

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Pennsylvania Railroad Company (hereinafter referred to as "the Carrier"), violated the currently effective Agreement between the parties, Part II, Regulations 2-B-2 and 6 thereof in particular, by its action in disqualifying and removing Movement Director J. P. Nolan from his position, effective January 22, 1965.

(b) The Carrier shall now be required to restore Claimant Nolan's rights as Movement Director unimpaired.

EMPLOYES' STATEMENT OF FACTS: There is an Agreement between the parties, copy of which is on file with this Board and the same, by this reference, is incorporated as though fully set out herein.

For ready reference, Regulations 2-B-2 and 6 (Part II) thereof are here quoted in full:

"REGULATION 2-B-2.

REMOVAL FROM POSITION OR EXTRA LIST

(a) When it develops that an employee who is regularly assigned to a position covered by Part II of this Agreement cannot continue to satisfactorily perform the duties of the position and is removed therefrom, he may exercise seniority under Regulation 3-F-1 subject to agreement between the Superintendent of Personnel and the Office Chairman.

(b) When it develops that an extra Movement Director cannot continue to satisfactorily perform the duties of a Movement Director position or positions, he shall be declared disqualified on such position or positions. Unless disqualified for all service as Movement Director, he shall retain seniority, but shall not be eligible to perform Movement Director service on the position or positions on which disqualified unless and until, in the judgment of Management, he is qualified for such service. If he is declared

In accordance with Regulation 2-B-2, agreement was reached between the Superintendent of Personnel and the Local Office Chairman enabling Mr. Nolan to exercise seniority under Regulation 3-F-1. This agreement was set forth in letter dated January 22, 1965, a copy of which is attached as Exhibit C.

Mr. Nolan believed that an injustice had been done and, therefore, had the matter presented, in writing, by the Office Chairman on his behalf to his immediate superior, Mr. J. A. Hackenbracht, in a letter dated February 2, 1965. A copy of this letter is attached as Exhibit D. The handling of the matter was in accordance with Regulation 2-B-2(d) and 7-A-2(a). Regulation 7-A-2 is quoted and attached as Exhibit E.

The Office Chairman's appeal to the Division Operator was denied by the latter in a letter dated February 3, 1965, reading, in part, as follows:

"The matter of the determination of the ability of Mr. Nolan to continue satisfactorily as a Movement Director was properly developed under Regulation 2-B-2. I regret that he was found not able to do so and was, accordingly, disqualified.

Your appeal in behalf of Mr. Nolan is hereby denied."

In accordance with Regulation 7-A-2(b), the Division Operator's decision was appealed to the Superintendent-Personnel, under date of February 6, 1965, and a hearing was scheduled for and held on February 26, 1965. A copy of the letter of appeal is attached as Exhibit F.

Under date of April 17, 1965, the matter was referred to the Manager, Labor Relations, under the provisions of Regulation 7-A-2(c) and Regulation 7-D-1, and discussed at meeting held on May 8, 1965. A copy of the General Chairman's April 17th letter of appeal is attached as Exhibit G.

The Manager, Labor Relations denied the appeal by letter dated July 6, 1965, a copy of which is attached as Exhibit H. In effect, the Manager advised that the Carrier's action in disqualifying the Claimant as Movement Director did not constitute any form of disciplinary action; that the Claimant's service over a period of time was unsatisfactory; and that it had been determined Mr. Nolan could no longer satisfactorily continue in such service.

Ostensibly, the question to be determined is whether the Carrier violated the applicable Agreement when it disqualified the Claimant as a Movement Director.

In so deciding, the Board will note that it is requested only that "The Carrier . . . restore Claimant Nolan's rights as Movement Director unimpaired." There is not now, nor has there been, any claim for compensation on any basis.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was employed as Movement Director in the Movement Bureau at New York. Claimant had seniority as an Assistant Movement Director and Movement Director from December 1, 1950 and May 20, 1955, respectively, and seniority as a train dispatcher from July 20, 1954.

Upon January 14, 1965, Claimant was advised he was being held out of service pending trial in connection with two alleged excessive delays in the substitution of engines west of Midway, on the 13th and 14th of January, 1965. Carrier, by letter of January 15th, rescinded the notice of January 14th and advised Claimant of the hearing to be held on January 21, in connection with his alleged unsatisfactory past performance of his Movement Director duties and his competency to continue in that capacity. Though held out of service and not required to work, he was to be compensated until said hearing to determine his competency to continue in his position. Carrier advised Claimant on January 22nd, after a hearing, that he could no longer continue to satisfactorily perform his duties as Movement Director and was disqualified from performing this position. As provided in Regulation 2-B-2, Claimant was allowed to exercise his seniority under Regulation 3-F-1, and did so on the position of train dispatcher under date of January 23, 1965.

Claimant appealed Carrier's decision to disqualify him. Appeal was taken under 2-B-2(d) in accordance with Regulation 7-A-2. His appeal was progressed and duly denied, and his claim is now before this Board for adjudication.

