NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20958
THIRD DIVISION Docket Number TD-20973

Louis Norris, 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 existing schedule Agreement in effect between the parties, Article 8, Section (b) thereof in particular, by its action in assessing discipline amounting to thirty (30) days' actual suspension from service upon Train Dispatcher J. R. Canttell. The record of the formal hearing held on May 21, 1974 failed to establish that Claimant violated Carrier's operating rules as alleged, thus Carrier's action in imposing discipline was arbitrary, capricious, and in abuse of managerial discretion.

(b) The Carrier shall now be required to clear Claimant's employment record of the charges which provided basis for Carrier's action, and to compensate him for wage loss sustained as a result of suspension from service.

OPINION OF BOARD: The Statement of Claim sets forth generally the nature of this dispute, the alleged violation of the Agreement, and the relief demanded. The pertinent facts which led to the imposition of discipline upon Claimant are as follows.

On May 1, 1974, Claimant, with 10½ years of service, was working his regular assignment as Branch Dispatcher on the Midnight to 8:00 a.m. trick. The territory assigned to this position is a single-track, automatic block signal territory, operated by means of timetable-train order method of operation. Cottage Grove and Roseburg are intermediate stations on this subdivision. Train Order No. 109 was issued by Claimant to Operator Natale at Roseburg for delivery to Train Extra 8411 East, and simultaneously to operator Saltsgaver at Cottage Grove for delivery to Train Extra 8465 West. Train Order No. 109 read as follows:

"Extra 8411 East hold main track meet Extra 8465 West at Wilbur." (Emphasis added).

The confirmatory procedures followed by the Dispatcher and the Operators will be discussed hereafter. In any went, it appears that the words "hold main track" were not contained in the order delivered by Saltsgaver to Extra 8465 West at Cottage Grove. In the absence of this restric-

tion, Extra 8465 was the superior train by timetable direction. In consequence, both trains held the main track at the meeting point and this obviously created, as Carrier contends, "a hazard of accident" which, fortunately, did not occur.

Accordingly, formal hearing was held on May 21, 1974, to which the Dispatcher and the Operators were cited and charged with violation of various operating Rules. Claimant was found guilty of "failure to underscore each word as repeated by each operator after you had issued Train Order No. 109", and was suspended for a period of 30 days. In denying Claimant's appeal, however, Carrier asserted that the discipline "squared with proven failure to detect there was crucial language missing from the order repeated to him by the operator at Cottage Grove".

Various issues are raised by each of the principals and these will be discussed separately for purposes of clarity and emphasis.

NOTICE OF HEARING

Petitioner's submission to the Board during the appellate process raises for the first time the issue that the formal hearing on May 21st was hot held within ten days of the Notice dated May 3rd, as required by the Agreement. Carrier objects, and properly so, that this contention constitutes "new matter" not previously raised on the property. The record clearly supports Carrier's objection and, accordingly, we do not sustain Petitioner's contention on this issue. Innumerable prior awards of this Board have held repeatedly that issues not raised on the property will not be considered by the Board at this stage of the appellate process.

See Awards 18122, 18247, 18545, and 19832, among a host of others.

THE CHARGE

The record indicates, as contended by Petitioner, that there is some variance between the items of charge Levied in the Notice of Hearing and those specified by the Hearing Officer at the outset of the hearing. On balance, however, we are persuaded that Claimant and Petitioner were sufficiently placed on notice that the purpose of the Investigation was to ascertain responsibility, if any, in connection with the facts and attendant developments relating to the issuance of Train Order 109; the claimed "hazard of accident"; and possible violation of various operating Rules. Certainly, Claimant was not in any degree misled by such variance nor, as the record indicates, was he unprepared to reply fully to all questions put to him.

In the Latter respects, therefore, we find no impropriety in the procedure followed by Carrier, nor any violation of the Agreement.

However, we cannot fail to note the obvious discrepancies between the stated charge as contained in the Notice of Hearing and opening stat-t of the Hearing Officer, on the one hand, and the conclusions stated by Carrier Officers during the appeal process, on the other hand. Thus, Superintendent Babers letter of May 31, 1974 states:

> "Evidence adduced at formal investigation/hearing . . established your responsibility in connection with your failure to underscore each word as repeated by each operator after you had issued Train Order No. 109 . . .". (Emphasis added).

The Letter of Mr. Hall, Personnel Manager, dated August 22, 1974, in denying the final appeal, evidences further discrepancy in stating that Claimant had "failed to detect that there was crucial Language missing from the order repeated to him by the operator at Cottage Grove". (Emphasis added).

