

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20557
Docket Number TD-20510

Irwin El. **Lieberman**, Referee

(American Train Dispatchers Association
PARTIES TO DISPUTE: (
(Chicago and Western Indiana Railroad Company

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

(a) The Chicago & Western Indiana Railroad Company (hereinafter referred to as "the Carrier"), violated the effective Agreement between the parties, Article 6(a) thereof in particular, by its arbitrary, capricious and discriminatory disciplinary action in assessing fifteen (15) days' actual suspension against Claimant Train Dispatcher G. L. Hardwidge as the result of formal investigation conducted June 22, 1973.

(b) Because of said violation, the Carrier shall now be required to clear Claimant Hardwidge's personal record of the charges involved in the investigation of June 22, 1973 and compensate him for all loss of time in connection therewith, plus interest at the annual rate of six per cent (6%) beginning with Carrier's scheduled pay dates when said compensation was due for the work days involved in the suspension.

OPINION OF BOARD: On June 14, 1973, while Claimant was on duty as a Train Dispatcher with responsibility for the area in question, two trains were permitted to operate on the **same** track in opposite directions simultaneously, which could have resulted in a head-on collision. Following a investigation, the Hearing Officer notified Claimant that after reviewing the transcript: "I find that it reveals that you were, in fact, in violation of Rule 204 inasmuch as Order No. 1 of June 14th was not addressed to Erie Extra 3620 North." Claimant was accorded a fifteen day **suspension.**

The Organization, as its first contention, argues that Claimant was not afforded a fair and impartial hearing. This position was based on the conduct of the hearing itself, including alleged **prejudgement** of guilt, as well as on the contention that Carrier did not require the **attendance** of and make available certain witnesses, including the hearing officer. A reading of the transcript of the investigation **indicates** that there was considerable **turmoil** during the course of the hearing, caused at least in part by the persistent efforts of Claimant's representative to find **errors** in the conduct of the proceeding. However the record does not support the position of Petitioner in the conduct of the investigation, per se. With respect to the matter of witnesses the record indicates that there was absolutely no showing that the hearing officer or either of the other individuals

had any relevant information bearing on the particular incident under investigation, even though Claimant was given ample opportunity to make such showing. Moreover there was no agreement proviso requiring Carrier to call witnesses; Claimant had the obligation to produce his own witnesses and he failed to avail himself of this right. Although we are somewhat uncomfortable with the Hearing Officer's refusal to testify, under all the circumstances of this dispute, we do not find that this action was in itself sufficient to impair Claimant's defense and as such **constituted** grounds for reversal of Carrier's conclusions.

With respect to the merits, Carrier's Operating Rule 204 contains the following provisions with reference to whom train orders must be addressed:

"Train orders must be addressed to those who are to execute them...."

Carrier's conclusion was based on the fact that Claimant issued a train order which had the effect of taking away the superiority of the northbound train but did not furnish that train a copy of the order. Claimant admitted that he did not give a copy of the train order to the northbound train but argued that other dispatchers over a recent period of time had interpreted **Rule 204** similarly under **analogous** circumstances. The record supports Claimant's contention in this respect; however there is no evidence to show that Carrier had been aware of, much less acquiescing in, such conduct. We have held repeatedly that an **employee** should be disciplined for his own misconduct regardless of the fact that other **employees** may also have been guilty of similar misconduct (see for example Award 15978).

The record in this case supports the charges against Claimant. There is no showing that Carrier acted arbitrarily or exercised **capricious** judgment in imposing the suspension in this case. Under all the circumstances, we will not disturb Carrier's disciplinary action.

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 **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 Agreement was not violated.

A W A R D

Claim denied.

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

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 13th day of December 1974.

Dissent to Award 20557, Docket TD-20510

In Award 20557 the Board has exceeded its jurisdiction when adjudicating the dispute contained in Docket TD-20510. The Board is not empowered to change Agreement rules but must confine itself to the interpretation or application of Agreements covering rates of pay rules, or working conditions.

The Discipline Rule, Article 6, of the Agreement reads in pertinent part:

"Train dispatchers will not be disciplined without a fair hearing before a designated officer of the Railway Company. Investigation shall be held within ten (10) days after written notice is given the employe of the charges preferred against him. He shall have the right to have a representative of his choice present at the investigation to hear all oral and to read all written testimony, and to bring out any facts in connection with the case. ***"

Award 20557 states "Moreover there was no agreement proviso requiring Carrier to call witnesses; Claimant had the obligation to produce his own witnesses and he failed to avail himself of this right." Even a casual reading of the Discipline Rule should have revealed that the employe does not have the right to call his own witnesses under the Discipline Rule of the Agreement. However, the employe is entitled to a representative and this representative is entitled under the Agreement to "bring out any facts in connection with the case". In addition "a fair hearing" could only be construed to be an investigation to fully and completely develop all the facts regarding the charges preferred against the employe.

