

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25000
Docket Number MS-25219

Paul C. Carter, Referee

(Illinois Central Train Dispatchers Association
PARTIES TO DISPUTE: (
(Illinois Central Gulf Railroad Company

STATEMENT OF CLAIM: "This is to **serve notice**, as required by the rules of the National Railroad Adjustment Board, of our intention to file an **ex parte** submission on May 20, 1983 covering an unadjusted dispute **between** the Illinois Central Train Dispatchers Association and the Illinois Central Gulf Railroad involving the **question:**

That Dispatcher T. A. Hastings was dismissed from **service** of **Illinois** Central Gulf Railroad without due cause and should be reinstated with no **loss** of seniority and with full pay for time lost since October 15, 1982."

OPINION OF BOARD: The Claimant herein was employed by the Carrier as a train dispatcher at Chicago, Illinois, with about twelve years of service.

In the early morning of September 28, 1982, Illinois Central Gulf dispatch train GS-2 was moving northbound from Geismar, Louisiana, via **Baton Rouge**, to St. Louis, **Missouri**. While moving through the town of Livingston, Louisiana, at about 40 miles per hour, the 16th through the 58th cars derailed at about **5:05 a.m.** 27 of the derailed cars contained hazardous commodities. Fires broke out among the derailed cars, and, shortly, explosions took place. 14 homes were destroyed **or** made uninhabitable by the explosions and the fires, and about 3,000 residents were evacuated from their homes. The derailment and the damage received wide media coverage.

Numerous Federal and State agencies, in addition to the railroad, were involved in containing the fires, explosions and contamination, and investigating **the** cause of the accident. While devoting all necessary resources to dealing with the derailment, the Carrier began its own investigation of the **cause** of the accident. **Members** of the train **crew** were questioned by company officials and other agencies, as well as numerous other persons, company **employees** and non-employees. Eventually the direct cause of the derailment **was** found to be a **broken** center pin on an empty gondola car which permitted the **rear** trucks and wheel assembly to come out from under the car and derail over a recently broken joint in the track. A following tank car ran over the truck and wheel assembly, and numerous following cars derailed and turned over. Other aspects, such as alleged alcohol consumption by crew members, the presence of unauthorized personnel on the locomotive, alleged excessive speed, and a worn air hose connection, were thoroughly investigated.

On October 11, 1982, a railroad clerk, Janet Byrd, apparently from the Baton Rouge area, admitted to railroad officials that she was on the locomotive from Baton Rouge to Livingston, and at the controls when the derailment occurred. Shortly thereafter the company received information that clerk Byrd had telephoned certain train dispatchers in Chicago shortly after the derailment and told them about **her** presence on the locomotive when the derailment occurred.

On October 14, 1982, Carrier's Director of Police and Special Services held an interview with Claimant. In the statement given to the Director Of Police and Special Services, Claimant stated that he received a telephone call from Janet Byrd, about two or three days after the Livingston derailment. during which Byrd admitted being present on the locomotive and handling the controls when the derailment occurred. Claimant also admitted a second conversation with Ms. Byrd and discussion on September 28, the day of the derailment, with another train dispatcher about Byrd's revelations to that dispatcher. He also admitted advising Byrd in his first conversation with her to keep her mouth shut about her involvement in the derailment.

Claimant was suspended from service October 15, 1982, pending formal investigation. On October 18, 1982, Carrier's General Superintendent of Transportation gave a joint notice to Claimant and another train **dispatacher** to attend a formal investigation on October 22, 1982:

"... for the purpose of determining the facts and your responsibility, if any, in connection with information each of you had concerning the circumstances involving derailment of Train GS-2 at or near Livingston, Louisiana, at approximately 5:05 a.m., September 28, 1982; also, to determine if the facts known by you that were under investigation were reported promptly; in addition, to determine if each of you concealed these facts concerning this incident.@

Formal investigation was held as scheduled and on October 27, 1982, Claimant was dismissed from service for violation of Train Dispatchers Rule 3 and Operating Rules E and H, which rules provide:

"Rules for Train Dispatchers

Rule 3. They must be familiar with all rules, special instructions, bulletin orders, bulletin notices and general orders governing the portion of the railroad they are dispatching and promptly report any violations thereof.

They must also promptly report any irregularities, neglect of duty, disobedience or apparent incompetence of which they have knowledge, defects in engines, cars, tracks, signal and related equipment or failure of trains to move at usual speed and other unusual occurrences **must** be recorded and promptly reported."

"Operating Rules

Rule E. Employees must assist each other in complying with the rules and special instructions. Any violation of rules or special instructions must be reported to their immediate supervisor."

"Rule H. Dishonesty, desertion from duty, insubordination, willful neglect, gross carelessness, making false reports or statements, concealing facts concerning matters under investigation, immoral character or serious violation of the law are prohibited.

Employes are forbidden to make unauthorized charges for service performed in line of duty."

