

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVE ICS

Award Number 21227
Docket Number TD-21285

Walter C. Wallace, Referee

PARTIES TODISPUTE: (American Train Dispatchers Association
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(Fort Worth and Denver Railway Company

STATEMENT OF CLAM: Claim of the American Train Dispatcher6 Association
that:

(a) The Fort Worth & Denver Railway Company, hereinafter "the Carrier", violated the Agreement in effect between the parties, Rule 28 (a) and (b) thereof in particular, by its action in assessing discipline in the form of dismissal, at the request of the Chicago, Rock Island and Pacific Railroad Company, effective December 27, 1973 following formal hearing held November 28, 1973. The record of said formal hearing fails to support Carrier's charges of rules violations, thus imposition of the supreme penalty was arbitrary, capricious, unwarranted and indicative of complete disregard for Claimant's rights in the procedure required in industrial due process.

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

OPINION OF BOARD: On October 2, 1973, Claimant P. R. Armstrong was working as train dispatcher, assigned hour 3:00 p.m. to 11:00 p.m.. Part of the territory under Mr. Armstrong's jurisdiction extended from Belt Junction, Houston, Texas, Mile Post 57.4, to and including Waxahachie, Texas, Mile Post 270.9.

At approximately 7:55 p.m., October 2, 1973, Dispatcher Armstrong issued train order 197 over the telephone simultaneously to Operator J. W. Bishop at Teague, Texas on the Joint Texaco Division of CRI&P-FW&D, and Operator M. C. Higginbotham at Belt Junction, Houston, Texas, reading:

"Men and equipment on main track between Mile Post 91 Pale 27 and Mile Post 95, between Tomball and Karen from 8:01 a.m. until 5:01 p.m., October 3. All trains on main track proceed through these limits at reduced speed not exceeding 25 miles per hour unless a different speed is verbally authorized by employee in charge or entire train has passed a green flag."

This order was completed to the operator at Teague at 7:59 p.m. and completed to the operator at Belt Junction at 7:59 p.m., October 2, 1973.

Subsequently it developed that the operator at Belt Junction issued train order 197 erroneously listing the expiration time at 12:01 p.m. instead of 5:01 p.m., October 3, 1973.

After certain postponements Dispatcher Armstrong and operators Bishop and Higginbotham were notified to attend an investigation of the matter on November 28, 1973. At such investigation the above individuals were represented and full opportunity was afforded each to give testimony, produce witnesses and conduct cross examinations. It was considered by one and all that the hearing was fair and impartial. Thereafter the Chicago, Rock Island and Pacific Railroad Company and the Fort Worth and Denver Railway Company determined that Dispatcher Armstrong should be dismissed for his responsibility. In assessing the discipline the claimant's prior record was taken into account. The claimant, at the time of his dismissal, had 46½ years of service.

Subsequently the claimant was dismissed, effective December 27, 1973, and a claim was filed on his behalf for reinstatement with seniority and other rights unimpaired along with pay for time lost. Carrier was accused of violating Rule 28(a) and (b) by assessing discipline in the form of dismissal following formal hearing where the "record" of said formal hearing failed to support Carrier's charges of rules violations" and therefore it was claimed imposition of this penalty "was arbitrary, capricious, unwarranted and indicative of complete disregard of Claimant's rights in the procedures required in industrial due process". Accordingly, the claimant requested the rescinding of the discipline assessed, clearing of the record of such charges and compensation or claimant for wages lost as a result of carrier's actions.

We have a threshold question in that the Employees contend this claim has been adjusted on the property that carrier failed to comply with the time limits imposed by the Railway Labor Act. Specifically, it is claimed carrier acknowledged receipt of the claimant's appeal on June 17, 1974 and suggested a conference on September 16, 1974. The Employees contend that absent a contractual time limit within which to handle appeals, the time limits imposed by the Railway Labor Act are applicable, citing various awards.

We do not find it necessary to decide the proper time limits applicable, if any, here. Instead, we agree with carrier that this issue was not raised on the property. It is incumbent upon the party making such claim to raise the issue on the property rather than make the claim before this Board for the first time. Failing in that, this Board lacks authority to consider it.

The factual issue here is whether or not Dispatcher Armstrong failed to catch the erroneous message repeated by Operator Higginbotham. It is uncontested that Operator Bishop and Operator Higginbotham received

the message simultaneously and Operator Bishop's version **was** correct. It is assumed that Higginbotham received the same correct message. **However**, the message written in **his records is** incorrect with respect to the expiration time. Presumably, **Dispatcher Armstrong** would **have** caught the erroneous message on repeat **through proper** attention to **and** compliance with the rules. This could be so if Higginbotham had repeated the incorrect message. Of course, claimant **denies** this **and** the other operator, Bishop, could not hear the repeat. On the other hand, if Higginbotham repeated the correct message and, somehow, later copied out the message incorrectly, then claimant would be absolved. Here we have a neatly balanced question that is impossible to resolve in the absence of some independent or corroborating evidence that would tip the scales one way or the other. Clearly, one of these men **was** at fault **for** the **erroneous** message.

If It **was** the function of **this Board** to evaluate the evidence and **substitute** its **judgment for that** Of the **trier Of facts** it **would be difficult** to speculate as to which **conclusion** we would reach here. But that **is** not our function in **discipline cases** and we **must resist** the temptation to substitute our judgment **for that** of the carrier, however different our view might be concerning the facts. So long as the **carrier's** decision is **supported by substantial, probative** evidence that is **unrebutted**, the carrier's **burden is satisfied** and its **conclusions** should not be disturbed. **Here** the **carrier** had such proof **in the testimony** of Operator Higginbotham and, under the **circumstances, carrier** could accept that **testimony**. In all candour, if carrier had **chosen** to believe **Dispatcher Armstrong** instead and based its **decision** accordingly, we would have had no **basis** for **disturbing** that **result** based upon this record. See Award 19696. If this **seems anomalous** we **make** reference to the **observations** of Referee Ables in Award 13168 dealing with a **similar case**. There **are** pertinent here and we adopt them:

"Under **all** the **circumstances**, including hearing the testimony of both employer, the carrier **chose** to believe the telegrapher. Since the **telegrapher's testimony was** direct, **substantive** and probative evidence on the offense **charged**, the carrier **has** satisfied whatever burden it **carries** In **this respect** to support its discipline of the **dispatcher**. The fact that the **dispatcher's testimony was** equally direct, **substantive** and probative merely establishes that there is another **side** to the **story**, not that the carrier has **failed in its burden** to support the charge. The precedent **is** too well established, that **this Board should not substitute** its **judgment** for that Of the **carrier** in discipline **cases** where It has produced **Substantial** evidence that the **offense** charged **was committed**, to **sustain** the claim here."

Under the **circumstances** we find the **necessary support** in the record for the **carrier's** finding that claimant **was** the **guilty** party. **Further**,

carrier was entitled to review the claimant's **prior** record for **violations** and infractions and **in** doing so it **cannot** be said the imposition of the penalty of dismissal was arbitrary, **capricious**, unwarranted or **in** disregard of claimant's **rights**.

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

That the Agreement was not **violated**.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A.W. Pauls*
Executive Secretary

Dated at Chicago, **Illinois**, this **31st** day of **August 1976**.