

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22291
Docket Number TD-22315

Nathan Lipson, Referee

PARTIES TO DISPUTE: { **American Train Dispatchers Association**
 { **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, in particular **Rule 8(a)**, when on **December 19, 1975** it administered **thirty (30) days** actual suspension, further reduced to **fifteen (15) days** actual suspension by letter dated **January 2, 1976**, to **Train Dispatcher E. L. Cobb** as a consequence of hearing held on **December 11 and 12, 1975** - **Board of Inquiry No. 12464** - such action being unjust, harsh, unreasonable, in abuse of managerial discretion, and is neither fair nor impartial.

(b) **The Carrier shall now be required account of this** flagrant violation to clear the record of **Train Dispatcher E. L. Cobb** and **make him whole by reimbursing Mr. Cobb for time lost account required to attend Board of Inquiry on December 11, 1975, along with the days lost account serving suspension time at the pro rata rate because of said violation referred to in paragraph (a) hereof:**

Time Lost

December 11, 1975	Attending Board of Inquiry	\$ 64.70
December 21, 1975	Suspended	64.70
December 22, 1975	Suspended	64.70
December 23, 1975	Suspended	64.70
December 24, 1975	Suspended	64.70
December 25, 1975	Suspended	64.70
December 28, 1975	Suspended	64.70
December 29, 1975	Suspended	64.70
December 30, 1975	Suspended	64.70
December 31, 1975	Suspended	64.70
January 1, 1976	Suspended	72.33
		\$719.33

OPINION OF BOARD: The underlying facts in this case are not in dispute. Same are summarized in the following excerpt from the carrier's submission:

"On Wednesday, November 19, 1975, Train Dispatcher E. L. Cobb was working his regular assignment on Second Mck from 3:59 p.m. through 11:59 p.m. on the "swing" position as dispatcher on the New River Sub-division. At this time, Train Dispatcher Cobb had two (2) extra trains moving westbound on his Model Board. The first train, Extra 8225, had departed from Thurmond, West Virginia, destined for Handley, West Virginia, had proceeded west to M. A. Cabin over No. 1 M.L. (Main Line) Track, then proceeded through the "Crossover" at M. A. Cabin to No. 2 M.L. Track and proceeded to Handley. It was at this time that Train Dispatcher Cobb noticed that the track circuit on No. 2 Track West at the Crossover was "occupied". He apprised Assistant Chief Dispatcher Long of this situation. Signal Maintainer H. G. Cole was then called and proceeded with his motor cart to that location. Train Dispatcher Cobb then proceeded to block and code to the "stop" position that portion of track between Cotton Hill and M.A. Cabin on No. 2 M.L. Track. At 8:10 p.m. that evening, Maintainer Cole advised the Operator at Thurmond, West Virginia, that he had found a 2-inch "pull apart" in the No. 2 rail at M.P. 409.5. Upon checking with Carrier's Supervision, Mr. Cobb instructed Operator Boyd to call a Section Force to effect repairs.

The second train noted on Mr. Cobb's Model Board, Extra 7579 West, left Thurmond, West Virginia, at approximately 7:54 p.m., using No. 2 M.L. Track to M.A. Cabin. It was intended that this crew would meet Train No. 92, using No. 1 M.L. Track at M. A. Cabin. As Extra 7579 approached Bachman near W.P. 408, the crew observed that the block signal at that location was on "approach" (Yellow over Red), which would dictate that the train proceed at a "slow speed" over the track. When Extra 7579 proceeded within ten (10) car lengths of the signal, the signal went "Clear" (Green over Red). Extra 7579 then proceeded to M.A. Cabin Signal Location 130-L near Mile Post 409. After moving westward approximately sixty (60) car lengths, Extra 7579 struck the Motor Car of Signal Maintainer Cole which was situated on No. 2, M.L. Track.

"The investigation on this matter was scheduled for December 11, 1975. On December 3, 1975, a Notice of Investigation above Trainmaster J. W. Cowherd's signature was sent to Mr. Cobb, among others, advising him:

'You are charged with responsibility in connection with Motor Car 1805 being struck and damaged in the vicinity of M. A. Cabin on No. 2 main line by Extra 7579-3787 West at approximately 8:45 PM November 19, 1975.'

