

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30601
Docket No. TD-31219
94-3-93-3-116

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

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

STATEMENT OF CLAIM:

"The purpose of this letter is to appeal the discipline, in accordance with Rule 18, Section 4 (a) of the agreement. ... Please advise when the discipline will be removed and Mr. [M. J.] Barbieri will be returned to full Train Dispatcher service and compensated for all lost time as a result of said discipline and hearing."

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 employee 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.

Claimant, subsequent to this occurrence, has been employed by the Carrier as a Clerk. Until his permanent disqualification by the Carrier pursuant to notice dated November 4, 1991, Claimant served as a Train Dispatcher. He was assigned to Selkirk, New York, on the Carrier's Albany Division. Claimant had been disqualified in January of 1991 for an infraction not identified in the record. Under circumstances which are also not a part of the record, he was later reinstated.

On October 14, 1991, Claimant was working as a trick Dispatcher on Desk J, Selkirk. His dispatching responsibilities included the main line between Swain and CP Cass Street on the Carrier's Southern Tier Line, part of which is double track. In the course of his dispatching duties, Claimant authorized a hi-rail vehicle to proceed east on Track 1 from CP Silver Spring to CP Cass Street. Claimant had discussion with the hi-rail operator in advance of giving him clearance in which the operator indicated he would clear Track 1 on the double track portion of the line for an anticipated westbound move. Later, the hi-rail operator reported that he was east of cross-overs at which he was to stand clear; and he reported that the cross-over had been thrown to allow the westbound move from Track 2 onto Track 1. At the time the hi-rail operator communicated that information to Claimant, he was not clear: his vehicle continued to occupy Track 1. The operator did not give Claimant notice that he was in the clear.

Although the hi-rail operator did not report that he was clear, Claimant assumed, on the basis of his prior discussions with the operator, that he was clear. Claimant then removed the block protection and allowed light engines to proceed westbound on the same track, in the same block, as the hi-rail vehicle, thereby setting up a possible collision.

The hi-rail operator heard the transmission to the light engines and advised Claimant that he was not, and had not been, clear. Claimant then directed the hi-rail operator to clear the track and stopped the westbound movement. The possible collision was averted.

Claimant did not report the incident to the Carrier or enter it on any records or reports.

The Carrier, through its Manager S. A. Doran, charged Claimant with violation of NORAC General Rules B and D and Operating Rules 808, 817, 902 and 905, all setting forth requirements for the proper dispatching and control of trains. Assistant Superintendent D. J. Eckles conducted an informal inquiry and thereupon suspended Claimant from service, pending hearing. He thereafter convened an investigatory hearing at which the above facts were ascertained.

During the course of the hearing, the Hearing Officer allowed into the record, over the Organization's objections, reference to an earlier suspension of Claimant, which had been imposed by the Carrier without the benefit of a Hearing which was later rescinded.

Following the hearing, the Carrier, through Mr. Eckles, reviewed the record, determined Claimant to be guilty of the charges and assessed against him penalties of permanent disqualification as a Train Dispatcher and suspension for the period from the time he was held out of service until he was disqualified and reassigned. Claimant was returned to service in the Clerk craft, where he had retained seniority.

The Organization appealed the discipline; and, when the appeal was unsuccessful, brought the dispute to this Board.

The Organization argues that the discipline imposed was excessive, in light of Claimant's reasonable belief that the hi-rail operator was clear of Track 1 at the time Claimant authorized the Westbound movement and the failure of the hi-rail operator to comply with his earlier instructions. It asserts that Claimant's permanent disqualification is the equivalent of dismissal from his craft and that the Carrier's action is not consistent with the corrective purpose of discipline.

The Organization argues that the discipline is defective and must be overturned, based on the Carrier's failure to afford Claimant due process and a fair hearing. It points to the dual role of Mr. Eckles, who suspended Claimant and ordered a hearing, then reviewed the record, determined Claimant's guilt, and assessed the penalties; and it argues that Claimant was thereby deprived of an independent and unbiased review of his case. It asserts that Mr. Eckles cannot be deemed to have objectively reviewed his own decision. The Organization also argues that the Carrier's refusal to produce the Charging Officer, Ms. Doran, prejudiced Claimant's right to confront his accuser and explore her basis for preferring the charges.

