

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26202
Docket Number TD-26330

Philip Harris, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM:

"We ask that Dispatcher Poullard's record be cleared of this charge, that he be reinstated, and all wage loss and expenses sustained by him be paid. [Carrier file D 246-558]"

OPINION OF BOARD: On May 21, 1984, Claimant allegedly caused a near collision by permitting a train on a track occupied by maintenance of way employees and equipment. The Organization states that due process was denied when the Hearing Officer limited the testimony he would allow concerning defective blocking devices. Also, the Claimant was inadequately trained and therefore should not bear the full brunt of the incident.

The Carrier claims that due process was provided, and Claimant had been disciplined for a similar occurrence where a collision actually occurred. Dismissal for the second offense is not excessive.

The Hoard finds that the Carrier committed a serious procedural error. When the Organization was questioning the Chief Dispatcher, a question was posed relating to any possible known defects in the operation of the blocking devices. Before a response was made, the Hearing Officer immediately said to the Organization's Representative, "Mr. Murphy, I am going to have to ask you to contain your remarks to the captioned matter in your questions, please." By preventing this line of inquiry from going forward, the existence of possible mitigating circumstances could never surface. The Claimant's rights were violated by the stricture that was imposed.

However, had the line of questioning been successfully pursued by Mr. Murphy, we are persuaded that the excluded testimony, at best, would have been mitigative, rather than exculpatory, in nature.

We turn then to the merits. The evidence at the Investigation showed that Claimant allowed a train onto a track that was occupied by a maintenance of way gang and equipment without advising the train crew of the gang's presence. The gang had been given permission to be on the track by the Claimant. The testimony presented by members of the train crew and the maintenance gang is convincing, and is not seriously challenged.

We agree that dismissal would not be excessive, absent mitigation or procedural error. Mitigation would not, of itself, result in total remission of the discipline warranted in this case. The Claimant has been out of service almost three years. We believe the discipline has served its purpose. The Claimant shall be restored to service, but without backpay.

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

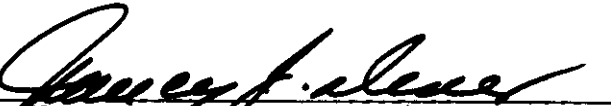
That the discipline was excessive.

A W A R D

Claim sustained in accordance with **Opinion**.

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

Attest:


Nancy J. Zever - Executive Secretary

Dated at Chicago, Illinois, this 12th day of **December** 1986.