Award No. 11295

Docket No. TD-13111

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Preston J. Moore, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

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

(a) The New York, New Haven & Hartford Railroad Company (hereinafter referred to as "the Carrier") violated the effective schedule agreement between the parties, Article 6 thereof in particular, by its action in withholding, and subsequently dismissing, Train Dispatcher E. J. Gannon from the Carrier's service; such action being pursuant to hearing held in violation of the requirements of said Article 6 and upon charges not sustained by evidence of record.

(b) The Carrier shall now be required to compensate Train Dispatcher E. J. Gannon for all loss of compensation from date withheld from service, October 21, 1959, until reinstated, on or about March 1, 1960; and that the individual Claimant's record be cleared of the charges upon which Carrier's action relies.

OPINION OF BOARD: This is a dispute between The American Train Dispatchers Association and The New York, New Haven and Hartford Railroad Company.

The instant dispute arises out of disciplinary action imposed upon the Claimant, Train Dispatcher, E. J. Gannon.

On the morning of October 20, 1959, Carrier's passenger train No. 55, manned only by a conductor and engineer, found it necessary to stop near Rowayton, Connecticut, and request assistance before it could proceed. The conductor called Claimant by telephone and reported the difficulty and location of the train. The Claimant proceeded to send an extra to assist. There was a misunderstanding whether the train was east or west of Rowayton, and a collision resulted injuring several people.

Pending investigation several employes were held out of service. Under date of October 21, 1959, a notice was sent Claimant by certified mail which directed him to attend a "Preliminary Inquiry." There was no charge against

Claimant in the notice. This procedure was objected to by the Petitioner.

On November 15, 1959, another notice was sent Claimant to be present at a hearing to determine Claimant's responsibility.

The hearing began on November 16, 1959 and was concluded on November 18, 1959. Within ten days the Claimant was dismissed from service.

After discussion, the Claimant was restored to service with all rights unimpaired. Discussion was then held regarding the matter of compensation for time lost by Claimant. During the course of discussion, engineer Tripp, who had recovered, was interrogated by Carrier. The Claimant nor his representative had no opportunity to be present. Thereafter, Carrier denied Claimant's request for compensation.

Petitioner contends that Carrier's action was in violation of Article 6 of the Agreement and that Carrier's action cannot be supported by the record and was arbitrary.

We believe the Agreement does not prohibit a "Preliminary Inquiry." To hold otherwise would place restrictions upon the Carrier which are not in the Agreement. A provision which provides for a hearing does not bar an inquiry so long as it is held in good faith and not an abuse of power.

We adhere to the principles established by this Board which hold that this Board will not substitute its judgment for that of the Carrier if there is substantive evidence in the record to support the Carrier's findings.

We cannot point to definite evidence which conclusively establishes the fact that Claimant was not afforded a fair or impartial hearing. We do believe that from a careful study of the record, the Claimant was not given a fair or impartial hearing. It is not necessary to point to definite facts or testimony. As set forth in Award 2771, it is sufficient if we believe that something, other than a proper regard for the rights of all parties, had undue influence on the Carrier in arriving at its decision.

"Award 2771

> "The fact that we have been consistent in our application of such rules does not mean that there cannot be a factual situation where, notwithstanding our adherence to them and irrespective of the status of the evidence, a situation may arise which convinces us a party to a disciplinary proceeding may not have been awarded a fair and impartial hearing. Nor does it mean that we are required to place our hands upon some definite circumstance or evolve some tangible theory which conclusively establishes complete justification for our view that situation prevails. It suffices if within the innermost walls of our conscience the conclusion persists.
>
> "In the instant case we are not disposed to cast any reflection upon the testimony of any witness. We simply say that from an examination of the entire record we have an innate feeling that something, perhaps unconsciously, other than a proper regard for the rights of all the parties to the controversy, had undue weight in influencing the Company to arrive at its conclusion. The same feeling prevails with respect to influences responsible for the testimony given by the Conductor at the hearing.

"Under such conditions we conceive it is our obligation to intervene and do what in our judgment is just and equitable as between the parties. So, we exercise that prerogative and hold that the attendant disciplined did not have a fair and impartial hearing. On that account it follows the punishment imposed by the Company was an abuse of its discretion and should be set aside.

"In announcing this conclusion this Division adheres to the just and equitable proposition that where doubt exists it is better that a guilty employe should go free even though it means compensation for lost time and reinstatement than that all employes should be denied the safeguards of a fair and unprejudiced hearing."

