

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number **24483**
Docket Number **TD-24446**

Robert Silagi, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(Burlington Northern Railroad Company

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

(a) Burlington Northern Incorporated (hereinafter referred to as "the Carrier") violated the Agreement between the parties, Article 24 thereof in particular, when it assessed five (5) days' suspension as discipline to train dispatcher D. L. **Hedrick** in connection with formal investigation held at Alliance, Nebraska, on January **31, 1980**. The record is clear that the Claimant committed no rules violations and that he was not guilty of the charge. The Carrier has refused and continues to refuse to **reimburse** the **Claimant** for time lost and to clear his record of the charge which is an arbitrary, capricious, unreasonable abuse of managerial **discretion**.

(b) Because of such violation the Carrier shall be required to reimburse the Claimant for all **time** lost and clear the Claimant's record of all reference to the matter here involved.

OPINION OF BOARD: Claimant is charged with the improper completion of a train order and was disciplined for violation of Rule **208** which, in essence, provides that "when a **train** order has been transmitted, operators must, unless otherwise directed, repeat it at once in the succession in which the several offices have been addressed. Each operator receiving the order must observe whether the others repeat correctly. When an order has been repeated correctly, the response 'complete' and the **time**, will be given by the train dispatcher".

The events are not disputed. On January 23, **1980**, Claimant, working at Alliance, Nebraska, issued Train Order No. **326** to the Operators **at** Northport and Alliance for the purpose of setting up a train meet between Train Extra **5381** East and Extra 7830 **West at** Angora. In the repetition of this order by the operators to Claimant, both operators transposed the number of Extra **5381** to Extra **5831**. Claimant failed to detect the error and "completed" the order. When the trains arrived in Angora, the error was discovered and a new accurate order was issued by radio. Claimant conceded that the order was incorrectly repeated and that he "completed" an erroneous order. Carrier disciplined Claimant by a five-day suspension from service and the entry of censure on his personal record.

The Organization raises two objections, the first addressed to procedure and the second to disparate discipline.

The Organization contends that Claimant was denied a proper investigation when the conducting officer refused **him** the right to question witnesses on

his own behalf but limited that right to his representative. At the investigation, Claimant was represented by J. W. Hollis, Office Chairman, ATDA, who participated fully in the proceeding. The transcript of the investigation shows the presence of 14 other persons including members of the train crew, all of whom participated in the proceedings through their own **Employe** representatives. When such a large number of litigants and litigators are assembled at a hearing, orderly procedure indicates that the examination and cross-examination of witnesses be conducted by representatives rather than by the parties themselves. Presumably the representatives have the training and experience to deal with such matters. If a party to the proceedings believes that specific questions should be asked, it is wiser that he first make them known to his representative. The art of cross-examination lies just as much in knowing when to refrain from asking a question as it does in putting the question. In any event, the conducting officer did invite Claimant to make a statement for the record and Claimant at least twice availed himself of that opportunity. We are mindful of the awards of this Division which hold that a **grievant** did not receive a fair and impartial hearing when he and his representative were denied the right to introduce evidence or were prohibited from asking questions, however, the instant case does not fall into that category. We therefore find that the conducting officer's ruling did not deprive Claimant of a fair and impartial hearing.

The second objection has to do with the fact that the operator at Alliance and all members of the train and engine crew were disciplined by the entry of **censure** on their personal records but no suspension was imposed. The Organization complains that a 5 day suspension to Claimant is disparate **treatment** for the same offense. Two observations must be made in this connection. Although handled in the same investigation, the discipline meted out to the train and engine crew is not part of the claim **in** this proceeding hence no **comment** thereon is necessary beyond noting that the crew was not disciplined for a violation of Rule 208. Moreover, the operator at Northport was suspended for five days. The issue to be decided herein is whether Carrier's discipline of Claimant was excessively severe, unjust and harsh.

This Board has often noted that it does not presume to substitute its judgment for that of a Carrier or reverse or modify discipline unless the Carrier has acted in an unreasonable, arbitrary, capricious or discriminatory manner amounting to abuse of discretion. A Carrier's disciplinary decision is, however, discriminatory "when the Carrier does not apply rules with reasonable uniformity for all employees". Award 18050 - Quinn; accord, Award 5297 - Wyckoff "... the assessment of discipline should also be even-handed"; see also Award 22160 - Weiss.

A letter dated May 9, 1980 from Carrier's Assistant Vice-President, Operations states that the operator at Northport was given a 5 day suspension and the operator at Alliance did not receive one **because the operator at** Northport had the proper address to C & E 5381 instead of it also being transposed. This, it is claimed, provided a check or comparison for the former which the latter did not have, hence the discrepancy in discipline. Be that as it may, Rule 208 mandates that operators must repeat the order at once and observe whether the other operators repeat the order correctly. **There** is no contention here that Claimant issued an incorrect order which the two operators repeated as

they heard. Carrier contends that both operators transposed the number 5381 and that Claimant failed to catch the error. Therefore all three violated Rule 208. In assessing discipline against them uniformity and evenhandedness is essential. That the Northport operator was disciplined by a suspension in addition to censure may well be accounted for by his violating some undisclosed rule in addition to Rule 208. For violating Rule 208 the Alliance operator was censured. It follows that Claimant should be similarly treated. Consequently, we find that the discipline of suspension against Claimant was excessive and that he should be compensated for the wage loss suffered.

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 discipline was excessive.

A W A R D

Claim 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 - Administrative Assistant

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

4
J.O.P.
S.M.

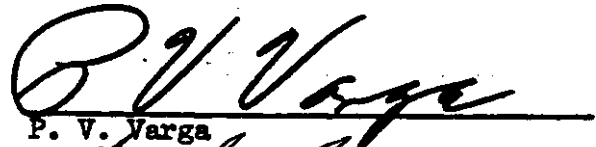
DISSENT OF CARRIER MEMBERS
TO
AWARD 24483, (DOCKET TD-24446)
(Referee Silagi)

The rationale for the disposition made in this case was that since the two operators and the **Claimant** were all in violation of Rule 208, they should receive the **same** discipline. Yet, **despite** the **Majority's** unwarranted attempt to foist uniformity, the Rorthport operator did serve! a suspension for his violation of the rule. Further, there was and is no "**undisclosed** rule" upon which the Majority can hang **its** attempted **rationalization**. The **factual basis** for the **Carrier's** action is stated at the **bottom** of Page 2 of the **Award**. To supplant such **factual evidence with assumption and presumption** requires a leap totally beyond the records developed.

It is obvious that the Majority **should have** headed Its own counsel as stated in Award 24481 (Silagi):

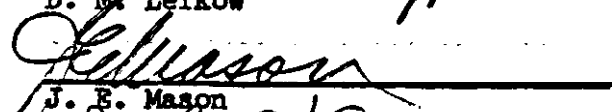
"That the Block Operator may be e-responsible or even responsible to a greater degree for a dereliction in duty in no way absolves Claimant of blame. A train dispatcher has important safety responsibilities. His failure to discharge these responsibilities subjects him to discipline even when another is also at fault. Awards 19461 - Devine; 17761 - Kabaker; 17163 -- Jones; 13399 - O'Gallagher."

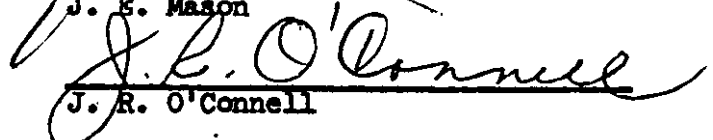
We dissent.


P. V. Varga


W. F. Euker


D. M. Lefkow


J. E. Mason


J. R. O'Connell