NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 29590
Docket No. TD-30231
93-3-91-3-693

The Third Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers
(Association
(
(National Railroad Passenger
(Corporation (AMTRAK)

STATEMENT OF CLAIM:

"Appeal of 10-days suspension assessed Train Dispatcher Janet M. Pineiro, 1/14/91. AMTRAK file NEC-ATDA-SD-147D"

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 employe 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.

The facts in this case are not in dispute. Claimant began her shift as Dispatcher on Carrier's Harrisburg Line between Philadelphia and Harrisburg at 11:59 P.M. on December 13, 1990. At approximately 4:00 A.M. on December 14, 1990, Claimant was informed a maintenance of way foreman placed a thirty mile per hour speed restriction on Track 4 between mile posts 58.3 and 58.5 on the Harrisburg Line. At 4:16 A.M. and 4:34 A.M., Claimant issued two Form D speed restrictions covering this track to trains at Penn Tower, Thorn Interlocking and Cork Interlocking. Amtrak Train 641, however, operates from New York to Harrisburg by a route which does not pass Penn Tower. Accordingly, it was necessary for Claimant to request the New York dispatcher to issue a Form D for the crew of that train. When Claimant gave the instructions to the New York dispatcher, she identified the restriction as being on Track 3 instead of Track 4. Consequently, Train 641 departed New York at 5:07 P.M. with an erroneous Form D.

The second shift dispatcher on December 14, 1990, noticed Claimant's error and issued Train 641 a correct Form D at Paoli block station. As a result, when Train 641 reached the restricted track, the crew had the correct information.

At 10:34 P.M. on December 14, 1990, Claimant was notified she was removed from service pending Investigation. A Notice of Investigation was issued on December 17, 1990, scheduling the Hearing for December 21, 1990. It was postponed at the request of Claimant's representative until January 4, 1991. Claimant was returned to service on December 24, 1990. Following the Investigation, Claimant was suspended from service for ten days.

Prior to addressing the merits of the discipline, the Board must consider several procedural arguments raised by the Organization. First, the Organization asserts Claimant was improperly suspended from service pending the Investigation.

Rule 19(a) of the Agreement provides:

> "The employee may be held out of service pending investigation only if his retention in service could be detrimental to himself, another person or the Corporation."

In Third Division Award 28319, involving these parties, this Board wrote:

> "With respect to the Claimant being held out of service pending the Investigation, it has been consistently held in this industry that charges involving safety...may properly be the basis for holding an employee out of service."

Generally, this Board gives substantial deference to the Carrier in determining whether employee or public safety might be in peril. We will only overturn such a decision if it is evident the Carrier has been unreasonable in its determination. In the instant case, Claimant was charged with issuing an incorrect speed restriction which would have had the effect of not protecting the train on Track 4. This, certainly, is a safety matter which would allow Carrier to withhold Claimant from service. This case is thus distinguished from Award 2 of Public Law Board No. 4218, between these parties, which is relied upon by the Organization. That case involved a delay to trains due to the failure to issue instruction for the efficient movement of trains. Safety was not an issue in that case.

The Organization next argues Carrier failed to give Claimant at least five days notice of the charge against her.

Rule 19(b) provides:

> "An employee and his representative shall be given written notice no less than five (5) days in advance of the investigation, such notice to set forth the specific charge or charges against him."

In applying this Rule, the Board is obligated to look to the purpose for the Rule. Setting forth a minimum period of time between notice and the Investigation affords the employee under charge an opportunity to secure representation and witness and to prepare a defense. This is not to say this right cannot be satisfied in a shorter period of time. It is a right which cannot be taken away by the Carrier, but may be waived by the employee. In the instant case, had Carrier insisted on conducting the Investigation on December 21, 1990, as originally scheduled, over the objection of Claimant, it would have been in violation of the Agreement. But that did not occur. Claimant's representative requested and was granted a postponement until January 4, 1991. Thus, Claimant was afforded the time to prepare for the Investigation as guaranteed by the Rule. The Organization's objection became moot.