These additional charges against Claimant for "failure to underscore" and "failure to detect" were not contained either in the Notice of Hearing or in the opening statement of the Hearing Officer as to the purpose of the Investigation.

We stress these discrepancies since they tend to support Petitioner's contention that various inferences and conclusions were drawn by Carrier officers unsupported by the record testimony, to which detailed reference will be made hereafter, and that in fact Claimant was disciplined on the basis of a "new theory".

THE HEARING

The Investigation was in all respects fairly and properly conducted, with full Latitude on testimony being afforded to all witnesses, including Claimant, and with full opportunity to Organization officers to cross-examine and inquire fully on all pertinent facts.

However, the conclusions reached as to the guilt of Claimant are quite another matter and leave much to be desired, particularly when viewed in the Light of the testimony.

The accident report of Chief Train Dispatcher Mayberry, witness called by Carrier, and which is part of his testimony, states in part that both trains had stopped; that as to "hazard of accident" he stated "none",

and that "Incomplete train order (was) delivered to Extra 8465 West at Cottage Grove". The accident report attributes no fault to Claimant. Moreover, the "incomplete train order" to Extra 8465 could only have been so delivered by operator Saltsgaver at Cottage Grove.

Additionally, Mayberry testified that the train order book showed no "alterations, erasures or errors made" in connection with Train Order No. 109; that the train order was issued "in the proper form"; that it was written in full; that it was completed to Roseburg at 3:49 a.m. and to Cottage Grove at 3:50 a.m.; that the "operators repeated the train order" but in improper sequence (inferior train before superior train); that the train orders were repeated by the operators by the underscoring of each word; and that "each word is underscored twice". Further, that there was no communication problem and that "The book would indicate the order was sent to both operators simultaneously since the repeats were one minute apart." (Emphasis added). Finally, that the train order as shown in the train order book was "in correct form".

On cross-examination, he testified that the order issued at Roseburg was "the same in every manner" to Train Order LO9 issued by Claimant. But that the order issued at Cottage Grove omitted the words "Hold main track". As to whether the order was heard by the operator at Cottage Grove while it was "being given by the train dispatcher in the correct manner and again being repeated by the operator at Roseburg in the correct manner", Mayberry stated:

> "It should have been heard by the operator at Cottage Grove, yes."

Analysis of this testimony does not to this point evidence any impropriety or fault on the part of Claimant, except in one minor respect - delivering the Train Order "in improper sequence" as between an inferior and superior train. But this minor aspect fades into insignificance when we consider that the Train Order was issued to both operators simultaneously.

Claimant, on his part, testified fully and frankly on all questions put to him. Ha took no exception to Mayberry's testimony. He testified that he was familiar with both operators and that he issued Train Order--No. 109 in proper form to each of them "in the same words"; that both operators repeated the train order "as it was transmitted"; that he made no additions or changes; that he transmitted and listened to the repeats without any interruptions; and "clearly and distinctly"; that they were so repeated to him by each operator; that he spelled out the contents "Letter by Letter": that ha took "no exception" to the manner of the repeats; that he underscored each word and number twice as it was repeated; that neither operator indicated that any errors had been made. Further, that he could not account for the discrepancy as between the train orders delivered by Roseburg and Cottage Grove. And, finally, that be exercised good judgment of safety in issuing Train Order 109.

On cross-examination, he testified that he became aware of a possible discrepancy "after returning to duty the following day" when the Roseburg Operator indicated that he had missed part of the order, during the repeat from Cottage Grove, due to radio interference. Further, that there was no doubt in his mind that he had complied fully with all regulations and instructions, and that he was able to hear "very clearly" the repeat orders from the Roseburg and Cottage Grove Operators.

The Operator at Roseburg, Mr. Natale, fully corroborated the testimony of Claimant and stated that he took "no exception" to the testimony of Claimant or to the testimony of Mayberry. He conceded that he should have advised the Dispatcher that he had not been able to hear in full the repeat from Cottage Grove, but admitted that "he did not do this". In short, Natale attributed no fault or lack of proper procedure to Claimant.

Mr. Saltsgaver, the Operator at Cottage Grove, also corroborated the testimony of Claimant and stated that he "took no exception" to the testimony of Cantrell (Claimant), Mayberry or Natale. He testified that he could hear the Dispatcher distinctly and, equally important, could hear the Operator at Roseburg distinctly. Further, that the train order was spelled out to him by the Dispatcher "letter by letter" and that it was sent simultaneously to him and to the Operator at Roseburg.