The Organization argues, in addition, that the Carrier's inclusion of the Claimant's prior disciplinary record was prejudicial to Claimant, in particular the reference to a prior disqualification of Claimant which was defective and subsequently withdrawn by the Carrier. It asserts that the penalty determined by the Carrier is unavoidably tainted by the deciding official's improper access to invalid prior discipline.

Finally, the Organization asserts that the Carrier's notice of discipline was not timely "given" as required by the Agreement, since it was not received by Claimant until after the 10th day following the close of the hearing, even though sent by certified mail on the 10th day. The Organization argues that "give" means "execute and deliver" or "put into the possession of another" rather than "place in the mail".

The Organization urges that the discipline was imposed in violation of Claimant's rights to due process and fair hearing and must be overturned. In the event that the Carrier's action were to be determined to be procedurally proper, the Organization argues that the penalty is arbitrary and excessive and should be reduced.

The Carrier argues that the evidence is clear that Claimant committed a serious violation of his obligation to ensure that all train movements under his control were properly executed, in particular by improperly removing block protection and allowing equipment to enter a block occupied by other equipment. It asserts that Claimant thereby created the possibility of a collision and then compounded the violation by not reporting it. The Carrier argues that the penalties of permanent disqualification and suspension were proper responses to Claimant's negligence.

The Carrier argues that disqualification is an appropriate penalty for the type of gross negligence Claimant demonstrated and the potential for serious harm which his conduct created. It asserts that qualification decisions are, in any event, reserved to the Carrier and should not be disturbed unless shown to be arbitrary and capricious. The Carrier argues, further, that the Board should only overturn discipline where it is demonstrated that the amount imposed is unreasonable or excessive.

The Carrier argues that the procedural challenges to the discipline are not sufficiently severe to warrant overturning the discipline. It asserts that the charging officer exercised simply an administrative function and lacked substantive knowledge of the charges; and it urges that she was not, therefore, a "pertinent witness[]" to the offense". It also asserts that there is no requirement to provide advance notice of the identity of witnesses.

The Carrier urges that the Organization's complaint that the Carrier failed to produce the Charging Official as a witness is without merit, since the Official had no knowledge of the alleged offense and signed the charge in her administrative capacity.

The Carrier argues that the dual role played by Superintendent Eckles in suspending Claimant from service, pending hearing, and ordering an investigatory hearing, then reviewing the record, determining Claimant to be guilty of the charges and assessing the penalties did not violate Claimant's right to a fair hearing. It asserts that Mr. Eckles action in suspending Claimant, pending hearing, was merely a ministerial act. The Carrier also argues that, since the hearing and disciplinary proceeding is a Carrier-administered process, there is nothing inherently prejudicial to Claimant's rights in having Carrier officials fill multiple roles

in the processing of the charges and imposition of discipline.

The Carrier also urges that the notice, sent certified mail on the 10th day following the close of the hearing, was not untimely, since mailing has been consistently deemed in the industry to constitute notice, since to hold otherwise would allow employees to escape discipline simply by avoiding receipt of notice, and since Claimant received the notice the next business day following mailing, there being no demonstrated harm to Claimant as a result of the date of receipt of the notice.

The Carrier argues that consideration of Claimant's prior record was appropriate to the determination of penalty; and it asserts that Claimant, by his own testimony, conceded in the investigation that he had previously been "fired" as a dispatcher in January of 1991, was reinstated and required to requalify.

The Carrier urges that the claim be denied.