Turning to the merits, we find there is substantial evidence to support Carrier's charge against Claimant. There is no doubt she issued incorrect instructions which resulted in an erroneous Form D being issued. The fact that it was subsequently reversed by an attentive dispatcher on a later shift was fortuitous, but it does not negate Claimant's responsibility. Under the circumstances, we do not find the ten day suspension to be either arbitrary or unreasonable.

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 9th day of March 1993.

(Corrected)

Labor Member's Dissent
Award No. 29590, Docket TD-30231,
ATDA and AMTRAK, Referee Simon

It appears that in their zeal to rationalize the Carrier's assessment of discipline in this case, the majority has chosen to ignore numerous facts, circumstances, and procedural errors. Therefore, dissent is necessary.

There isn't any question that the Claimant improperly filled out a "Speed Restriction Form". This form was sent to the dispatcher in New York requesting the issuance of the speed restriction to Train No. 641. Unfortunately, the request incorrectly identified the restricted track. The track identified by the Claimant does not even exist in the restricted area. As such, in reality, this error was a nullity.

For this relatively minor offense, the Carrier removed Claimant from service for ten days pending the investigation. This, even though there was absolutely no indication that the Claimant's retention in service would have been detrimental, to herself, another person, or the Corporation. [Rule 19(a)]

Furthermore, the majority decision quotes only selectively from Rule 19. Other provisions of this rule also address the assessment of discipline. For example, Rule 19(f) provides that:

> "If the discipline to be imposed is suspension, its application shall be deferred unless within the succeeding six (6) month period, the accused employee commits another offense for which discipline by suspension is subsequently imposed"

In other words, had the Claimant not been removed from service pending the investigation, the ten day suspension would have been deferred, resulting in no actual time lost. See Third Division Award No. 29364.

The opinion expressed in Award No. 29590, improperly equates the gravity of the offense involved in Award 28319 with this case. Award 28319 involved a Claimant's failure to provide protection for passengers who, when disembarking their train, were crossing an active track. Clearly, Award 28319 addressed a much more serious offense than the instant case. The findings of Third Division Award No. 29364, are more applicable to this dispute.

Finally, the majority decision in this case effectively negates the clear and unambiguous time limit provisions embodied within Rule 19(b). The Claimant was notified of the

investigation on December 17, 1990. The proceeding was scheduled to begin on December 21, 1990. Clearly, only four days notice was given. On December 19, 1990, in an attempt to cover up their failure to comply with time limits contained in Rule 19(b), the Carrier scheduled the Claimant's representative to attend a mandatory rules examination on the same day the investigation was scheduled. This forced the Claimant's representative into requesting a postponement.

To this writer, it is simply astounding that the time limit violation can be so clear, the duplicity so obvious, and yet the majority still "buys into" the Carrier's argument that the time limit violation was moot in the face of the extorted postponement.

Applying its own tortured interpretation to the section of Rule 19 which establishes minimum notification of a pending investigation, the majority states that while the agreement may convey to the accused employee a right to receive proper notification that "...is not to say that this right cannot be satisfied in a shorter period of time."

Following this illogical approach, what then, is the point in including a time limit in the first place if, as the majority contends, this right can be satisfied in a shorter time?

Third Division Award No. 11757

> "When time limitations for the performance of an act, are embodied in an agreement, with precision, the parties are contractually obligated to comply with them. Whether the limitations are found in practice to be harsh, not equitable, or unreasonable is no concern to this Board...We cannot by decision alter, vary, add to or subtract from the agreement of the parties. We have no power to dispense our sense of what we might consider just and equitable under the circumstances-the terms of the contract are absolute." [emphasis added]

It just doesn't make sense, or serve any useful purpose, for this Board to engage in the issuance of decisions that will void the due process rights of employees. That is exactly what has happened here. I dissent.

L. A. Parmelee
Labor Member