

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Horace C. Vokoun, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that:

(a) The action of the Missouri Pacific Railroad Company, hereinafter referred to as the "Carrier", was discriminatory, an abuse of its discretion, and contrary to the wording and intent of the first paragraph of Section (b) of Article 8 of the currently effective Agreement, when on or about April 25, 1956, it discharged S. H. Senteney employed as train dispatcher in its Bush, Illinois dispatching office.

(b) The Carrier shall now reinstate Claimant S. H. Senteney to service as train dispatcher with seniority and all other rights unimpaired and shall compensate said Claimant for all wage loss suffered by him on account of the Carrier's unjust action under the circumstances involved.

OPINION OF BOARD: On April 7, 1956 Carrier's Bridge over the Okaw River on its Illinois Division was destroyed by fire and part of the main track was out of service until repairs were completed on the evening of April 10, 1956. During this interval several train orders were issued advising of this condition. On April 7 Train order 599 was issued reading "Main track out of service Bridge 515 Okaw River MP51 Pole 29 to MP 51 Pole 32 Account fire. Signed S.H.S." On April 9 Order No. 526 was issued which was practically the same as order 599. This order read "Main track out of service Bridge 515 Okaw River MP51 Pole 29 to MP51 Pole 32. Signed S.H.S."

On April 10, 1956 at about 5:30 P.M. the Carrier's Superintendent communicated by telephone with the Assistant Chief Dispatcher and advised that repairs would be completed about 8:30 P.M., and that two trains should be moved to sidings near the bridge—Extra 599 North to the siding at Reilly Lake which is located south of the Bridge 515 but north of Chester and Extra 4360 South to the siding at Roots which is North of Bridge 515 but South of Flinton. Chester and Flinton were the last telegraphic points between the trains and the Bridge 515. Telephonic instructions were given to the Claimant

herein, the train dispatcher and he issued order number 540 reading "Reduce speed to 10 MPH over Bridge 517 Okaw River MP51 pole 28 to MP51 pole 33, repeated and completed Chester 7:45 P.M."

About 8:30 P.M. the Claimant was instructed by the Assistant Chief Dispatcher that the Birdge was O.K. At about the same time he was talking to Brakeman Exline of Extra 599 on the phone and told him "that repairs were completed and were permitting them to move first and would give them a signal at Reily Lake." Extra 599 left about 8:35 and passed the bridge about 8:45 P.M. After they cleared 4360 proceeded. Both trains had orders 526 and 540 in writing and neither had been annulled at the time the trains proceeded across the bridge and into the specified trackage.

As a result of this act on April 22, 1956 the following instructions were issued by the Carrier:

"Bush, Illinois April 22, 1956

"Mr. S. H. Senteney

Dispatcher

Bush, Ill.

"Report to the Trainmaster's office Bush Ill 930 am Tuesday April 24th 1956 for formal investigation to develop facts and your responsibility in connection with alleged mishandling of train orders on April 10, 1956. Bring representative of your choice and any witnesses desired.

"C R Dodson

"Division Trainmaster."

The investigation was held on Tuesday, April 24, 1956 and on April 25, 1956 the Carrier's Superintendent of the Illinois Division notified the claimant that he was dismissed from service with the following notification:

"Number 32

"To Mr. S. H. Senteney
(Sent U. S. Mail to his home—902 Carter, Carbondale, Ill.
(Occupation) Train Dispatcher
(Location) Bush, Ill.

Dear Sir:

You are hereby advised that you are dismissed from the service of this Company account violation of Uniform Code of Operating Rules 102, Train Order Form 'L', 108, 206(b) and Rules and Instructions for Train Dispatchers, Section 2 and 56, when failing to annul Train Order No. 526 to No. 360's connection and No. 393's connection, Chester Subdivision, April 10, 1956.

Your record now stands DISMISSED.

/s/ R. W. PARKER, Supt."

On May 25th the Carrier reinstated the claimant without pay for time off and reduced his position to that of Telegrapher.

There is an agreement between the Carrier and the Organization and the following rules are incorporated in that agreement:

"ARTICLE 1

(Effective January 1, 1948)

"(a) Scope

"This agreement shall govern the hours of service and working conditions of train dispatchers. The term 'train dispatcher', as hereinafter used, shall include Assistant Chief, trick, relief and extra train dispatchers. It is agreed that one Chief Dispatcher (now titled Division Trainmaster on this property) in each dispatching office shall be excepted from the scope and provisions of this agreement." * * *

"(b-2) Definition of Trick Train Dispatcher positions

"This class includes positions in which the duties of the incumbents are to be primarily responsible for the movement of trains by train orders, or otherwise; to supervise forces employed in the handling of train orders; to keep necessary records incident thereto; and perform related work . . ."

"ARTICLE 8

"(b) Investigations

"A train dispatcher against whom charges are preferred, or who may consider himself unjustly treated, shall be granted a fair and impartial investigation by the Superintendent or his representative within ten (10) days after notice by either party. Such notice shall be in writing and contain the specific charge or nature of complaint."

Further facts set forth in the record show that the train crews proceeded on telephone instructions with conflicting written orders in their possession with no investigation or penalty.