Petitioner was represented by Messrs. J. Gearhart and R. J. Irvin, General Chairman and Vice Resident of the Organization, respectively. ---"

During the formal investigation of this matter on December 11, 1975 Rule 957 of the Carrier's Operating Rules came up. On December 19, Claimant Cobb was notified that it had been found that he was at fault "for failure to comply with Rule 957 of the Operating Rules requiring you to code and observe machine indication after positioning and prior to blocking control devices resulting in Extra 7579-3787 West striking Motor Car 1805 standing on Number 2 main line, M.P. 409.9, New River Sub-Division on November 19, 1975 at 8:45 PM ---." Rule 957 reads as follows :

"Where Operating Rules, Motor Car Rules or special instructions require protection to be afforded by the display of STOP indication on controlled absolute signals and/or controlled switches properly positioned to prevent opposing or conflicting movement, the Train Dispatcher must comply with the following instructions:

- (1) On Non-Code Type Control Machines, devices controlling signals and/or switches must be blocked, but indications must first be observed to insure that the controlled functions in the field are in agreement with controlling devices.

Where switch levers are provided with Out-of-Correspondence lights, such light must be known to be functioning by manipulation of lever before blocking device is installed.

- (2) On Code Type Control Machines, devices controlling signals and/or switches must be blocked, but they must first be coded and indications observed to insure that the controlled functions in the field are in agreement with controlling devices. If the indication codes are not received assuring that such agreement exists, the controlled functions must not be used to provide protection. Blocking devices must be applied in accordance with instructions approved by the Signal Department.
- (3) Model Board Indication must not be accepted as assurance that a track section is clear of trains or engines when location of such trains or engines is not known.
- (4) Train Dispatcher must not use such protection whenever informed that work is being performed that could interfere with the normal functioning of Control Machine or associated code equipment.
- (5) When Protection cannot be afforded as outlined above, train orders may be used.
- (6) Train Dispatcher and/or Operator must make record of authority issued as required."

The Organization took the position that in relying on Rule 957 and other Rules, which were not mentioned in the December 3 notice, the Carrier failed to comply with Rule 8(a) of the contract. The pertinent part of said Rule reads as follows:

"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. ---"

Prior to considering the complex and technical facts that this case presents, it appears appropriate to consider the Organization's claim that the Carrier's case is defective because the Rule 8(a) requirement that a specific charge be stated against an employee was not met. There is no doubt that the contract requires notice as a condition precedent to any investigation that may culminate in discipline, and further requires that any notice "shall clearly specify the charge."

The underpinnings of such a contractual requirement can be readily understood. Specification of charges is based on the due process requirements that are part of our fundamental traditions. Just as a citizen is entitled to know the precise basis for a criminal charge or civil claim that he must defend against, an employee is entitled to know the precise dereliction that maybe alleged against him in a hearing in the labor relations content. In the absence of notification of the charge, the accused is hampered in his ability to defend.

Thus, in the instant case, it must be determined whether the Carrier met the specific charge requirement. In reading the portion of the notice of investigation set forth above, it can only be concluded that Said notice made the Claimant aware that he was being accused of dereliction of duty in connection with a Specific incident that occurred while he was at work on November 19.

The failure of the Carrier to mention reliance on Rule 957 was hardly prejudicial to the Claimant. The Claimant and Organization could well have inferred from the accusation of "responsibility" that all pertinent Operating Rules might come up during the course of investigation, and a review of the record of the investigation shows that numerous operating rules were discussed. In Award No. 3270 (Carter) the principle that is applicable to this case was stated as follows:

"The formation of a charge and the giving of notice thereof need not be in the technical language of a criminal complaint; It is sufficient if it appears that the one charged understood that he was being investigated and that he understood the dereliction of duty affording the basis of the complaint ---"

Since in the instant case the Claimant knew what he was to defend against, Carrier cannot be deemed to have failed to meet the requirements of Rule 8(a), and the procedural argument of the Claimant must be rejected.

