

From 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28634
Docket No. TD-28512
91-3-88-3-342

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

"Appeal of 45 days actual suspension from service assessed Train Dispatcher R. L. Sellars."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

By letter dated August 20, 1987, Claimant was directed to attend a formal Investigation scheduled for August 28, 1987, in connection with the charge he:

"...failed to properly perform (his) duties as train dispatcher on Tuesday, August 11, 1987, when at approximately 1201 hours Burro Crane 709 in charge of on-track equipment operator T. L. Roberson was given permission to occupy the southbound main track (Track No. 1) at south end double track Orlando and operate northward to Robinson Avenue when opposing train, the First Orlando Road Switcher, had been granted authority at approximately 1155 hours to enter the southbound main track (Track No. 1) at Robinson Avenue and operate to south end double track Orlando.

You are charged with possible violation of Operating Rules 355, 531 and 704."

Following the Investigation, which was postponed at the Organization's request and ultimately held on September 11, 1987, the Claimant was found in violation of the charged Operating Rules and by letter dated October 1, 1987, was assessed a 45 calendar days suspension (October 3 through November 16, 1987, inclusive).

On this property, the Train Dispatcher's radio and telephone circuits are recorded on tape. The verbal authorizations issued by the Claimant are in the record submitted to the Board.

Facts developed at the Investigation reveal that on August 11, 1987, the Claimant was in charge of train movements on a segment of double track located in the Orlando, Florida area, in addition to other territory. At approximately 11:49 A.M., he verbally authorized the First Orlando Road Switcher to enter the southbound main track (Track No. 1) and proceed south toward the end of double track at Orlando. Such authority was relayed through a Clerk Operator, who used a radio to talk to the Engineer of the train. Although the Claimant instructed the Clerk Operator to advise the train crew, "He can come out looking out for the roadway," the record contains conflicting testimony concerning whether the "looking out" precautionary warning was actually relayed to the train crew. The Clerk Operator testified he so informed the Engineer. The Engineer denies being so instructed. In any event, under the governing Operating Rules and signal indications, the train was required to operate at restricted speed.

At 12:01 P.M., the Claimant verbally granted a Maintenance-of-Way Apprentice Foreman authority to operate on-track equipment, Burro Crane 709, north on the southbound main track (Track No. 1) from the south end of double track at Orlando. It is undisputed that the Foreman was not apprised that the southbound train movement had previously been authorized on the same track.

Fortunately there was no collision since the First Orlando Road Switcher and Burro Crane 709 were moving slowly, and the involved personnel saw each other when they were approximately 1/2 to 3/4 of a mile apart. The train stopped without the necessity of an emergency brake application.

We find it necessary to first turn our attention to a procedural issue raised by the Organization. Paragraph 4 of the parties' February 4, 1987 Memorandum Agreement provides:

"In the event Train Dispatchers are charged with rule violations and are required to give statements, they will have the right to review the tape recordings of the event in question, to refresh or clarify their recollection."

Under date of August 27, 1987, the Claimant wrote to the Carrier's Division Manager:

"In order to prepare for this investigation I request an opportunity to listen to the tapes of the North End Dispatcher's phone. I believe the relevant period of time would be from 0930 hours until 1230 hours.

I will be available at any time other than my regular working hours between 1600 hours and 1800 hours August 28th. Thank you."

The Division Manager responded on September 8, 1987, as follows:

"You may contact Chief Dispatcher Green and schedule a convenient time to listen to the tapes; however, the matter under investigation involves incident which occurred between approximately 11:55 and 12:01, as outlined in the notice of investigation and your review will be confined to that specific incident under investigation."

Given the facts and circumstances of this case and the benefit of hindsight, in our judgment, it is apparent from a reading of the transcript that the Claimant should have been afforded more latitude than was demonstrated here. This is particularly true where, as here, the offense with which the Claimant was charged could very well have resulted in his dismissal. On the other hand, had the Claimant initially informed the Division Manager of his reason for wanting to review the tape for the longer period of time, rather than waiting until the Investigation to elaborate his rationale, the Division Manager may have granted his request. Clearly, reason should prevail in matters such as this. There is no question but that an employee's request must be within reason. However, we do not find it unreasonable for an employee in the preparation of his defense, to want to review events leading up to an incident which results in serious charges being placed against him, and such requests should not be rejected out-of-hand. An unreasonably narrow application of this Rule in the future may well result in a sustaining award on this basis alone.

In this particular case, however, the issue is moot, because the Claimant admitted in the record that the result would not have been any different:

"Q. From the portion of the tapes, a transcript of the recordings regarding specifics that are under investigation, do you not find it very clear that you knew what track Mr. Roberson, what track you gave him permission to operate upon?

- A. In the end I admit I gave him No. 1 track, it is plain as black and white all I wanted to establish was how that it happened, which may not be any concern to anybody but myself,...it was, you know just haphazard train dispatching but something, the contributing factors were there and I wanted that for my satisfaction. When it comes down to the end it really will not matter. I gave the No. 1 track and there was a train on it, that track, when it comes down to the specific investigation it is not going to help, I did break that rule, but I was just interested in, to comfort myself..."

* * *

- "Q. Would reviewing the tapes, in your opinion, have changed what occurred?
- A. I don't think so,...In the end I do not believe that it would have any reflection on what is going to end up being my punishment for the rule violation." (Underscoring added)

Turning to the merits, although the Claimant alluded to some confusion as to which track the Foreman wanted to use, the record is clear that the Claimant authorized his movement onto Track No. 1 without notifying him that an opposing train movement was in progress. Notwithstanding the asserted confusion, the Claimant repeatedly admitted during the course of the Investigation that he erred:

- "Q. Did you list any conflicting movement in the instructions you gave Mr. Roberson?
- A. No, I did not...."

* * *

- "Q. ...Did you comply with that rule as it relates to your responsibility in the matter under investigation?
- A. I'd have to say I wasn't in compliance with the part of actually lifting (sic) the opposing train given in this authority."

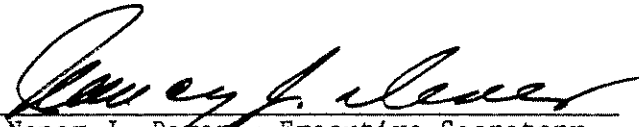
In light of these and other admissions and facts developed in the Investigation, the Claimant's responsibility for the incident is not in doubt. As to the quantum of discipline, the 45 calendar days suspension is neither inconsistent with the gravity of the offense, nor with the Claimant's prior disciplinary record. His record shows seven instances during the previous ten years, applied progressively, but for one very serious offense in 1980. The last two instances in 1984 and early 1987, wherein Claimant waived his right to a formal Investigation, were each 30 day suspensions. Accordingly, this Board is not disposed to expunge or modify the discipline.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of January 1991.