Petitioner contends that Claimant was improperly withheld from performance of service by an action which lacked any contractual basis; that he was denied due process, thus prejudicing his interest; and, the actions of Carrier were in violation of the Agreement, Regulation 6-"Discipline" and 2-B-2, Part II-"Removal from Position or Extra List", thereof in particular.

Carrier asserts that Claimant was properly removed, withheld, and disqualified from performance of service, as set forth by Regulation 2-B-2(a); that Regulation 6-"Discipline" is not applicable to the disqualification of an employe for inability to satisfactorily perform the duties of the position; and, that disqualification is not "discipline."

We have reviewed the record and find no restrictions on Carrier's right in the Agreement to remove an employe from a position under Regulation 2-B-2 and subsequently disqualify the employe for inability to satisfactorily perform said duties of that position. Nor do we find that Regulation 6-"Discipline" is the only authority for removal or withholding an employe. Regulation 6 is not applicable, because no discipline is involved in the instant dispute. It is true, as pointed out by the organization, that Claimant's first notice to be withheld conformed with Regulation 6; however, this notice was rescinded by the Carrier the following day, and Carrier elected to proceed in a determination of the Claimant's qualifications or lack of for that position under Regulation 2-B-2(a).

In Award 7283 (Cluster), involving the same parties, the Referee in that Award distinguished Regulation 6-"Discipline" from disqualification on a position of Movement Director whereby the employe in that dispute was disqualified due to loss of ability to perform satisfactorily. Pertinent portions of the Board's finding in Award 7283 in our opinion appropriate under the facts set forth in the instant dispute are as follows:

"... It appears from the language of Regulation 6 that the parties understood and used the word in this normal sense. Thus, Section 6-A-1(b) speaks of being 'guilty' of a 'major offense'; Section 6-C-1(a) speaks of a 'Movement Director who is accused of an

offense' and of his being 'tried'. Reading the rule of the generally understood meaning of 'discipline' it seems to have been intended to cover situations where a Movement Director is removed from his position permanently as punishment for a specific offense or offenses or temporarily as a corrective measure to insure that he will not commit the same or similar offenses in the future when he is returned to his regular position.

The record in this case is convincing that Carrier was not motivated by any intention to 'punish' Claimant for his shortcomings; it is equally clear that Carrier had no thought that its action would cause Claimant to overcome his shortcomings and become an efficient employe again. Just the opposite was true — Carrier was convinced that Claimant could no longer do his job, and no amount of correction would change this situation. On this state of facts, it cannot be said that Carrier's action in disqualifying Claimant was 'discipline'; therefore, the 'Discipline' rule is not applicable.

* * * * *

Since the discipline rule is not applicable, there was no requirement upon the Carrier to provide Claimant with the notice and hearing required by that rule. Nor does it appear that Carrier violated any other rule of the Agreement in its treatment of Claimant; no specific rule is found in the Agreement covering the procedure for disqualification of an employe for lack of ability to perform the duties of his position. . . ." (Emphasis ours.)

As in Award 7283 as in the instant dispute, Claimant was not suspended or dismissed from service, but was removed after a hearing and upon being notified, Claimant exercised his seniority under Regulation 3-F-1, and is now filling the position for which he is qualified. Additionally, Claimant relied upon the applicability of Regulation 2-B-2(d), which when an employe is affected by paragraphs 2-B-2(a) of this Regulation, who believes that an injustice has been done and may, if he so desires, progress the matter in accordance with Regulation 7-A-2, in appealing Carrier's decision to remove him from his Movement Director's position. Claimant followed these appeal provisions of Regulation 2-B-2(d) relating to his removal from a position rather than the appeal provisions relating to discipline. From the facts of the record, we do not find that Claimant was denied due process as alleged by the organization because he was required to attend a hearing or because no written transcript was furnished the organization of either the initial hearing or any of the three additional appeal hearings. To the contrary, the record is clear that the Claimant had been properly represented from the initial hearing date as well as at all levels of appeal by his designated representative as well as having witnesses present to testify in his behalf.

The many awards of this Division hold that the employer is the judge of fitness and ability and whether an employe possesses sufficient fitness and ability to continue in a position is a matter exclusively for the Carrier to determine, and such a determination, once made, will be sustained unless it appears that the action was capricious or arbitrary. Here the Carrier determined that Claimant's shortcomings as set forth by Carrier under date of January 19th covering a list of eight specific failures as Movement Director from April 2, 1964, through and including January 14, 1965. This is substan-

tial evidence to support Carrier's conclusion that Claimant was no longer qualified for the job of Movement Director; therefore, Carrier in the exercise of its management prerogative, under 2-B-2(a), concluded without bias or prejudice, that Claimant was not competent to continue to satisfactorily perform the duties of the position of Movement Director, and removed him therefrom. We find that Regulation 6—"Discipline" is not applicable to this case since discipline rules were not involved in the disqualification of the Claimant and, therefore, Carrier's actions in the removal of the Claimant from his position was not a violation of the Agreement, and we will deny the claim.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of July 1967.