Award No. 4169
Docket No. TD-4107

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Nathan Swaim, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

THE VIRGINIAN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association for and in behalf of L. C. Thompson, a train dispatcher employed by the Virginian Railway, that:

(a) The Virginian Railway Company violated Article 8, Sections (a), (b), and (c) of the Agreement between the said Virginian Railway Company and its train dispatchers represented by the American Train Dispatchers Association governing Rates of Pay, Hours of Service and Working Conditions, when on October 2, 1947 it disqualified L. C. Thompson as train dispatcher (which disqualification is equivalent to demotion) without a proper hearing and without a notice in writing which clearly specified a charge.

(b) Said Virginian Railway Company violated Article 8, Section (c) of said Agreement when, following hearing on appeal in the above described dispute, it failed to render a decision within the time limit prescribed by said Article 8, Section (c) of said Agreement.

(c) Said Virginian Railway Company be required to forthwith remove the entry of disqualification from the record of L. C. Thompson and that said Virginian Railway Company be required to reinstate said L. C. Thompson to the position of train dispatcher to which he is entitled under the rules of said Agreement and to compensate said L. C. Thompson for all wage loss suffered by him by reason of said disqualification.

OPINION OF BOARD: The claim alleges violation, by the Carrier, of Article 8, Sections (a), (b) and (c) of the current Agreement between the parties, in that the Carrier disqualified Claimant, L. C. Thompson, as a Train Dispatcher without a proper hearing and without a written notice which clearly specified a charge and also a violation in that when, following the hearing on appeal, the Carrier failed to render a decision within the time limit prescribed by Section (c) of said Article 8 of the Agreement.

Paragraph (c) of the claim asks that the Carrier be required to remove the disqualification from the record of the Claimant; that it be required to reinstate him to the position of Train Dispatcher; and that it compensate him for all wage loss suffered by him by reason of the said disqualification.

The petitioner states that in this case it is relying entirely on the violation of the Carrier concerning the manner in which it charged the Claimant,

as to the manner in which it conducted the hearing, and its failure to make its decision within fifteen (15) days of the conclusion of the hearing on appeal; and that the guilt or innocence of the Claimant is not before this Board.

Article 8, Sections (a), (b) and (c) of the current Agreement are as follows:

"DISCIPLINE:

(a) A train dispatcher shall not be disciplined, demoted or discharged without proper hearing as provided in the following sections. Suspension pending a hearing shall not be deemed a violation of this principle.

HEARINGS:

(b) A train dispatcher against whom charges are preferred, or who may consider himself unjustly treated, shall be granted a fair and impartial hearing by the Superintendent or his representative within ten (10) days after notice by either party. Such notice shall be in writing and shall clearly specify the charge, or nature of the complaint. The decision shall be rendered within ten (10) days from date of hearing.

APPEALS:

(c) If decision is not satisfactory, the case may be appealed to the next higher officer, up to and including the highest official designated by the railway to hear and render decisions; appeals must be made within fifteen (15) days from the date of the decision. Hearing on appeals shall be granted promptly and decisions rendered within fifteen (15) days from close of hearing."

The parties agree that the entry of the disqualification by the Carrier on the Claimant's record amounts to his being "demoted" as that term is used in paragraph (a) of Article 8.

Claimant was given a hearing, found guilty and demoted on the charge of certain train orders being issued in the office where Claimant was working as a Train Dispatcher, which train orders gave lap of authority to two trains traveling in opposite directions on the same track.

The only notice which the Carrier gave to the Claimant of the hearing was the following letter:

"Princeton, W. Va., September 23, 1947

Mr. L. C. Thompson,
Princeton, W. Va.

Notice is hereby given of a hearing to be held in the Superintendent's office at Princeton, W. Va., 4:15 P. M., September 25, 1947, in case of issuing train orders Nos. 232 and 223, giving lap of authority to Extra Crane B-30 East and Extra 459 West, MX Tower to Rock; also failure to include Ex. 459 West on Motor Car Line-ups, September 19, 1947.

At this investigation the responsibility of those to whom this notice is addressed will be determined. Please arrange to be present. You will be permitted to have a representative and to present evidence in your behalf, if desired.

Yours truly,

(s) B. MILLS,
Superintendent."

This same communication was addressed to two other employes.

The Organization insists that this letter did not constitute a sufficient notice to the Claimant of the charges preferred against him to comply with paragraph (b) of Article 8. The Organization contends that the letter on its face shows that the hearing, to which the Claimant was thereby summoned, was only an investigation to determine the responsibility of those to whom the notice was addressed and that after such investigation, the Carrier should then have given written notice to the Claimant specifically charging him with the offense and set a date for a hearing to determine his guilt or innocence pursuant to the provisions of Article 8.

The Organization relies strongly on the decision of Referee Curtis G. Shake, Award No. 2654 of this Division, which dealt with a case where the Carrier had ordered its employes to attend an inquiry conducted by the Interstate Commerce Commission and the State of Illinois to determine the cause of a train collision. The employe testified in that hearing or investigation as a witness on behalf of the Carrier. On the strength of the facts developed the Carrier subsequently demoted the employe and placed an entry of censure against his record, all without notice of any charge against him or any hearing. The factual situation there is, of course, entirely different from the one with which we are here confronted.

The only purpose of a notice against one accused, whether such notice be required by law or by an agreement between the parties, is to give the accused definite information as to the offense with which he is charged in order that he may prepare a defense and properly present such defense at a hearing where his guilt or innocence is to be determined.

