

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32755
Docket No. MW-33781
98-3-97-3-121**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(St. Louis Southwestern Railway Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [ten (10) day suspension] imposed upon Welder D. B. Smith for alleged violation of Rule 1.1 of the Safety and General Rules for all Employees and Rules 10.1 (M), 10.3 (M) and 10.3.4 of the Rules and Instructions for Maintenance of Way Engineering, in connection with his responsibility in allegedly occupying the main track near White City, Kansas about 11:00 A.M., October 18, 1995 without authority, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File MW-96-8-CB/MW D96-4).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be compensated ‘. . . for fifty-six (56) hours at his respective straight time rate of pay, with all benefits unimpaired and intact, and with charge letter be removed from his personal records, account wrongly withheld from service.’”**

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 were given due notice of hearing thereon.

Claimant is a Welder. On October 19, 1995, he was assigned to welding rail joints near White City, Kansas. In that connection, he was required to obtain permission to occupy a designated section of track, referred to by the parties as "track and time," between the east and west switches at White City, Kansas, while trains operated on the same rail. After occupying the main track between East White City and West White City for approximately 30 minutes pursuant to the permission he believed he had received, Claimant contacted the Dispatcher to release his authority. In doing so, he learned that in fact he had not been given authority between the two points sought, but elsewhere. Following the Investigation held November 21, 1995, Claimant was assessed a ten day disciplinary suspension for violation of the following Carrier Rules governing track and time.

"Rule 10.1 (M) AUTHORITY TO ENTER CTC LIMITS

CTC limits are designated in the timetable. A machine, track car or employee must not enter or occupy any track where CTC is in effect unless;

- *The control operator grants track and time under Rule 10.3 (Track and Time).*

* * *

Rule 10.3 (M) TRACK AND TIME

The control operator may authorize a machine, track car or employee to occupy a track or tracks, within specified limits for a certain time period.

Authority must include track designation, track limits and time limit. The machine, track car or employee may use the track in either direction within the specified limits until the limits are verbally released without providing flag protection.

* * *

RULE 10.3.4 RECORD TRACK AND TIME

The employee requesting track and time will state name, occupation, location or other identification. The employee will then repeat the authority granted. If the authority is repeated correctly, the control operator will acknowledge."

The record reflects that when Claimant called for authority to occupy the main track between East White City and West White City, Kansas, the Train Dispatcher misunderstood his request and gave verbal permission to occupy track between White City and Dwight, Kansas. As required by Rule 10.3.4, Claimant repeated back to her that he had received track and time authority between East White City and West White City and made notation in his track authority record to that effect. In the process of releasing that permission around 11:05 A.M. that morning, the Dispatcher informed Claimant that she had protected him between East White City and Dwight. Following Carrier's Investigation, it imposed the ten day disciplinary suspension now before this Board for consideration.

It is Carrier's position that by occupying the main track for 30 minutes without authority, Claimant placed himself and others at significant risk. The Organization asserts several procedural objections relating to Claimant's right to an impartial Investigation; on the merits it maintains that the Dispatcher was primarily responsible for the mix-up.

The Board has carefully reviewed the Organization's procedural claims. While it fully credits the general proposition that Claimant and his representatives may not be unfairly restricted in developing their case at Hearing, in this instance we find no irregularities that can be fairly said to have had any material effect on the outcome of Claimant's Investigation. Specifically, we conclude that Carrier did furnish the

Organization a copy of the transcript in accordance with the Agreement; that Carrier's typographical error in the charges assessed in no way interfered with Claimant's ability to prepare his defense or otherwise resulted in prejudice to him; that by producing tapes of the radio transmissions between Claimant and the Dispatcher without the presence of the Dispatcher, Carrier committed no material error in the absence of serious conflicts in opposing evidence.

The transcript of Claimant's Investigation reveals that Claimant requested "track and time Authority No. 12117, main track, East White City to West White City." Dispatcher Erickson, mistaking the request, verbally authorized time between "East White City and Dwight." Claimant then repeated "East White City and West White City," and Erickson said "That is correct."

A clearer case of mutual mistake could hardly be constructed. Claimant did not listen when Dispatcher Erickson cleared him for "East White City and Dwight." Dispatcher Erickson did not listen when Claimant then repeated "East White City and West White City." Two human errors were made, bilateral errors running together to make mischief.

For her role in this incident, the Carrier's Dispatcher was suspended without pay for five days. Claimant received ten days. The serious nature of these mistakes is obvious; what is far less clear is Carrier's basis for distinguishing the severity of the two offenses. The Board finds no record evidence to support such disparate treatment. Absent issues of prior progressive discipline, mitigating or extenuating circumstances, or other factors not in evidence, no principled reason appears on this record for assessing Claimant a penalty twice as much as the other party responsible for the events that transpired. Accordingly, this Board is compelled to conclude that there is some merit in the Organization's claim of arbitrariness, and sustains the claim in part. The discipline assessed Claimant shall be reduced to a five day suspension.

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 23rd day of September 1998.