Award No. 13168
Docket No. TD-14657

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Robert J. Ables, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

SOUTHERN PACIFIC COMPANY
(Texas and Louisiana Lines)

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

(a) The Southern Pacific Company, Texas and Louisiana Lines, (hereinafter referred to as "the Carrier"), violated the existing schedule agreement between the parties, Rule 25 thereof in particular, by its action in dismissing Train Dispatcher E. F. Hale, on November 21, 1963, following hearing upon charge not established by evidence of record at hearing, which action is therefore arbitrary, capricious and an abuse of managerial discretion.

(b) The Carrier shall now be required to compensate Claimant E. F. Hale, at train dispatcher's rate, for compensation lost from date of dismissal until restored to service on or about January 3, 1964, and that his record be cleared of the charge upon which Carrier's discipline action was based.

OPINION OF BOARD: This is a discipline case in which both sides agree that either the dispatcher or the telegrapher made a mistake in issuing or copying a train order. After investigation and hearing the carrier concluded that the dispatcher was at fault, based exclusively on evidence provided by the telegrapher. The claim here is for restoration of lost compensation and for clearing the claimant's record of the charge on the grounds that the carrier's action in dismissing the claimant was arbitrary, capricious and an abuse of managerial discretion.

The employes first ask that the claim be sustained because the carrier violated Rule 25, concerning time limits on appeal. If there is any procedural defect here, however, it is the failure of the employes to satisfy that part of Rule 25 which requires an appeal to be in writing "furnished to both the officer appealed to and the one whose decision is appealed." The request for a "conference" with the officer who had issued the decision did not meet

the requirement to advise the officer "appealed to" as well. Therefore, we do not think that the carrier violated the time limit rule since the employes did not perfect the appeal which they claim the carrier did not respond to in due time. The request for a conference with the officer who had issued the decision, however, served to keep the appeal alive, particularly since the carrier acquiesced in handling the appeal this way.

We are not going to overturn the carrier's decision to discipline the claimant dispatcher Hale for we know that either he or White, the telegrapher, made a mistake issuing or copying a train order and we would be only second-guessing the company in its judgment that the dispatcher was responsible if we were to sustain the claim. Actually, the only way we could exonerate the dispatcher is to find, in effect, that the telegrapher made the mistake. Clearly, we would be outside our province if we did this. But to say, as the carrier does, that the "evidence adduced at the hearing showed conclusively that Mr. Hale was guilty as charged" is breath-taking.

The evidence at the very abbreviated hearing establishes only that the dispatcher issued and had repeated back to him a train order including the time 10:15 A. M., according to the dispatcher; and that the telegrapher received and repeated back the time 10:50 A. M., according to the telegrapher. Since they both agree that prescribed procedures for repeat back of train orders were followed, the only rational explanation for the mistake is that one of them had a mental block on the time he was hearing or saying. In this respect, the only collateral evidence of mental acuity of the principals is that the dispatcher, and not the telegrapher, remembered that the train order had to be reissued for an error not involving the time.

Under all the circumstances, including hearing the testimony of both employes, the carrier chose to believe the telegrapher. Since the telegrapher's testimony was direct, substantive and probative evidence on the offense charged, the carrier has satisfied whatever burden it carries in this respect to support its discipline of the dispatcher. The fact that the dispatcher's testimony was equally direct, substantive and probative merely establishes that there is another side to the story, not that the carrier has failed in its burden to support the charge. The precedent is too well established, that this Board should not substitute its judgment for that of the carrier in discipline cases where it has produced substantial evidence that the offense charged was committed, to sustain the claim here. We may add, however, we are far from persuaded, as was the carrier, that the evidence shows "conclusively" that the dispatcher was "guilty" as charged. If, on reconsideration, the carrier has the same reservations we have about the certainty of the dispatcher's responsibility for the mistake, it could make such adjustments as will achieve full equity in this case. Decisions of this kind, as well as imposition of discipline, are within managerial discretion.

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of December 1964.