NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24481
THIRD DIVISION Docket Number TD-24420

Robert Silagi, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(Consolidated Rail Corporation

STATEMENT OF CLAIM: Claim # 1 - System Docket CR-90

"Claim of the American Train Dispatchers Association that discipline Of sixty (60) days actual suspension for C. B. Barber on G-32 dated 4/28/80 is harsh, unjust and unwarranted and not substantiated by trial transcript dated April 23, 1980."

Claim # 2 - System Docket CR-91

"Claim of the American Train Dispatchers Association that discipline of sixty (60) days actual suspension, time held out of service to apply, and restricted from holding a position under the American Train Dispatchers Association Agreement is unjust, harsh and not warranted by the trial transcript dated May 14, 1980."

OPINION OF BOARD: Two separate disciplinary actions against C. B. Barber, a Train Dispatcher with I.2 years of seniority, were consolidated by the Employes in a single ex parte submission.

Claim No. 1. Claimant was charged with excessive absenteeism from March 28 through April 6, 1980, and on April 8, 1980. Claimant testified that his first period of absence was caused by a "right lateral epicondylitis", commonly known as "tennis elbow", which totally incapacitated his right arm. At the hearing, Claimant produced a doctor's certificate, dated April 4th, stating that Claimant was under the physician's care, but could return to work on April 7th. Said certificate was first produced at the hearing held on April 23rd.

With regard to the April 8 absence, Claimant testified that his car became disabled 4 miles from home during the noon hour. He and his wife had to walk home arriving there about one and one-half to one and three-quarters of an hour later. He was unable to get a taxi to enable him to get to work by 4P.M., his starting time. Claimant then telephoned and marked off.

Over objection by Claimant's representative, the hearing officer admitted Claimant's service record which indicates that twice before, as recently as two months prior to the hearing, Claimant had been disciplined for absenting himself from duty. While such evidence may not be considered in determining guilt or innocence of the charges in this case, it is admissible with respect to the discipline to be imposed after guilt has been established.

The Employes' ex parte statement states that "Appellant was not charged with being absent from duty without permission. Although the record does not

so indicate, he appropriately reported in advance, his need to be absent from work during the periods involved in this case." (Emphasis supplied.) While it may be true that Claimant did notify Carrier in advance that he was going to be absent, the failure of the record to contain such information precludes this Board, at the appellate level, from taking It into account.

The need for regular and punctual attendance in any industry is beyond question. More so is it essential in the railroad industry where time schedules are critical. Award 2287'7 - Dennis. Based upon the record before us the Carrier was justified in assessing the discipline which we shall not disturb. It must be noted that the 60 days' deferred discipline was never served.

Claim No. 2. Claimant was charged with permitting three trains to operate on a track which had been taken out of service to allow maintenance of way work to be done thereon.

Bulletin Order No. 1-8, dated April 30, 1980 took Track No. 3 out of service between certain points in the Reading Terminal, Philadelphia. Said track was removed from service between the hours of 8:30 A.M. and 4:30 P.M. on May 5. 1983. Three passenger trains were allowed to operate on the out-of-service track that morning during the prohibited hours. The investigation shows that Claimant functioned at Wayne Junction where he had jurisdiction over portions of the railroad oat of service. Block Operator Spielman also was assigned to Wayne Junction where he controlled the blocking devices which were supposed to put the track out of service.

Claimant testified at the hearing but Spielman did not. The Employes, citing Rule 18, contend that Claimant did not receive a fair and impartial hearing because the members of two train crews and Spielman should have been produced by the Carrier. Rule 18 states, "Actual pertinent witnesses to the offense will be requested to attend the hearing by the Company." The short answer to this objection is that the Carrier did request Spielman to testify but his representative would not allow him to appear while he was still being held out of service. Presumably Spielman would have been an "actual pertinent witness to the offense", but it is difficult to see how members of the train crews would so qualify. Be that as it may, there was nothing to prevent Claimant or his representative from requesting Spielman to testify. The Carrier, of course, has no authority to compel the attendance of any witness (Awards 23857-Sharp; 20984-Sickles and others).

The Employes further contend that the Carrier prejudged Claimant by suspending him immediately after a preliminary inquiry, which, prima facie, established his involvement in a serious offense. We hold that the Carrier's decision was made in good faith based upon probable cause. Consequently, Carrier's decision lies within managerial judgment and will not be disturbed. Award 16584 - Carey.

The Employes additionally raised a procedural defense alleging that Carrier had failed properly to identify the rules allegedly violated by Claimant. We find no merit to this defense.

With regard to the merits of the claim the record discloses the following: Claimant admitted that he was aware of Bulletin Order # 1-8. Claimant testified that at 7 A.M., May 5th, when he came on duty, he asked Spielman whether the latter knew that track number 3 was being removed from service at 8:30 A.M., and received an affirmative answer. At 8:30 A.M. Claimant told Spielman to take the track out of service and Spielman did so. Claimant stated that he did not, however, see Spielman apply the blocking device below 16th Street Junction. Upon being telephoned by the conductor of one of the trains that it was on an out-of-service track, Claimant instructed Spielman to put blocking devices on track number 3 below 16th Street Junction. Spielman then told Claimant that he did not know that the section between 16th Street and Diamond Interlocking was out of service. Claimant then referred Spielman back to their earlier conversation when Spielman had told Claimant that he did know the contents of the Bulletin Order.

It is apparent from Claimant's testimony that there are questions of credibility as to exactly what was said and done by Claimant and Spielman on the morning of May 5th. These might have best been resolved by a confrontation between the two at the hearing. However, it did not occur so nothing is to be gained by speculation. Under these circumstances the Carrier's resolution of credibility must be accepted. There is no doubt, however, that 3 trains did, in fact, operate on an out-of-service track thereby creating a potential for serious mishap. That the Block Operator may be equally responsible or even responsible to a greater degree for a dereliction in duty in no way absolves Claimant of blame. A train dispatcher has important safety responsibilities. His failure to discharge these responsibilities subjects him to discipline even when another is also at fault. Awards 19461 - Devine; 17761 - Kabaker; 17163 - Jones; 13399 - O'Gallagher.

Claimant was disciplined by a 60 day suspension which, however, was deferred except for 9 days held out of service. We find no fault with such discipline. But Claimant was further-further disciplined by being restricted frw holding any position under the Employes' agreement; in effect he was demoted. It is our view that such permanent bar to holding a position under the Employes' agreement is an excessive penalty. For the 12 years of his service immediately prior to the incident under discussion Claimant's record shows no lapse in his adherence to safety standards. Where the Carrier saw fit to impose the relatively mild penalty of 9 days' suspension a lifetime disqualification from holding a position is disproportionate to the offense. It is too harsh in view of Claimant's long years of satisfactory service. Without in any wanner minimizing Claimant's responsibility in the instant case we shall restore Claimant to his former status as train dispatcher. Awards 5297 - Wyckoff; 15373 - Mesigh.

The Carrier did not violate the Agreement as to Claim No. 1. As to Claim No. 2, the permanent disqualification of Claimant as a train dispatcher was excessivley severe.

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 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 discipline was excessive.

A W A R D

Claim No. 1 is denied.

Claim No. 2 is sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of July 1983.