

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29364
Docket No. TD-29562
92-3-90-3-512

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

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

STATEMENT OF CLAIM:

"Appeal of fifteen (15) calendar days suspension assessed Train Dispatcher J. A. Smolko, 7/14/89. [Sys. Dkt. TD-16-D]."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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.

At the heart of the instant Claim is a dispute over the application of Rule 18, Section 1(b) of the Agreement between the Parties. Rule 18 Section 1(b) reads as follows:

"(b) An employee may be held out of service pending hearing only if his retention in service could be detrimental to himself, another person, or the Company."

The facts of this case are not in dispute. Claimant on July 3, 1989, was assigned as the first trick Desk B Train Dispatcher at Columbus, Ohio. His tour of duty was 6:30 A.M. to 2:30 P.M. At approximately 11:45 A.M., Claimant became aware that the Marion, Ohio, Block Operator had erroneously allowed Eastbound Train INPI-3 onto No. 1 track in a section where Maintenance of Way Equipment was previously scheduled. After a brief conversation with the Marion Block Operator, the Claimant determined that the train had been stopped and that no equipment had been compromised, nor had there been any

injuries. Claimant reported the incident to his Supervisor, the Chief Dispatcher, at approximately 2:30 P.M. Subsequently, the Assistant General Manager ordered that the Claimant be suspended from service pending an investigation.

On July 7, 1989, the Claimant was notified by Carrier to appear for a hearing concerning his alleged:

"Failure to promptly report as required by Rule 902 of the NORAC Operating Rules while working as Train Dispatcher 'B' Desk, Columbus, Ohio, that Operator C. W. Hughes at Marion, Ohio failed to provide proper protection for Maintenance of Way Equipment SBC-10 Eastbound on No. 1 Track between CP141 and CP124 at approximately 11:53 a.m. July 3, 1989, and allowing Eastbound Train INPI-3 on No. 1 Track to enter that occupied unprotected block."

Rule 902 of the NORAC Operating Rules reads as follows:

"Train dispatchers are in charge of the movement of trains and have supervision over employees connected with those trains. They will issue authorities for movement and such other instructions as may be required in accordance with these rules, for the safe and efficient movement of trains and track cars. Where the rules require train dispatchers to record the application of blocking device, they must insure that the blocking devices applied afford the necessary protection. They must maintain the Record of Train movements and blocking, which must be recorded in red ink. They must provide necessary information to properly authorized railroad officials and public safety authorities.

They must report any violation of the Operating Rules and any irregularly relating to the movement of trains."

Hearing was convened on July 11, 1989. On July 14, 1989, Claimant was assessed a fifteen day suspension, which, under the rules particular to this craft and property, was deferred to be served only if, within six months, another error was committed. Claimant was held out of service, without pay, pending the results of the Investigation; that is, from July 3, 1989, to July 14, 1989.

On July 27, 1989, the Organization appealed Claimant's discipline on both procedural and substantive grounds. The Organization's procedural objections were based upon on alleged failure of Carrier adequately to notify Claimant of the Hearing and Carrier's failure to provide the Organization with two of Carrier's Exhibits prior to the Hearing. The Organization also asserted

that Claimant did not violate Rule 902, and, therefore, should not have been disciplined at all. Carrier denied the appeal on July 27, 1989. On August 11, 1989, the Organization also requested that Carrier compensate the Claimant for the 11 days he was held out of service pending Investigation. In support of this request, the Organization cited Rule 18, Section 2 (reproduced above). The Organization maintained that there was no evidence in the transcript that Claimant's retention in service pending the Hearing could have been detrimental to himself, another person, or the Company. Carrier denied the Organization's request on August 21, 1989, citing Rule 18, Section 2(b)(3) of the Agreement, which reads as follows:

"(3) If the Discipline is suspension, the time the employee is held out of service shall be:

(A) Considered part of the period of suspension for the offense if the suspension is served, or

(B) Considered time lost without compensation if the suspension is not served."

The Organization appealed Carrier's denial, and the Claim was progressed up to and including the highest Carrier officer designated to handle such matters. Accordingly, it is properly before the Board for adjudication.

Carrier's response to the Organization's procedural objections is that the documents involved did not impede Claimant's ability to formulate an adequate defense at the Investigation. Accordingly, their accidental neglect to provide the documents does not constitute a fatal procedural flaw. With respect to the substance of the Claim, Carrier maintains that the evidence brought forth at the Hearing clearly proves that Claimant violated Rule 902 when he failed to report the incident in question in a timely manner. It points out that such delay prevented Carrier from making the appropriate tests of the Marion, Ohio Operator. In view of the seriousness of the Claimant's failure to report the incident at issue, a de facto discipline of 11 days suspension without pay is not excessive.

There is no evidence on the record before us to suggest that the apparently inadvertent omission of the text of NORAC Operating Rule 902 and Claimant's discipline record from the documents sent by Carrier to the Organization hindered Claimant's ability to mount an informed defense at his Investigation. The de minimis nature of the documentary omission in this particular instance precludes the Board's finding that it constituted a fatal procedural flaw.

With respect to the merits of the case, the record substantiates Carrier's position that Claimant's delay in reporting the incident in question to his Supervisor constituted a violation of NORAC Operating Rule 902. Accordingly, the Board sees no reason to disturb Carrier's assessed discipline of fifteen days suspension. A careful reading of the provisions of Rule 18, Section 2(b), however, convinces this Board that Carrier did violate that portion of the Agreement between the parties when it held the Claimant out of service

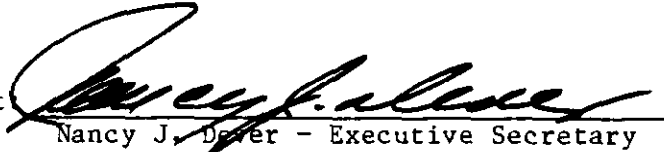
without pay for 11 days, pending the result of the Investigation. Nowhere in the record has Carrier shown that Claimant constituted a potential hazard to himself, to another person, or to the Carrier. Absent such a showing, "the holding out of an employee from service prior to a Hearing is a harsh and precipitous action." (PLB No. 4218, Award 2). Had Carrier complied with Rule 18, Section 1(b), Claimant would have been assessed a fifteen day suspension, and the period of suspension would have been deferred in accordance with Rule 18, Section (b) (1). Only if Claimant committed another offense for which discipline by suspension had been imposed, would he have been required to serve the fifteen days assessed in the present case. Accordingly, the Board finds that Claimant is entitled to restitution of the wages lost as a result of his being held out of service for 11 days pending results of the Hearing.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of August 1992.