Award No. 13295

Docket No. TE-12530

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Arnold Zack, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Norfolk and Western Railway that:

(1) The Carrier acted in a capricious and arbitrary manner when it held Extra Operator-Leverman R. B. Smith out of service, March 20, 21, 22, 23 and 24, 1960, pending investigation, in the manner in which it conducted the investigation and when it assessed a suspension of 30 days against record of claimant.

(2) Carrier shall now be required to clear the record of Extra Operator-Leverman R. B. Smith of all charges and compensate him for all time lost, five days March 20, 21, 22, 23 and 24, 1960.

OPINION OF BOARD: On Sunday March 20, 1960, R. B. Smith, an operator working off the extra board, was working the third trick Operator-Leverman position at Lovitt Avenue Tower, Norfolk, Virginia. At approximately 2:30 A. M. the engine of train No. 26 was delayed in release from the station for movement to the yard. Similarly west bound empty train No. 867 was stopped on the mainline before reaching Lovitt Avenue. Two Norfolk Terminal Supervisors went to the Lovitt Avenue Tower to determine the cause of the trouble. After questioning Smith, they relieved him by another operator at 4:25 A. M. He was sent a notice on March 21, 1960 of an investigation on March 24th concerning his "neglect of duty" and advised,

"If you desire to have employe representative or witnesses present at this investigation, you should arrange to have them on hand at the above stated place, time and date."

At the investigation the two supervisors testified that Smith had admitted that he had been asleep while working in the tower and had been awakened by the crew of the hopper train telephoning him. Smith himself testified that he had "overlooked 26's engine leaving the station," but that it was not "much delayed." He admitted stopping west bound empty train 867, and that he had told the two supervisors that he had "possibly dozed or dropped off to sleep in the tower."

On April 4, 1960, Claimant was issued a record suspension of thirty days in lieu of dismissal "account neglecting proper performance of his duties, resulting in unnecessary delays in movement in Norfolk Terminal, March 20, 1960."

The Organization contends that the Carrier acted improperly in suspending the Claimant prior to the investigation, that it denied him due process in failing to have present at the investigation the Assistant Yardmaster as well as crews of the allegedly delayed trains; and that it imposed an unjustified penalty in imposing the thirty days suspension because guilt of the alleged charge had not been proven by the Carrier. Accordingly it requests compensation for earnings lost and a clearing of his record.

The Carrier contends that it has a clear right to discipline its employes; that the Claimant admitted his guilt at the investigation; and that if the Organization or the Claimant felt that further witnesses should have been presented, it was up to them to request their presence. Additionally the Carrier notes that it is within its contractual rights in holding Claimant out of service pending investigation.

The right of the Carrier to keep the Claimant out of service from March 20 to 24, 1960, is founded on the following sentence in Rule 11:

> "* * * An employe may be held out of service pending investigation."

This is a clear grant of authority with no limiting language as is found in similar provisions in other Agreements. The rule cited in Award No. 10806 offered by the Organization in its presentation permitted suspension pending hearing "in proper cases * * * which shall promptly follow charges." That similarly cited in Award No. 11330 specified an employe:

> "* * * shall not be held out of service pending hearing for minor offenses."

Neither form of limiting language is present in the rule involved in the instant dispute. Accordingly it follows that no such restriction may be read into Rule 11. The Carrier acted properly in holding the Claimant out of service for the several days preceding investigation.

Turning to the issue of deprivation of due process in the conduct of the investigation, we find that the Carrier did not act improperly in failing to have Assistant Yardmaster Ballard or engineers or firemen from the delayed trains at the investigation. Even if they had been material witnesses, which is not at all convincing from an examination of the testimony, the Organization had ample opportunity to obtain their presence which it failed to invoke.

Rule 11 provides that the employe:

> "* * * may also have witnesses present in his defense and at his own expense.—(and) "* * * will have reasonable opportunity to secure the presence of witnesses and representatives."

Despite the fact that Carrier was in a more advantageous position for calling these witnesses, it was not incumbent upon Carrier to initiate a move for their presence. Such authority is likewise granted to the Organization in the Agreement, but in this case was not taken advantage of by it. True, reference was made in the testimony to their absence from the investigation,

but there is no evidence that their presence was requested prior to the investigation, that it was requested at the investigation once their absence was noted, or that a postponement was sought to permit their call.

The Organization cites several awards in which Claimants were successful because of Carrier's failure to produce certain witnesses. But these cases contained evidence of "a timely request made by the Organization for their appearance at the hearing, the Carrier officer refused to call * * *." (Award 12242, Coburn) and the failure of the Carrier to notify witnesses requested by the organization (Award 20466 First Division, Larkin). Neither situation is present here.

On the question of the Claimant's guilt of the charge of "neglect of duty" there is little question that although present at his station, he was not fulfilling his responsibilities. He acknowledged in examination that he overlooked one train release, causing at least some delay, and that, the second train had been stopped by his actions. To his supervisors he admitted that this second delay was brought to an end by the telephone call from the train's crew. Additionally he admitted to his supervisors and in his own testimony that he had "dozed or dropped off to sleep in the tower."

These admissions would seem to adequately support the finding of the Carrier that Claimant had been guilty of neglect of duty.

Accordingly, we find the penalty imposed to be proper.

There is nothing in the Agreement impowering us to reimburse the Claimant for earnings lost by virtue of his having been held out of service pending investigation. Compensation for that loss is justified by Rule 11 only when charges against the employe are suspended or dismissed. In this case the penalty imposed, even with awareness of the additional time lost prior to the investigation must be held as reasonable.

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 has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 10th day of February, 1965.