At the formal investigation Claimant appeared with an attorney as his representative. Claimant was informed by the hearing officer that he would not be permitted to have an attorney as his representative, but could have the **Senior** Vice President of the Train Dispatchers Association represent him. The Claimant elected to be represented by the Association officer, and proceeded under protest without his attorney. The attorney was excused from the room during the investigation.

As to representation in on-property disciplinary investigations, **or** hearings, it is well settled that a Claimant's right to representation in an on-property disciplinary hearing arises only from the provisions of the collective bargaining agreement. See **Carle** vs. Conrail, V.S.D.C., Southern District of New York (February 9, 1977) 94 **LRRM** 2719; **Edwards** vs. St. Louis-San Francisco R.R. 361 F. 2d 946, 954, 62 **LRRM** 2300, 2305-2306, (7th Cir. 1966); and **Broady** vs. Illinois Cent. R. Co. 191 F.2d (7th Cir. 1951), cert. denied 342 U.S. 897, 72 S.Ct. 231, 96 L.Ed.672 (1951). See also Third Division Awards Nos. 15676, 21228, 18352, Fourth Division Award No. 3134.

The collective bargaining agreement here involved is silent concerning the right of representation in on-property disciplinary hearings. It has been stated repeatedly by awards of all **Divisions** of the National Railroad Adjustment Board, that Carrier's managerial rights are restricted only to the extent that they are limited or surrendered by the **collective** bargaining agreement. In Third Division Award No. 10950, it was held:

"We thus proceed to a consideration of the claim on its merits. At the outset the **Employees** advance the novel argument that Carrier has not pointed to any rule or group of rules which permit the action taken by the Carrier in this case. It is sufficient answer to say that the burden is not on the Carrier to show that its action is authorized by some provision of the Agreement. Rather the burden **is** upon the complaining **employees** to show that the action taken violates some part of the Agreement. ****

Fourth Division Award 733:

"... Consequently, in all matters that have not been limited by agreement, the carrier's authority remains unrestricted."

Second Division Award 3630:

"**It** is a fundamental principle of the employer-employee relation that the determination of the manner of conducting the business is vested in the employer except as its power of decision has been surrendered by agreement or is limited by law. Contractual surrender in whole **or** in part of such basic attribute of the managerial function should appear in clear and unmistakable language."

Second Division Award 8352:

"... The terms of a collective bargaining agreement do not establish an employer's rights. they limit **them**."

In the absence of a contractual provision permitting outside representatives to attend an on-property disciplinary hearing, the Carrier was free to restrict representation **as** was done here. In the absence of **an** agreement on the subject, the Board cannot find a violation of the Agreement. The Carrier states that under its policy, Claimant had three options: to be represented by an officer of the union, **to be represented by a fellow dispatcher, or to represent himself.**

In the investigation, the statement that Claimant gave to Carrier's Director of Police and Special Services on October 14, 1982, was entered and not disputed. Claimant admitted in the investigation his conversations with clerk Byrd two **or** three days after the derailment, in which Byrd told him she **Was** running the engine at the time of the derailment, and that he told Byrd to keep her mouth shut, and the reason for not reporting the matter to his supervisors was that he did not believe Byrd. Whether Claimant believed the information that Byrd gave him is immaterial. It was his duty under the rules to report what he was told to his supervisors, which he did not do.

A copy of the transcript of the investigation has been made a part of the record. There was substantial evidence, including Claimant's statement, **to** support the charge and justify his dismissal. Actually, Claimant's actions in not reporting the information he received to his supervisors amounted to disloyalty to the **Carrier**. Any case involving disloyalty has always been considered extremely serious, usually resulting **in** dismissal. See Third Division Awards Nos. 18363, 19811, 10930, 15934, 24761 and 24766.

The only mitigating factors in Claimant's behalf are his years of service and the fact that in handling the dispute on the property, the Carrier offered, on August 9, 1983, to reinstate Claimant as a train dispatcher, provided he would sign a waiver of time loss, and pass a physical and rules examination. The Claimant agreed to the proposal. provided the Carrier would clear his personal record of any involvement in the matter, which the Carrier would not agree to do. Claimant took the matter under consideration and on August 12, 1983, rejected the offer. There is no question in our opinion that Claimant acted ill-advisedly in the matter. As indicated previously, we consider Claimant's dismissal justified, but because of the offer made by the Carrier on August 3, 1983, and Claimant's years of **service**, we will award that Claimant be restored to service as a train dispatcher. with seniority and other rights unimpaired, without any compensation for time lost while out of the service, provided that he can pass satisfactory physical and rules examinations. We will **not** award that his record be cleared of involvement. Claimant should understand that the only **reason** for this **award is** the offer of the Carrier, and the Board does not consider him innocent of the charge or that his dismissal was unjustified.

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

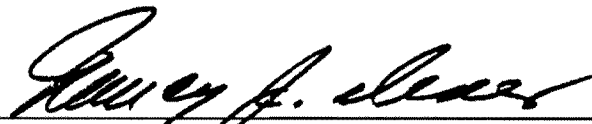
That the discipline **was** excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of September 1984.