The Organization on behalf of the claimant maintains that (a) the notice of the investigation was faulty and did not comply with Article 8 of the Contract in that it did not contain "specific charges against the claimant" and "an exception was properly entered at the beginning of the investigation," and (b) that the dismissal of the employee by the Carrier was "discriminatory and unjust." As a basis for the latter contention the Organization maintains that it has "long been the practice in emergencies such as the one here involved to move trains from blind sidings on this division on verbal directives. The dispatchers have been told to do so to avoid claims of telegraphers and the only time dispatchers issued train orders direct to train crews at blind sidings were in cases of engine failures or other instances where the emergency developed after a train has passed a telegraph office, making it absolutely unsafe to handle without the issuance of train orders". The claimant also points out that no penalty was meted out to the train crews because they moved over the bridge holding an unannulled order that the bridge was out of service.

The record indicates that the Claimant and his representative attended the hearing and the caption of the record of that proceeding was read to him. That caption read

"Formal investigation held Trainmaster's office Bush, Illinois, 9:30 A. M., Tuesday, April 24, 1956, to develop facts and your responsibility in connection with alleged mishandling of train orders, on April 10, 1956."

The Claimant stated he understood the purpose of the investigation and although recording his exception to the notice stated "but I am ready to proceed. I have received the notice." Further at the end of the investigation the Claimant stated for the record that he had been given the opportunity to "make a full and complete statement of the facts"; that "no other witnesses were desired"; that he "had been given the opportunity to ask all of the questions desired of any witness and there was no wish to insert any exceptions in the record concerning the manner in which the investigation had been conducted."

A conflict in decisions cited was evident on the question of the sufficiency of the notice to the claimant. Award No. 4607 presented by the claimant holding

"* * * When the hearing opened claimant through his representative requested a more specific statement of the charges and when such request was refused, the claimant and his representative refused to take any part in the hearing."

The facts in that case were that the claimant through his representative requested a more specific statement of the charges and when such request was refused, the claimant and his representative refused to take any part in the hearing. No such procedure was evident in this case.

Award 4239:

"It is a well-established principle in legal procedure, both criminal and civil, that a defect in any notice can be waived. Likewise, this is true in the rules of an agreement, such as Article 8 under consideration herein. It must be presumed that Mr. Reed knew the rules of the Agreement and therefore the provisions of Article 8. Also, he knew the rules pertaining to train dispatcher and the duties of his position. He knew before he took the stand and answered the direct question as to proper notification and as to his willingness to proceed; likewise, relative to representation; that he had violated rules pertaining to his work as train dispatcher, as his evidence later showed by his admission of the violation of certain rules prior to the collision. Therefore, as stated, he waived the defect in notice of the investigation."

Article 8 referred to is the same as Article 8 in this agreement and the Carrier and Organization are the same as in this case. Also 4239, 5026, 6590, and others.

In Award 2974 the Board held:

"While the notice fails to state a 'precise charge' against Woods it does specify the 'nature of the complaint.' Its only reasonable mean-

ing was to advise Woods that he would be called upon to explain his guilt or innocence under any duty chargeable to him in connection with the operator's handling of train orders. Such was the case. At the hearing Woods admitted it was his duty to watch the delivery of orders and the carding of trains, which he failed to do, and attempted to explain the reason for his failure. Furthermore the record shows that Woods stated he was ready to proceed with the 'investigation,' and at its conclusion that he was satisfied with the 'investigation.' His representative participated in the questioning in developing Wood's defense."

The Claimant makes charge of "discrimination" because no penalty was meted out to the train crews. This Board has held in numerous cases that this is no defense or excuse for the defendant's acts—Awards 3321; 3342.

The Organization, on behalf of the claimant has protested the fact that the Carrier made use of the past record of the claimant in assessing the penalty, stating that "the parties cannot introduce new considerations after the claim reaches the Board." The facts indicate that the Carrier in its original statement filed with the Board stated that Claimant's "past record as a train dispatcher was reviewed in this case. It revealed that twice before the instant occurrence, he had been investigated in connection with mishandling of train orders. He was given reprimand April 25, 1952 and again September 16, 1955, in those instances." This statement indicates that the record was reviewed by the parties and the Board finds no denial of that inference in subsequent filings before the Board. The ruling of the Board regarding records has been well settled as set forth in Award 6171 which states:

"* * * An employee's record cannot properly be received and considered in determining his guilt but can properly be received and considered in determining the * * * penalty that should be imposed upon him if and when it has been determined he is guilty of the charges which have been made against him. * * *"

Claimant was discharged as a dispatcher on April 25, 1956 and the discharge was reduced to a layoff to May 25, 1956 at which time Claimant was recalled and demoted to the position of Telegrapher.

Award No. 4796:

"The principles followed by this Board in the review of discipline cases are well known. We will not substitute our judgment for that of the Carrier unless there is clear evidence of the abuse of discretion. If there is sufficient evidence of probative force upon which a finding of guilt may be based, even though there are conflicts, the findings of the Carrier will not be disturbed."

The Board holds that a proper investigation was held and the penalty imposed was not discriminatory.

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 Employee involved in this dispute are respectively Carrier and Employee 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 has not violated the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of October, 1958.