NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19662
THIRD DIVISION Docket Number TD-19868

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(Southern Pacific Transportation Company
((Pacific Lines)

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

(a) The Southern Pacific Transportation Company (Pacific Lines). hereinafter referred to as "the Carrier," violated the agreement in effect between the parties, Article 8, Section (b) thereof in particular, by its action in dismissing Train Dispatcher T. J. Clein from service following formal hearing held on December 6, 1971. The record in the dispute evidences Carrier's failure to accord Claimant the right to basic due process, thus the penalty of dismissal was arbitrary, harsh, excessive and unwarranted.

(b) The Carrier shall now be required to reinstate Claimant T. J. Clein to service with all rights restored unimpaired, to compensate him for wage loss sustained as a result of Carrier's action, and to clear his employment record of the charges which purportedly provided the basis for said action.

OPINION OF BOARD: This is a dismissal case arising under Agreement between the parties effective April 1, 1947 (reprinted July 1, 1955, including revisions). At the time of the incident which led to this dispute, Claimant had eighteen (18) years of service with Carrier; he had about two years service as a train dispatcher and, when this dispute arose, he was regularly assigned to the position of "Guaranteed Extra Dispatcher" in the Carrier's Roseville, California train dispatching office.

The subject incident occurred on November 29, 1971, while claimant was issuing train orders from the Roseville station. He issued train orders which authorized two opposing extra trains to move on the same track, but without giving one of the extra trains superiority over the other and without making provision for the trains safely to meet and pass one another. The claimant himself reported the conditions, and corrective action was taken. There was no collision or damage of any kind.

On November 30, 1971, claimant was simultaneously removed from service and given notice of hearing on charges of violations of Carrier's Rules of the Transportation Department and Instructions to Train Dispatchers. By letter dated December 9, 1971, claimant was notified that, on the basis of the hearing evidence, he had been found responsible on the charges and that he was dismissed.

Petitioner contends that claimant's suspension from service before the hearing was non-permissible under the Agreement and that it constituted prejudgment. Petitioner further contends that the discipline of dismissal was discriminatory and excessive. However, Petitioner concedes that claimant violated the rules as charged.

Because the record indicates that the suspension of claimant was the first suspension by Carrier of a train dispatcher in more than thirty (30) years, we have carefully examined the suspension issue. In the main we believe the answer to this issue is found in the Agreement itself, which in pertinent part, provides:

"ARTICLE 8

* * * * *

"Section (b). Discipline. A train dispatcher who has been in the service as such more than ninety (90) days or whose application for employment has been approved, shall not be disciplined or dismissed without a fair end impartial hearing as provided in the following sections.

"Section (c). Hearings. When charged with an offense likely to result in disciplinary action, he shall be advised in writing of the precise charge at the time notified of such hearing, which shall be held by the Superintendent or his representative, within ten (10) days from date of notice. He shall have the right to be represented by one or more train dispatchers of his choice and/or an official of the Organization and he shall be given a reasonable time to secure the presence of necessary witnesses. Decision shall be rendered within fifteen (15) days from date of close of hearing.

"Section (d). Appeals. If the train dispatcher or his representative is dissatisfied with the decision rendered pursuant to a hearing held under the provisions of this article, the matter may be handled further with the proper officer of the Company, provided such handling is undertaken by correspondence or conference within sixty (60) days. Following final disposition of the case by such officer, an appeal may be taken from such decision by the train dispatcher or by his representative, to the general officer of the Company designated to handle such appeals provided that the appeal is presented

"in writing to such officer within ninety (90) days from the dote of the final decision from which appeal is taken. The decision of the general officer to whom the appeal is taken shall be final and binding, unless within sixty (60) days after written notice of such decision such officer is notified in writing that his decision is not accepted.

"Section (e). Reinstatement. If decision decrees that the charges against the train dispatcher were not sustained, his record shall be cleared of such charges; if suspended or dismissed he shall be reinstated and shall be compensated for net wage loss, if any, suffered by him." (Emphasis supplied.)

One could read the text of Article 8 as being silent on the subject of 3 pre-hearing suspension, in which case there would be no prohibition thereof. See Award 171.55 (McCandless), which cited Awards 16622, 9435, and 16308. We believe the same result receives implicit sanction by the text of Article 8. In construing Article 8 es a whole, it is obvious that the term "if suspended" in Section (ej qualifies the word "decision" in that section and, thus, in any situation where suspension, issued es discipline, has been overturned on appeal under Section (d: , the employee must be compensated for the suspension period. And though possibly less obvious, we believe the word "decision" in Section (c) is assumed in the word "decision" in Section (e), so that, when reed together, the texts of Section (c) and (e) clearly imply that a pre-hearing suspension may have occurred in a discipline case. And since the charges herein were sustained, as conceded by Petitioner, the effect of Section (e) is to exclude claimant from compensation for the pre-hearing suspension period.

The Awards cited by Petitioner do not alter the foregoing. In all of those Awards, in which suspension was held improper, the decision turned upon specific Agreement language. For example, in Award 21476 (First Division, without a Referee), the language under consideration provided that -

"... no yardmen . . . will be dismissed or have his personal record assessed with censure entries or have his seniority restricted until after he has been given a fair and impartial investigation". (Emphasis supplied.)

The term "until after" clearly delineates a specific sequence in time so as to prohibit any pre-hearing dismissal, censure, or restriction of seniority. Thus the above language and the Agreement language in the other Awards called to our attention is quite different from the language in the instant Agreement.

In view of the language of the instant Agreement and the rulings of prior Awards, we do not find any basis for disturbing Carrier's action regarding the pre-hearing suspension of claimant. Nor do we find any reason to regard the suspension as prejudgment. It would appear that Carrier, having brought charges concerning claimant's violation of safety rules, took the suspension action in recognition of the possibility of a recurring violation while the charges were being resolved.

On the question of excessive discipline, we have carefully studied both the record and prior Awards which have bee" called to our attention; however, we have found no reason to disturb Carrier's action of dismissal. Carrier's submission states that, after the instant charges against claimant were established through the hearing procedure, his prior performance was taken into account in determing the discipline of dismissal. Included in the prior record was an admonition for essentially the same fact situation that was presented in the instant charges. The prior record also included a" admonition issued after 3 hearing which established claimant's failure properly to address train orders to those who were to execute them. In Award 18550 (O'Brien) this Board stated that "It is well established by this Board that in affixing the degree of discipline, Carrier is privileged to take into consideration the employes prior service record." See also Awards 16247 (McGovern) and 18509 (Devine). Carrier therefore was privileged to consider the prior service record in determining the degree of discipline and our review of the same record discloses no basis for finding the discipline to be so arbitrary, unreasonable, or capricious as to amount to an abuse of discretion. Where this Board has reduced the discipline of dismissal or disqualification of train dispatchers, there have always been compelling facts such as the train dispatcher's long record of satisfactory performance and/or a" unfair hearing. See Awards 13778 (Weston), 19504 (Devine), and 17475 (McCandless). Such facts are absent in this case and we shall therefore deny the claim.

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.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of March 1973.