Prior to the hearing the Employees' representative wrote to the Carrier advising that certain persons should be made available as witnesses at the hearing to afford the Claimant the fair hearing contemplated in the Agreement. The Carrier in reply advised that the Carrier was not obligated under the Agreement to make these persons available as witnesses and the Employees had been instructed in the notice of charges to the Claimant that if certain persons were desired as witnesses, the Employees could summon them. Some of the persons requested as witnesses by the Employees were made available as witnesses at the hearing but others were not. The Carrier made a unilateral determination as to what persons should be summoned as witnesses and which persons should not be summoned as witnesses. Clearly, the Carrier was not interested in a fair hearing but had made a prejudgment as to which "facts in connection with the case" were going to be developed in the investigation in direct violation of the terms of the Agreement, which amounted to a denial of "a fair hearing" which was Claimant's right under the Discipline Rule.

Dissent to Award 20557, Docket TD-20510 (Cont'd)

One of the persons which Carrier refused to make available as a witness at the hearing, in spite of the prior written notice and repeated requests at the hearing, was the Carrier's Rule Examiner-Chief Train Dispatcher who conducted the hearing. In addition to having pertinent knowledge of the incident under investigation, i.e. the movement of the trio trains, the Rules Examiner would have been able to present relevant testimony in regard to the rules allegedly violated as to the application or interpretation of these rules on the property.

Carrier's contention that it was under no obligation to call the persons requested as witnesses does not destroy the Agreement requirement that the employe be granted a fair hearing and that he or his representative be allowed to bring out any facts in connection with the case. Likewise, Award 20557 cannot destroy these Agreement rights and at best Award 20557 can only be considered to have miserably failed to interpret and/or apply these provisions of the Agreement as the Board is not empowered to detract from, i.e. change, the terms of the Discipline Rule in the Agreement.

Award 20557 recognizes that Claimant was disciplined because "Order No. of June 14th was not addressed to Erie Extra 3620 North" and the Carrier had held that Claimant had thereby violated Rule 204. Award 20557 cites a portion of Rule 204, stating:

"Train orders must be addressed to those who are to execute them. . ."

Rule 204 then states:

"those for a train must be addressed to the conductor and engine man and to anyone who acts as its pilot"

and further states:

"Orders addressed to the operators restricting the movement of trains must be respected by conductors and engine men, the same as if addressed to them."

Therefore, you have an ambiguity within Operating Rule 204, i.e. orders restricting the movement of a train must be addressed to the train but orders restricting the movement of a train addressed to the operators must be respected by the conductors and engine men of the train the same as if addressed to them. The Board is not expected to and cannot interpret an Operating Rule as this is not the duty or function of the Board. The Board's duty or function is to interpret or apply the Agreement. When you have an ambiguity in an Operating Ru

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the Board must look at the evidence presented in the transcript of the investigation to find the correct meaning and/or application of the Operating Rule on that property. The investigation is where the guilt of the employee is to be proved and the Carrier must bear the burden of proof in discipline cases.

The Carrier failed to present a shred of evidence to show that it was not an accepted practice on the C&WI for the train dispatcher to issue orders restricting trains (to permit opposing movements against the current of traffic) by having the operator place the signal blocking devices (controlling entering the territory wherein the train order restriction occurs) and then issuing the order to the operator to be executed by the operator. All of the testimony of train dispatchers at the hearing, including Carrier's Relief Chief Train Dispatcher-Rules Examiner, confirmed the train order book evidence and clearly showed that such restricting train orders were addressed only to the Operator to execute by holding the restricted train at the controlled signal protected by a blocking device until the opposing train granted the superiority by the train order had fulfilled the terms of the train order issued. This handling was further confirmed by Engineer Moore on Erie Extra 3620 North at the hearing when he testified that in the twenty-five year period he has operated trains in that territory he had never received a train order such as the train order in question but that his train has been held at a signal when a train is opposite him on the same track and on which track his train was the superior train. On this property the train order creating the restriction is addressed to the operator who is to execute the order by leaving the blocking device in place. The Hearing Officer conceded at the hearing that placing the blocking devices were the required and necessary protection by asking if the necessary blocking devices had been placed prior to the issuance of the train order. In addition, this same Carrier officer was on the ground and at the station when the blocking devices were placed to protect the movement of this very train Erie Extra 3620 North, which is the subject of this investigation, but the Carrier held that this officer did not have knowledge which would require his attendance at the investigation as a witness.

While Award 20557 has adversely affected the Claimant's right to a fair and impartial hearing as provided by the Agreement, the Board cannot render an Award which would have the effect of destroying the right to a fair hearing to bring out any facts in connection with the case as provided by the Agreement for the Board does not have the authority to change Agreements. Award 20557 failed to perform the function of the Board by failing to interpret and apply Article 6, the Discipline Rule of the Agreement.

Dissent to Award 20557, Docket TD-20510 (Cont'd)

Award 20557 exceeded its jurisdiction when it interprets and/or determines the application of Carrier's Operating Rule, which is not a proper function of the Board. Award 20557 makes an erroneous as well as an improper interpretation of Operating Rule 204 holding directly counter to the evidence presented at the hearing.

Award 20557 is clearly in error and I must dissent.



J. P. Erickson
Labor Member