

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20530
Docket Number TD-20551

Irwin M. **Lieberman**, Referee

(American Train Dispatchers Association

PARTIES TO DISPUTE: (

(The Chesapeake and Ohio Railway Company

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

(a) The Chesapeake and Ohio Railway Company (hereinafter referred to as "the Carrier"), violated the currently effective Schedule Agreement between the parties, **Rule** 8(a) thereof in particular, by its arbitrary, capricious and unreasonable disciplinary action in assessing ten (10) days' actual suspension against Claimant Trick Train Dispatcher H. L. Hiltibrand and ten (10) days' overhead suspension against Claimant Assistant Chief Train Dispatcher W. K. Cook following formal investigation (Board of Inquiry No. 7557) conducted June 1-2, 1972.

(b) Because of said violation, the Carrier shall **now** be required to clear Claimants' personal records of the charges involved in the investigation of June **1-2**, 1972 and compensate them at the appropriate pro-rata rate for all loss of time in connection therewith.

OPINION OF BOARD: This dispute involves the discipline assessed the two Claimants as a result of a series of incidents starting at **2:30** A.M. extending to **4:40** A.M. on May 10, 1972 culminating in Train No. 51 striking a shifted load of steel protruding from a car in Train No. 192 as it passed that train **resulting** in \$750. worth of damage and delays. Both Claimants were charged as follows:

"You are charged with responsibility concerning train **#51**, engine 1471, striking shifted load from RI 91524, 32nd rear end car of train **#192**, engine 7522, at **approximately 4:40** A.M. May 10, 1972, at Dg Cabin, Kentucky, Russell **Sub-** Division."

The investigation notice and charge was dated May 19, 1972. On May 26, 1972 the notice was amended and the investigation was postponed at the request of a representative of one of the Organizations involved, to June 1, 1972.

Following the hearing, by letters dated June 7, 1972 both Claimants were found guilty and disciplined; the letters both stated:

"It has been found that you **were** at fault for failure to act promptly to protect trains, to know train **#193** was instructed to proceed at restricted speed through territory affected, and to take such action as necessary to insure the safe passage of trains in violation of **Rules** 910, 966, 108 and 101, resulting in train No. 51, Engine 1471, striking shifted load from RI-91524, 32nd rear car of train No. 192, Engine 7522, at approximately **4:40 A.M., May 10, 1972....**"

Petitioner first alleges certain procedural defects in the conduct of this investigation: lack of precise charge and unilateral change in date of hearing which extended the **time** limit between date of notice and date of hearing beyond the **ten** day period provided in the **Agreement. Rule** 8(a) in pertinent part provides:

"(a) A train dispatcher shall not be disciplined, demoted, or dismissed without proper hearing as provided herein. Suspension pending such hearing shall not be deemed a violation of this principle. The hearing shall be fair and impartial and shall be held by the Superintendent or his designated representatives. Such hearing shall be held within ten days from the date of **notice** to the train dispatcher involved notifying him of the charge or charges. Such notice shall be in writing and shall clearly specify the charge. The train dispatcher shall have the right to be represented by his duly accredited representatives or by counsel of his choice, and he shall be given reasonable opportunity **to** secure the presence of necessary witnesses. The train dispatcher's representatives shall be permitted to hear all evidence introduced into the record and shall have the right to examine all witnesses. Decision shall be rendered within ten days **from** the date of close of the hearing. A copy of the transcript of the hearing shall be furnished the train dispatcher or his representatives upon request."

With respect to the time limit issue, we note that this matter was not raised by Petitioner until its rebuttal statement. Since this issue **was** not raised on the property (or at the investigatory hearing) we may not consider it at this stage of the proceeding, in **accordance** with long standing policy.

The question of the adequacy of the notice is another matter. This issue was properly raised by Petitioner at every phase of this dispute. A **comparison** of the charge and the ultimate finding reveals significant discrepancies; for example the reference to train **#193** which was not mentioned in the charge was a finding in the letter of discipline. Although we do not

believe the omission of the specific operating rules in the charge precluded the proper preparation of a defense per se, **we** are seriously concerned about the disparity between the charge and the findings. Although Claimants and their representatives were fully aware of the incident under investigation, from the **language** of the charge, we are not convinced that the investigatory hearing stayed within the bounds of those charges. Since this is at best a very marginal question, we shall examine the **merits** of the dispute further.

First it is our **judgement** that the record does not support Carrier's findings with respect to train 11193. Further, in the investigation it is brought out that Claimants could have stopped train **#192** at any of six controlled signals and by this action prevented the accident from taking place. It is also obvious that the appropriate action by the Operator at HX Cabin, the Track Supervisor or the Conductor of Train **#193** could also have prevented the accident. What might have been, however, is only relevant if the actual action taken was either in violation of rules or **was** bad judgment or malfeasance. We are not convinced that there is any evidence to indicate that any prudent **employee** would act differently than Claimants herein in the performance of their functions as dispatchers.

In addition, there is no evidence whatever to support Carrier's contentions that **Claimants** violated certain operating rules including the broad injunction of Rule 108: "In case of doubt or uncertainty the safe course must be taken."

We have frequently expressed our concern for the safe operation of the railroads in the United States and are well aware of the substantial responsibilities of management in this regard. In many Awards on **all** Divisions we have afforded considerable Latitude to management in dealing with employees who's performance created hazards to themselves, their fellow **employees** and the public. However, we have at the same time insisted that the rights of **employees**, as enunciated in the agreements must be protected and that the discipline imposed must be fair and equitable.

We have consistently held that there must be substantial evidence in support of Carrier's disciplinary action; in the absence of such evidence we are compelled to disturb the imposition of penalties. In the matter before us the record of the investigation does not support Carrier's conclusions; the record does not **meet** the standards of substantial evidence which **we** have followed in all Divisions. That standard was well presented in Award 12952 (First Division) as follows:

"It must be true that the evidence at least must have sufficient substance to support a reasonable inference of fact as distinguished from a possibility or an unsupported probability."

Based, therefore, on our evaluation of the evidence of record in the investigation expressed heretofore, we find that Carrier improperly assessed the discipline in this case.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the widence, 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 the discipline was improperly assessed.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **Third** Division

ATTEST:

A. W. Paulsen
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of November 1974.