."

RULINGS ON PETITIONER'S CONTENTIONS

We find no merit in Petitioner's contentions concerning prejudgment of guilt and violation of procedural due process.

The verbiage "all of which is in violation, etc." is normal language for phrasing allegations of the type involved here, and the Petitioner has offered no meaningful explanation of why the language falls outside the norm. The mere omission from the notice of such terms as "alleged or reported" violations does not constitute probative evidence of prejudgment of guilt. Consequently, we find that the language of the charge in no way prejudiced Claimant or impinged upon his right to a fair and impartial hearing.

We also find that there was no violation of Claimant's procedural due process rights. The handling of a charge by a single Carrier official through the assessment of discipline is normal procedure and, again, Petitioner provides no meaningful explanation of why this case falls outside the norm. Furthermore, the record shows that the case was properly appealed to the Division Manager, and thus both the hearing rights and the appeal rights of Claimant have been honored.

With regard to Petitioner's contention that Carrier's findings of guilt are not supported by substantial evidence, we shall dismiss in part and sustain in part.

The record contains substantial evidence in support of Carrier's finding that issuance of two (2) waiting times for Train No. 61 at Edward violated Rule 983, and we shall dismiss the claim to this extent. Petitioner notes that the two waiting times posed no hazard because the most restrictive of the two times governed, and that the 2:01 PM wait applied to No. 133 and the 4:30 PM wait applied to No. 61. Petitioner also noted that no trains departed a station ahead of leaving time.

These facts are of no avail to Claimant because the existence or non-existence of a hazard or unsafe combination of orders is in no way related to the Rule 983 requirement that dispatchers must issue "orders in a clear and concise manner, so that there may be but one interpretation". Since this requirement is separate and distinct from the requirement in the last sentence of paragraph 2, Rule 983, "hazardous conditions, etc.", it is subject to proof of violation separate from proof of violation in respect to the last sentence.

It is true that by reference to the Time Table, and the therein scheduled departure time of Train No. 61, the intent of the order could be deduced to be that the 2:01 PM wait at Edward applied to Train No. 133 and the 4:30 PM wait applied to No. 61. However, this intent was not expressed by the text of the order. It expressed a different intent and the reader had to resort to collateral information in order to deduce its true intent. Self-evidently, such an order cannot be said to have been issued in a clear and concise manner so as to produce but one interpretation.

We shall sustain Petitioner's contention that the record does not support a finding of violation of Rule 987, paragraph 12. The part of the charge concerning improper combinations of orders is evidently predicated on the combined text of the last sentence of paragraph 2, Rule 983, and paragraph 12 of Rule 987. The test here for determining an improper order, as laid out by the previously quoted testimony of Carrier's expert witness, is whether the order is "one that would tend to be confusing to those receiving it." Testimony from the train men and engine men, themselves, saying the order was confusing, is of course one source of evidence that would meet this test. Another source of such evidence would be an expert witness such as Chief Dispatcher Williams. However, the record shows that there was no testimony at all from the train and engine men. Chief Dispatcher Williams said he assumed the crews would have questioned the order if they had understood it clearly; this statement was too speculative and conjectural to have meaningful probative value. Also, as previously noted, the hearing evidence established that the combination of orders used in Train Order No. 7 was not prohibited by Carrier's rule book. The record, in consequence, does not contain substantial evidence to support a finding of violation of Rule 987, paragraph 12, and we shall sustain the claim to this extent.

In view of the foregoing we shall dismiss the claim as to Rule 983, paragraph 2, and sustain the claim that Rule 987, paragraph 12, was not violated. Accordingly, we shall reduce the discipline from thirty (30) demerits to fifteen (15) demerits.

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 violated to the extent indicated in Opinion.

A W A R D

Claim dismissed in part and sustained in part, as indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 20th day of December 1972.