We believe that the notice to the Claimant in this case served that purpose. The notice definitely described the offense and stated that the hearing or investigation was for the purpose of fixing the responsibility. The notice addressed to the three employes in effect said to each of them, in language which they could understand, "This hearing will be for the purpose of determining if you are responsible for this mistake." Each was told that he would be permitted to have a representative and to present evidence in his behalf if he desired. The notice to each of the employes charged that employe and informed him that the hearing would be held on a certain date, at a specified place, and was issued in sufficient time to give him an opportunity to prepare a defense. The notice here was more definite than the notice involved in, and sustained by, Award No. 2974. In that award the Organization made complaint of the word "investigation" being used in the notice instead of "hearing." Here, as there, the record failed to show that the use of the word "investigation" misled the accused or prevented him from having a full and fair hearing of his defense.

At the time the hearing was opened the Claimant was asked if he had been notified of the charge against him prior to the date of the hearing and he answered that he had.

Prior to the hearing he had made a written report of the occurrence in which he stated that he issued and delivered the Train Order which constituted a lap of authority between the two trains and said "this was my responsibility and no one else is involved." In the hearing, held pursuant to the above described notice, he was asked if he had changed his mind about his responsibility for the lap of authority order and he answered that he had not.

In Claimant's written report of this occurrence before the hearing, his statement amounted to a plea of guilty which he reaffirmed in the hearing as above shown.

In considering the charge that the notice of the hearing was not in conformity with the provisions of said Article 8, it would seem that we should also consider the fact that this Claimant was the General Chairman of the Organization and as such officer necessarily familiar with the provisions of Article 8 and aware of his rights thereunder. It would seem that we must, therefore, give more weight to his statements at the beginning of the hearing that he understood the charge; that he did not desire a representative; and

that he was ready to proceed. In the hearing he acted as his own representative, interrogated witnesses and prosecuted his own appeal from the decision.

The Carrier objects to the manner in which the Claimant appealed the decision insisting that the General Chairman should have first appealed to the Superintendent for a reconsideration of the decision and that instead the Claimant prosecuted the appeal directly to the higher officer of the Carrier. We do not believe that paragraph (c) of Article 8 requires this. Here the decision was by the Superintendent and we find nothing in paragraph (c) which would indicate that when the Superintendent is the one who makes the decision complained of, he must be asked to reconsider his decision before appealing to a higher officer.

The Organization also insists that the delay of one day on the decision on Claimant's appeal invalidates that decision and removes all charges against the Claimant.

Paragraph (c) of Article 8 does state that decisions on appeals shall be "rendered within fifteen days from close of hearing." The decision here was rendered on the sixteenth day. The Claimant had been responsible for some delay in the hearing on appeal. The purpose of this portion of the rule, of course, is to secure prompt action in order that an employe charged with an offense may not be indefinitely kept under a cloud and suspended from his position. This rule does not provide that in the event the decision is not rendered within fifteen days it is void and an employe charged with the offense shall be cleared of the charge and reinstated. In this particular case we fail to see how the Claimant was in any manner prejudiced by the delay of one day in the decision on his appeal.

The offense charged against the Claimant in this case is one of the most serious offenses which could be charged against a Train Dispatcher. The Organization, by resting its case entirely on the technical grounds which it has presented, in effect, admits the guilt of the Claimant and says that we are not to consider his guilt or innocence. The transcript of the evidence in his hearing, however, is in the record and also his admission that the error was his, an error which almost caused a head on collision. In our dealing with such a disciplinary case as this it would seem clear that in addition to our being charged with the responsibility of seeing to it that the Claimant has had a fair hearing on a proper charge, all pursuant to the provisions of the Agreement, we must also bear in mind the fact that in such a case our decision is important to the safety of the traveling public and that we owe that public the duty of not reinstating, on purely technical grounds, a Train Dispatcher who has admitted making such a mistake. Award No. 1513.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier did not violate the Agreement as alleged.

AWARD

Claims (a), (b) and (c) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 22nd day of November, 1948.

DISSENT IN AWARD 4169, DOCKET TD-4107

The Award made herein fails to give effect to the requirements of Article 8(b) and (c) of the Agreement. The majority virtually admit this when it is said in the Opinion that:

> "The only purpose of a notice against one accused, whether such notice be required by law or by an agreement between the parties, **is to give the accused definite information as to the offense with which he is charged** in order that he may prepare a defense and properly present such defense at a hearing where his guilt or innocence is to be determined." (Emphasis ours.)

Claimant in this instance received no such notice as described in the foregoing. He had not been accused of any offense prior to the only hearing held before imposition of discipline. He was informed as to such hearing only that,—"At this investigation the responsibility of those to whom this notice is addressed will be determined."

If a precise charge was known to the Carrier, as the Opinion presumes, in advance of the determination of responsibility of Claimant, he should have been advised of it prior to the hearing, as required by Article 8(b). This Award does not constitute an interpretation of Article 8(b) but serves instead to change its requirements.

It is stated in the Opinion—"The notice addressed to the three employes (including Claimant) in effect said to each of them, in language which they could understand, 'This hearing will be for the purpose of determining if you are responsible for this mistake.'" The Opinion holds in effect that this is a "precise charge." Sush holding is not warranted in view of the record showing that the Carrier was in possession of information which would have admitted of proper observance of the requirements of the Agreement.

Now the Carrier will undoubtedly hold it may not be obliged to advise employes of a precise charge against them, especially whenever it conceives the employe has reason to believe he may have committed an error.

The Award condones nonobservance of Agreement Article 8(b) under the guise that the result, so far as complainant was concerned, would have been no different had the Agreement Article been literally observed. It also condones nonobservance of Agreement Article 8 (c) through the statement that—"In this particular case we fail to see how claimant was in any manner prejudiced by the delay of one day in the decision on his appeal."

As to the traveling public, its interests could not have been in any manner prejudiced by complete compliance with the Agreement, and such reference becomes an excuse, rather than a reason, for concurrence in the Carrier's action.

W. G. Cantley