However, as to the "contents" of the Train Order, he stated:

> "The way I copied the Order, I heard him say, 'Extra 8411 East meet Extra 8465 West at Wilbur"'. (Emphasis added)

Further, that he was "able to hear the repeat of Roseburg as he repeated it to the dispatcher." However, when he was asked to account for the words "Hold main track" being left out of the body of his train order, he stated:

> "I cannot explain why the three words, 'Hold main track' are left out of my order. But I copied the order, I listened to the repeat and I read it right; I listened to Roseburg repeat it and I read it. I read my order right along with him and i thought our orders compared the same at that time."

Nevertheless, he finally stated that he did not make "any type of error or mistake in copying Train Order No. 109".

ANALYSIS AND FINDINGS

We have analysed the testimony in detail to stress two points of major relevance. Firstly, that the testimony of Claimant was corroborated by each of the witnesses, whereas the testimony of Saltsgaver stands uncorroborated. Secondly, that except for the testimony of Saltsgaver, no fault or failure to comply with the operational Rules is attributed to Claimant.

As part of its written submission, Carrier asserts that Petitioner conceded the truth of Saltsgaver's testimony. Were this the case, we would have no reason to render an Award. Such assertion, however, is factually inaccurate and taken out of context. In point of fact, the statement by Petitioner is that in order for the charge against Claimant to have any substance "one must accept the testimony of the Cottage Grove Operator as absolutely unimpeachable. We submit that it is not!" Obviously, there was no such concession by Petitioner.

We are cognizant of the principle enunciated in many prior Awards that this Board will not substitute its judgment for that of the Carrier in evaluating the evidence; provided, however, that substantial probative evidence is presented in the record supporting the charge against Claimant.

See Awards 6387 and 20245 (Lieberman), 19487 (Brent), 17914 (Quinn) and 15574 (Ives), among many others.

Such "substantial probative evidence" is not present in this record, particularly in respect to the testimony of Saltsgaver. The testimony clearly establishes the following facts. The Train Order was sent simultaneously to both operators, Natale and Saltsgaver, and was in "correct form" when issued. It was repeated back between Cantrell and Natale, and Natale issued precisely the same Train Order. It was repeated back between Cantrell and Saltsgaver, but Saltsgaver issued a differently worded Train Order omitting the vital words "Hold main track". This, in spite of the fact that he could hear the Dispatcher distinctly and could hear Natale distinctly on the repeat. But Natale's repeat was precisely the same as the order issued by Claimant. It is inconceivable, therefore, that although Saltsgaver heard Natale repeat the correct train order, nevertheless Saltsgaver issued a different train order. Indeed, he testified that the train order was spelled out to him letter by letter and that it was sent simultaneously to him and to Natale.

In the face of these glaring inconsistencies in Saltsgaver's testimony, we find his version of the facts to be incredible to the point of impossibility. We can sea no way for Saltsgaver to have heard what he says he heard, and yet to have issued an incorrect train order. Error certainly occurred; but the error was his, not Claimant's. We can see no way for Cantrell (with 10½ years of experience) to have heard an incorrect repeat of the order and not have called it to Saltsgaver's attention imediately. Small wonder that Saltsgaver could not "explain" why the three words "Hold main track" were omitted from the train order issued by him.

Once we determine that Saltsgaver's testimony was not credible, there is no case against Claimant. We are impelled to the finding, therefore, that the conclusions reached by carrier Officers as to the guilt of Claimant were based on inferences, surmise and speculation not warranted by

the evidence. We have held repeatedly that a finding of guilt on such basis cannot be allowed to stand.

See Awards 17347 (McCandless), 18551 (O'Brien) and 20766 (Lieberman), among others.

> "A record must establish by substantial and competent evidence of probative value that the accused has violated some rule or instruction. (Among many others, see Awards 10692, 6827, 6116, 6056, and 5881.) This, Carrier has failed to do in the instant case." See Award 17347, supra.

Carrier asserts that the discipline here imposed was "exceedingly mild". But if, in fact, the guilt of Claimant has not been probatively established, as is the case here, then clearly <u>any</u> discipline is excessive and unwarranted.

The principle is well established in innumerable prior Awards of this Board that in discipline cases the burden of proof rests squarely upon Carrier to demonstrate convincingly by evidence preponderating in its favor that Claimant is guilty of the offense upon which his disciplinary penalty is based.

See Awards 14120 (Harr) and many cases cited therein, 20245 (Lieberman), 20471 (Anrod) and 20252 (Sickles), among a host of others.

Analysis of the testimony allows but one conclusion - the absence of any convincing preponderating evidence establishing the guilt of Claimant. Consequently, Carrier has failed to sustain its burden of proof.

Accordingly, based on the record evidence and established precedent, we are compelled to sustain the claim.

<u>FINDINGS</u>: 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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

dated at Chicago, Illinois, this 13th day of February 1976.