For the foregoing reasons, we believe the Agreement was violated.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of April, 1963.

CARRIER MEMBERS' DISSENT
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Award 11295 omits the fact that after claimant advised No. 55's conductor that assistance would approach from the rear, the conductor stated: "I am going out to protect my rear end", to which claimant replied: "O.K., Go ahead."

Later claimant sent assistance from the opposite direction without communicating the change in plan to No. 55's conductor, in violation of carrier's Operating Rules, providing:

RULE 94:

"If an accident occurs to a train between stations or at a station where an operator is not on duty, and assistance is required, a message, signed by the conductor and engineman, must be sent to the

superintendent, giving the location and stating their train or engine will not be moved and will be protected in both directions until the requested assistance arrives. The movement of assistance may then be authorized without addressing a copy of the order to the disabled train as required by Rule 208."

RULE 208:

"A train order to be sent to two or more offices must be transmitted simultaneously to as many of them as practicable, and sent first to the train or trains of which the right or schedule is to be restricted. When not sent simultaneously to all, the order must be sent first to the train or trains of which the right or schedule is to be restricted."

Claimant's action was not in compliance with the rules as reflected by his testimony at record pages 55 and 56:

Q. "* * * Did you comply with this Rule (94) in failing to enter the phrase 'and will be protected in both directions until the requested assistance arrives'?"

A. "I failed to write in my train order book the last four words of the message I gave and received 'and will protect train'. * * *"

* * * * *

Q. "In view of the fact that you did not have a message per Rule 94, should a copy of that train order then be addressed to No. 55?"

A. "In view of the fact that I actually did not have the proper message, a copy of the order should have been sent to train No. 55. However, I felt I had the proper message in my book, which I see now I didn't."

The majority vaguely implies that carrier's interrogation of engineer Tripp affected the case, but the fact this event did not take place until 45 days after claimant's dismissal, rebuts any such implication. The record does not include a scintilla of evidence that claimant was not afforded a fair and impartial hearing. On the other hand, carrier's assessment of discipline was amply supported by claimant's admission that he violated the rules.

The majority pays lip service to established principles, then, contrary to the overwhelming weight of authority finds:

"We cannot point to definite evidence which conclusively establishes the fact that claimant was not afforded a fair or impartial hearing. We do believe that from a careful study of the record, the claimant was not given a fair or impartial hearing. It is not necessary to point to definite facts or testimony."

Although Award 2771, relied upon by the majority, was declined almost 20 years ago, that portion of the opinion quoted in Award 11295 has never been cited or followed but has been repudiated repeatedly. It follows that Award 2771 is not authority for anything.

In **Award 7072** (Carter), it was held:

"It is only when the evidence **clearly** indicates that the carrier

> acted arbitrarily, in bad faith, or without just cause under the circumstances, that the intervention of this Board is permissible." (Emphasis ours.)

to the same effect, see **Awards 7363** (Larkin), **8424, 8511** (Lynch), **8715** (Weston), **10571, 10642** (LaBelle) and **10096** (Rose).

The majority in this case admits there is no evidence to which they can point that sustains the finding which falls far short of the above rule requiring that the "evidence **clearly** indicate"

In **Award 9199** (Weston), this Board held that:

> " * * * this Board's well-established principle that it is not our function to weigh conflicting testimony, determine the credibility of witnesses or upset findings of fact based upon competent, if contradicted, evidence. * * * "

See, Also, **Award 9511** (Elkouri).

Award 9046 (Weston) stated:

> "On the question of appropriate discipline, particularly in an accident case, we are not disposed to substitute our judgment for that of the Carrier which is charged with the responsibility for the safety of its employes and property as well as the public. (See Awards 891, 8711, 2632, 2621)."

This Board will not substitute its judgment for that of the carrier if there is substantive evidence in the record to support the carrier's findings. (See **Awards 5974**—Messmore, **6919**—Coffey, **9046**—Weston, **8449**—Johnson, **10113**—Daly, **10595**—Hall, **10642**—La Belle, and **11017**—Dolnick).

In view of these controlling authorities by experienced referees, Award 11295 is a shameful exercise of authority.

For these reasons, we dissent.

/s/ **W. M. Roberts**
W. M. Roberts

/s/ **G. L. Naylor**
G. L. Naylor

/s/ **R. A. De Rossett**
R. A. De Rossett

/s/ **R. E. Black**
R. E. Black

/s/ **W. F. Euker**
W. F. Euker