

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21056
Docket Number TD-21135

Irvin M. Lieberman, Referee

(American Train Dispatchers Association

PARTIES TO DISPUTE: (

(Louisville and Nashville Railroad Company

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

(a) The Louisville and Nashville **Railroad** Company, **Monon** Sub-Division, hereinafter referred to as "the Carrier" violated the Agreement in effect between the parties, Article VIII (a) and (b) thereof in particular, by its action in assessing discipline in the form of dismissal following a formal hearing held Monday, September 24, 1973. The record of said formal hearing fails to support Carrier's charges, thus imposition of discipline was arbitrary, capricious, unwarranted and an abuse of managerial discretion.

(b) Carrier shall now rescind the discipline assessed, clear **Claimant's** employment record of the charges which provided the basis for said action, and to compensate Claimant for wage loss suffered due to Carrier's action.

OPINION OF BOARD: Ibis **is a** discipline diepute in which Claimant was dismissed from service for alleged improper issuance of a train order. Claimant was a Train Dispatcher on the **former Mown** property of Carrier. The **Monon** was merged into Carrier's organization in 1971; the incident herein occurred on September 11, 1973.

Both Petitioner and Carrier allege time limit violations by the other side. Petitioner claims that Carrier did not confirm the decision reached at the conference held on November 15, 1973 until December 28, 1973 which was considerably in excess of the fifteen day time limit provided in the Agreement. Carrier alleges that Petitioner did not submit its intention to file a submission with this Board until December 18, 1974 which was almost eleven months too late, in accordance with the thirty day appeal period specified in Article VIII (c) of the **Agreement**. After careful evaluation of the arguments and authorities cited, **it** is concluded that neither position has merit. First with respect to Carrier's argument on the appeal to this Board, we find no provision in the Agreement (contrary to provisions in **many** other Agreements which set forth specific **time limits**) containing a **time** limit within which a claim must be submitted to **a tribunal for final adjudication**. The **time** limit provisions alluded to relate to appeals from Lower to higher **officials** and **have nothing** to do with **time** limits in bringing disputes to **this** Board (see Award 6863). The argument presented by the Organization is equally without merit. The Claim was denied by Carrier's highest officer in timely fashion on October 29, 1973; the subsequent conference was held on **November** 15, 1973 at which **time** the declination was reaffirmed. The confirmation of the conference, dated December 28, 1973,

does not fall within the purview of Article VIII (c); further there is no penalty provision applicable to this circumstance. In addition, it must be noted that Petitioner waived **its** position with respect to the **timeliness** of Carrier's confirmation Letter by continuing to handle the **case** on its merits alone, thereafter.

Since the investigation itself was not flawed, the dispute must be examined on its merits. There is no dispute that Claimant did not secure the signatures of the conductor and engineer as required by Rule 219 of the L & N operating **rules**, which became effective on the Monon Subdivision on August **1**, 1971. The only significant defence raised was that the Chief Train Dispatcher had previously issued instructions that it would be unnecessary to obtain signatures of conductors and engineers to annul their work orders. It must be observed, however, that evidence in support of this defence **was** not submitted until some time after the investigation was completed, and hence is **inadmissible**. However, it is noted that Carrier admitted that the signatures of conductors **and** engineers on train orders was not required in the Operating Rules of the Monon Railroad.

It **must** be concluded that Carrier adduced sufficient evidence at the investigatory hearing to justify its conclusion that Claimant was guilty as charged. The only question remaining is whether the penalty of dismissal was arbitrary or capricious. It **must** be observed that Claimant, with twenty five year's of service, had been used to the practices on the Monon Railroad even though he had been examined on the rules of the L & N. Under all the circumstances, the penalty of dismissal seems arbitrary and unwarranted. Claimant received a disability retirement and information from Carrier that if his condition improves he would be considered for return to service before reaching **age 65**. It is our conclusion that the discharge be converted to **a** disciplinary suspension to run from the date he was **removed** from service to the date he received the disability pension; he shall **not** receive any **pay** for time lost.

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

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That the discipline imposed **was** arbitrary.

A W A R D

Claim sustained to the extent indicated above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A. W. Paulson*
Executive Secretary

Dated at Chicago, Illinois, this 29th day of April 1976.