Dispatchers play a critical role in the movement of trains and equipment over the railroad. Central to their responsibilities is safety; and of all the safety responsibilities of dispatchers, perhaps none are more important than the avoidance of collisions. One way in which the chances for collisions can be minimized is by obtaining positive assurance that a block is clear of prior movements before releasing block protection and authorizing any other movement. This the record establishes, Claimant did not do. He thereby set up the possibility of a collision and violated the rules with which he is charged. The record demonstrates that Claimant also violated his responsibilities by failing to report the incident, as required.

The Board has reviewed the various procedural objections raised by the Organization; and, with the exceptions discussed, below, finds them to be without merit.

The Carrier did not violate the Agreement or Claimant's right to due process and fair hearing by refusing to make available the charging official; there is no indication that she had information relevant to the investigation. The Organization's arguments concerning the scope of the charge are essentially legal in nature and did not require her testimony.

Of the Organization's argument that the notice of discipline was untimely because it was not received by the 10th day following the hearing the Board is not persuaded. The general rule in the industry is that notice is deemed to be given when it is sent. To hold otherwise would allow employees to escape discipline by the

simple device of making themselves unavailable to receive notice. The Organization's interpretation of the requirement that notice be "given" to mean that delivery of the notice must be completed is not, in this context, persuasive. "Given" is, in many contexts, differentiated from "received" (e.g., "it is better to give than to receive"). The Board concludes that "given" means "sent". While it is the Carrier's burden, when challenged, to prove that notice was, in fact, sent, the proof of mailing to Claimant's last address satisfies the burden. The signed receipt establishes Claimant's actual notice.

The inclusion of an employee's prior disciplinary record, offered to allow consideration of the appropriate penalty, is not improper. The Board recognizes the prejudice that would result from inclusion and consideration of discipline later overturned; however, the record does not contain documentation for the Organization's assertion that the disqualification of Claimant was overturned or indication as to the basis for any such reversal. It is well-established that the Board cannot take cognizance of material which has not been made a part of the record.

The Organization's argument that the Carrier violated Claimant's right to a fair hearing by utilizing Superintendent Eckles as the reviewing and deciding official for charges for which he had already suspended Claimant and convened a hearing touches the basic right of Claimant to an independent review of the record and assessment of guilt and penalty. This the Board believes could not have occurred, by the very fact of Mr. Eckles' earlier, substantive participation in the decision to suspend Claimant, pending hearing, and his preliminary inquiry in connection with that decision. Mr. Eckles' inquiry and determination to suspend Claimant, pending investigation, gave him information in connection with the incident other than that acquired through the hearing. His pre-hearing determination to suspend Claimant both implicated his conclusion as to the likelihood of Claimant's violation and his conclusion, necessary under Rule 18, Section 1, Paragraph (b) of the applicable Agreement, that his retention in service, pending hearing, would be detrimental to himself, another person, or the Company - a necessary reflection as to Mr. Eckles' view of the seriousness of the offense. We are persuaded that the Carrier's utilization of Mr. Eckles, later in the process, to review his own, earlier determinations and to select and impose the penalty, violated Claimant's right to an independent review and requires a sustaining award.

The Board acknowledges the Carrier's right to determine Claimant's right to determine an employee's qualifications for a job; but when the Carrier disqualifies an employee as a

disciplinary penalty, it must be prepared to establish both the employee's violation and, when challenged, to establish that it afforded the employee due process and fair hearing. This the Carrier did not do in the case of Claimant; and, for that reason, his permanent disqualification must be rescinded.

Claimant's further service as a dispatcher is, of course, subject to his requalification. To the extent that Claimant's violations resulted from lack of knowledge of the rules, or insufficient respect for their careful application, this ruling, and the Carrier's requalification process, should underscore the importance of assuring his full knowledge of and strict compliance with applicable rules and procedures.

The Carrier failed to afford Claimant due process and a fair hearing. The penalties of suspension and permanent disqualification as a dispatcher shall be rescinded and Claimant returned to service as a dispatcher with seniority unimpaired, and made whole for wages and benefits lost. Claimant's return to service as a dispatcher shall be subject to his requalification.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 2nd day of December 1994.