

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20285
Docket Number TD-20377

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(Norfolk and Western Railway Company (Lake Region)

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

CLAIM #1

(a) The Norfolk & Western Railway Company (NYC&StL) (hereinafter referred to as "the Carrier"), violated the effective Schedule Agreement between the parties, Articles 8(a), 8(b) and 8(c) thereof in particular, by its disciplinary action in disqualifying Claimant L. J. Pettyjohn from train dispatcher service on June 30, 1972 following formal hearing held on June 19, 1972:

(b) Because of said violation, the Carrier shall now be required to clear Claimant Pettyjohn's personal record of the charges involved in the hearing of June 19, 1972, restore him to his train dispatcher position with all rights unimpaired and compensate him for all loss of train dispatcher service June 30, 1972 until reinstated as train dispatcher.

CLAIM #2

(a) The Norfolk & Western Railway Company (NYC&StL) (hereinafter referred to as "the Carrier"), violated the effective Schedule Agreement between the parties, Articles 8(a), 8(b) and 8(c) thereof in particular, by its disciplinary action in disqualifying Claimant L. J. Pettyjohn from train dispatcher service on July 10, 1972 following formal hearing on June 26, 1972;

(b) Because of said violation, the Carrier shall now be required to clear Claimant Pettyjohn's personal record of the charges involved in the hearing of June 26, 1972, restore him to his train dispatcher position with all rights unimpaired and compensate him for loss of compensation, if any, in connection therewith.

OPINION OF BOARD: This dispute involves two related disciplinary actions against the same Claimant, within a short time span.

Claim No. 1

Claimant received the following notice from Superintendent Watters, dated June 9, 1972:

"Arrange to report to the Office of the Superintendent, East Wayne Yard, 1100 AM Railroad time, June 19, 1972, for formal hearing to determine your responsibility in connection with permitting Extra 1352 West to operate Green Springs to **FS** on eastward main track following Extra 1807 West in these limits without providing protection for Extra 1352 West, May 24, 1972, in accordance with Operating Rules and special instructions."

Following the hearing, Claimant received notice dated June 30, 1972 finding him guilty of the infraction above, causing him to serve as "actual" a previously incurred thirty day "record" suspension, and disqualifying him as train dispatcher.

Petitioner alleges that the charge above was not precise, and first raised this issue at the outset of the hearing. This allegation is based on the omission of the specific operating rules or special instructions which Claimant was charged with violating. Petitioner refers to Article 8(b) which provides:

"(b) HEARINGS - A train dispatcher **who** is charged with an offense which might result in his being disciplined shall be notified thereof in writing by the superintendent or the chief train dispatcher. Such notice shall set forth the precise charge against him and shall be served on the train dispatcher within ten days from date the alleged offense becomes known to the superintendent or chief train dispatcher, depending upon officer serving the notice. He shall be given a fair and **impartial** hearing on such charge or charges by the superintendent or his designated representative within ten days from date of such notice. He shall have the right to be represented by the representative of his choice and be given a reasonable opportunity to secure the presence of necessary witnesses. His representative shall be permitted to hear all oral and **documentary** testimony at said hearing and have the right to examine witnesses. The decision shall be rendered within 15 days from close of hearing."

Over the years we have held that the fundamental purpose of the notice of charge is to afford the **employee** an opportunity to prepare his defense against Carrier's accusations. For example, in Award 17154 we said:

"...where the notice is sufficient for Claimant to understand what is to be investigated (Award 12898), and precise enough to **understand** the exact nature of the offense charged (Awards 11170 and 13684) - such notice will not be held to vitiate Claimant's rights under the **Agreement** for adequate notice...."

Rather than to provide technical escape hatches to avoid discipline, Rules such as 8(b) **above** were designed to protect **employees** and to prevent surprise or misleading accusations by Carrier. In the case before us **we** do not find that the **omission** of the specific rules in any manner prejudiced Claimant's defense; he and his representative were clearly aware of the meaning of the charge and the particulars alluded to by Carrier.

Petitioner also raises the objection that the hearing was not held in timely fashion as provided in Rule 8(b). The only evidence produced indicates that the division trainmaster was made aware of the incident in question on June **2nd**, the notice of charge was dated June 9th and the hearing was held on June 19th. We find that Petitioner has produced no evidence to support this procedural objection. The Organization asserts further that **Claimant** was denied a fair and impartial hearing in that the conducting officer acted as a witness in the proceeding. We note that in the Awards cited by **Petitioner** in support of this argument the Board in the past has asserted that due process was denied when the conducting officer acted as chief or principle witness (Awards 8431, 8513, and 18050) as well as interrogator and judge. In this hearing the conducting officer did insert information in the record as to when he was apprised of the incident under investigation, but under no stretch of the **imagination** could he be considered a **key** or "principle" witness. **His** testimony in no way detracted from the fairness of the hearing and did not constitute a procedural imperfection.

With respect to the merits, the record clearly establishes that Claimant provided protection for the train following **Extra** 1352 West, but not for that train; he was obviously aware of Carrier's operating requirements and instructions. The record contains substantial competent testimony to support Carrier's conclusion of Claimant's guilt. In view of the significance of **Claimant's** position, including the serious safety responsibilities, and taking the previous disciplinary record into consideration, the discipline imposed was appropriate, rather than arbitrary or capricious.

Claim No. 2

In this matter, Petitioner at the outset asserts that there were procedural defects: 1. the hearing was not held within ten days of the date of notice; 2. the notice of hearing and other actions indicated that Carrier had prejudged Claimant; 3. the hearing officer's conduct was improper, thus denying Claimant a fair trial; 4. the proper avenue of appeal was not provided. An examination of the record leads us to conclude that these four contentions are unsupported and without merit. The hearing was first scheduled for June 22, rescheduled for June 19th, within the ten day period and then subsequently postponed at the request of the local chairman and held on June 26, 1972. The notice of hearing and the other actions alluded to by Petitioner were not raised at the hearing as constituting prejudice by Carrier and are not in any event persuasive. The transcript does not reveal any ~~im-~~proper conduct by the hearing officer. Finally, it is clear that Petitioner could and did have recourse to appeal this grievance to Carrier's highest designated officer.

With respect to the substantive issue, Petitioner alleges that Carrier did not establish Claimant's guilt. It is alleged that Claimant was not given appropriate information on movements in order to protect the train in question. However the transcript shows that Claimant was twice requested to issue orders and would not do so; this evidence is **unrebutted**. Claimant's lack of recollection of critical incidents on the day in question lends added credence to the testimony of **other** involved **employees**. Though the facts in this case are **some-**what obscured by Claimant's lack of explanation of his actions, our evaluation of the record brings us to the inescapable conclusion that the charges were supported by substantial evidence. For this reason the claim must be denied.

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 **Employee** involved in this dispute are respectively Carrier and **Employee** 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

Award Number 20285
Docket Number TD-20377

Page 5

That the Agreement was not violated.

A W A R D

claims 1 and 2 are denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A.W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1974.