

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35554
Docket No. TD-34498
00-3-98-3-139**

The Third Division consisted of the regular members and in addition Referee Donald W. Cohen when award was rendered.

(American Train Dispatchers Department
(International Brotherhood of Locomotive Engineers
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

“Please accept this appeal from decision of Hearing Officer M.J. O'Connell assessing discipline of 10 days' suspension to Member Train Dispatcher K. Martin, of the New York Train Dispatchers' Office, for an infraction alleged to have taken place on December 26 -- 27, 1996. This appeal is filed in accordance with RULE 19 DISCIPLINE - INVESTIGATION - APPEAL (c) of our Agreement.

It is ATDD - BLE's position that because of a defective 'NOTICE OF FORMAL INVESTIGATION' and charge contained therein, because of procedural errors in the conduct of the investigation, and because NRPC/Amtrak failed to sustain the defective charge, that Member Train Dispatcher K. Martin was improperly found 'guilty' and assessed discipline. We therefore demand that this finding be overturned, Mr. Martin's record be cleared, and the matter never referred to again.”

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.

The Claimant was charged with a violation of NORAC Operating Rule 922, which reads in part, "In cases where the Rules require that Operators apply blocking devices, they must ensure that the blocking devices applied provide the necessary protection".

The charge set forth the Rule violated and continued in part by stating "... you failed to ensure and confirm that necessary blocking device protection was applied. . . ."

The Organization contends that the use of the phrase "ensure and confirm," constituted a failure to properly appraise Claimant of the violation alleged to have occurred. This, the Organization claims resulted in the issuance of a "Defective Notice of Investigation and Charge." The Organization states that the misquoting of the Rule expanded upon the language of the Rule and added additional requirements of which the Claimant could not be aware. The Carrier claims that the use of the word 'confirm' is synonymous with the use of the word 'ensure' while the Organization claims the dictionary definition does not concur.

According to Roget's Thesaurus, 'confirm' is a synonym for the word 'ensure'. When the two words were used together in the charge, the term 'confirm' amounted to mere surplusage, neither adding to, nor detracting from the substance of the charge. The Claimant was clearly placed on notice of his alleged infraction of Rule 922. The contention of improper notice is without merit.

The next contention raised by the Organization is that the Hearing Officer improperly assumed the roll of Charging Officer. An analysis of the transcript of the Hearing shows that the Hearing Officer may have misstated certain facts but that there is no evidence that he was attempting to make a case for the Carrier. Absent an obvious bias, there is no basis for a finding that the actions of the Hearing Officer constituted a basis for setting aside his decision.

The final matter to be resolved is whether the Carrier sustained its burden of proving that the Claimant was guilty of violating Rule 922. The charge against the Claimant states in part: "... while in performance of applicable responsibilities associated with manipulation of the Penn Station Control Center (PSCC) Console Machine, you failed to ensure and confirm that necessary blocking device protection was applied at Bergen and A Interlockings for the affected Track and by so doing applied this protection for Track 2

in error and then routed New Jersey Transit Train No. 3257 and Amtrak Train No. 199 into Track No. 1 which was removed from service for maintenance of way forces endangering the safety of passengers and employees.”

There is substantial conflict between the parties, in the evidence submitted in this proceeding. In the Hearing, the Claimant testified at pages 80 - 81 that he followed different procedures depending on the person with whom he was working. This ranged from nonverbal signals to a physical confirmation, depending on the circumstances. The Claimant stated that he was confident his co-worker understood exactly what he had been told. The Carrier contends that the Claimant contented himself with his belief that his co-worker acknowledged his actions relative to proper protection being applied without receiving a verbal response.

The co-worker testified that he told the Claimant to run down the signals at Bergen in order to block up the South Tube to go out of service. He also stated that he told the Claimant the signals were run down at Bergen and that when the Claimant went over to put the blocking out then he said “you have it”. The co-worker later testified that when the Claimant responded to him he may have said “okay” but that he was not certain whether or not he had made a verbal response. The Claimant testified that he was told to run the signals at Bergen and the North Tube was going out of service. He stated that the co-worker never verified or confirmed what he had originally told him. The Claimant also stated that it is not his practice to say “you have it” and that he is always specific about which tunnel.

While the testimony strongly indicates that the Claimant believed the co-worker understood what he had been told, Rule 922 is mandatory in its requirement that the responsible party must ensure that the blocking devices applied provide the necessary protection. Under such circumstances the Claimant was required to obtain a formal response verifying that the necessary measures had been undertaken. The action of the Carrier is sustained.

There remains the outstanding issue of whether the Claimant is entitled to pay for time held out of service. While it is well settled that the Carrier may withhold an employee from service for safety reasons while investigating an incident, the question of whether an employee so withheld may become entitled to pay for the time spent in investigation when a subsequent suspension is upheld must be resolved.

In this case the Claimant has been assessed a ten-day suspended suspension. Under the provisions of Rule 19, should he be guilty of no other offense within a six-month period the suspension will be deferred. The first case to be considered is Third Division Award 30071. This case contained a finding that the Carrier could not include actual days out of service without pay, in a suspension assessed under the provisions of Rule 19(f). The Carrier relies upon Third Division Awards 32987 and 32988, in which consideration was given to the rationale of Award 30071. A contrary result was reached by the Board in the latter cases. It stated, in part "Having closely examined Award 30071 we conclude that although its holding can be easily understood, it does not warrant application in this matter".

A careful analysis of these Awards leads to the conclusion that they cannot be reconciled. Since the result obtained by following the reasoning of Awards 32987 and 32988 would be a double punishment for the same offense, the rationale of Award 30071 is accepted as controlling. The Claimant is entitled to pay for all days held out of service.

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 24th day of July, 2001.