Turning to the merits of the case, the following testimony of Train Dispatcher E. L. Cobb, the Claimant herein, is of significance:

"Q. After you removed the block from the signal at South Fayette and the Extra 7579 West moved by that signal did you watch his movement on your Model Board?

A. No sir. No.

Q. From the Model Board with the signal 130 L coded to stop and blocked, could you from the Model Board tell when Extra 7579 moved past that signal?

A. No sir.

Q. Can you tell us why you couldn't tell us when the engine moved by that signal?

A. I wasn't observing him at the time.

Q. If you had been observing him, could you have told from the Model Board when he moved by that signal?

A. Yes sir."

There is evidence in the record that the CTC machine malfunctioned on November 23, 1975, or four days after the incident that is the subject of the instant discipline. The Organization argues that said evidence should control this case, because it demonstrates that equipment malfunction was the proximate cause of the accident that was the basis for discipline. But it is to be noted that although the malfunction evidence exists, the record reflects a dispute as to whether same could have caused the mishap under discussion. It is however, to be observed that the equipment involved was in use prior to November 19, and subsequent thereto, and that no accident occurred (other than on November 19) during such use.

The Organization goes on to argue that if equipment malfunction could have caused the accident, that should suffice to exculpate the Claimant, and that circumstantial evidence, with present limitations, cannot suffice for discipline. This Board cannot accept

such a contention, since it **is** well known that **circumstantial** evidence can sometimes suffice to establish a **criminal** conviction. A **circumstantial** case need not be absolutely air-tight, but **guilt** can be established if the **circumstantial** evidence establishes same beyond a reasonable doubt.

In any event, it **is** to be noted that the investigation hearing of December 11, 1975 went into the **circumstances** of the November 19 occurrence in great detail. There is a **substantial** amount of evidence in the record to support a finding of the Claimant's culpability. The excerpt from the Claimant's testimony alone, constitutes an admission that the Claimant failed to exercise due care in failing to observe the position of the train from his Model Board.

All of the above provides the perspective that **18** required by this Board to resolve the appeal at bar. It **must** be quite clear that the **only manner in which this** Board could sustain the present claim is by deciding that the Claimant's witnesses are to be credited over those of the Carrier, and, in the face of substantial evidence in the record supporting the Carrier's decision, substitute our judgment for that of the investigating Board. But it is well established that such an approach goes beyond our authority and proper function. For example, in an early Award of this Division (Award No. 5032, by Judge Parker) it was stated:

"*** Our function in discipline cases is not to substitute our judgment for the company or decide the matter in accord with what we might or might not have done had it been our8 to determine but to pass upon the question whether, without weighing it, there is some substantial evidence to sustain a finding of guilty. Once that question is decided in the affirmative the penalty imposed for the violation is a matter which rests in the sound discretion of the Company and we are not warranted in disturbing it unless we can say it clearly appears from the record that its action with respect thereto was so unjust, unreasonable or arbitrary as to constitute an abuse of that discretion. ***."

In Third Division Award No. 13179 (Dorsey) we find:

"In discipline cases, the Board sits as an appellate forum. As such, our function is confined to determining whether: (1) claimant was afforded a fair and impartial hearing; (2) the finding of guilty as charged is supported by substantial evidence; (3) the discipline imposed is reasonable.

We do not weigh the evidence de novo. If there is material and relevant evidence, which if believed by the trier of the facts, supports the finding of guilt, we must affirm the finding."

Numerous other Awards of this Division along the same lines include 21442 (McBrearty); 21242 (Caples); 21299 (McBrearty); 21291 (Lieberman); 21290 (Lieberman); 21241 (Eischen); 21236 (Wallace); 21234 (Sickles).

The discipline in this case is a rather light one, so that the possibility of modification or reversal on the basis that discipline was arbitrary or excessive is not possible. Given all the circumstances and analysis set forth above, it can only be concluded that the decision of the Carrier and the discipline here involved must stand.

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.

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58 claim **is** denied.

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

ATTEST: *A.W. Paulos*
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1979.