

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19918
Docket Number TD-20110

Burl E. Hays, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
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(The Atchison, Topeka and Santa Fe Railway Company
(-Coast Lines-

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

(a) The Atchison, Topeka and Santa Fe Railway Company (hereinafter referred to as "the Carrier") violated the Agreement in effect between the parties, Article VII thereof in particular, by its action in assessing discipline in the form of fifteen (15) demerits upon the personal record of Train Dispatcher T. H. Eshelman following formal investigation held on March 30, 1971. The record of said formal investigation fails to support Carrier's charges of rules violation by the Claimant, thus imposition of discipline was arbitrary, capricious and unwarranted.

(b) Carrier shall now be required to clear Claimant's employment record of the charges which purportedly provided the basis for discipline, and to compensate him for any wage loss sustained as a result of the Carrier's action.

OPINION OF BOARD: Claimant T. H. Eshelman was regularly assigned to a train dispatcher relief position in the San Bernardino, California train dispatching office of the Atchison, Topeka and Santa Fe Railway Company. He received a letter over the signature of Superintendent H. J. Briscoe dated April 27, 1971, which read in part:

"As result of formal investigation conducted at Needles March 30, 1971, decision has been reached to assess your personnel record fifteen (15) demerits for responsibility in failure to report delay to train 668-Q-1 by train 788-Q-1, or to ascertain cause for delay, Needles District, March 18, 1971; violation of Rules B, 251, and 775, Rules Operating Department, and Instructions to Dispatchers."

On May 12, 1971, Vice General Chairman N. S. Peterson of American Train Dispatchers Association, on behalf of Claimant, wrote a letter to Carrier's Assistant General Manager, C. E. Rollins, which read in part:

"Pursuant to the provisions of Article VII, Sections 3 and 4 of the Agreement in effect between this Company and its employees represented by the American Train Dispatchers Association, this is to advise that the decision of Superintendent Briscoe in this case is not acceptable, and appeal

"therefrom is hereby registered."

Much correspondence ensued at higher levels over procedure. Carrier representatives consistently maintained the matter was not properly presented in that Claimant should have filed a claim for removal of the demerits with their designated representative authorized to receive claims. In this instance the proper person was Superintendent Briscoe. On the other hand, Claimant argues that it was not necessary to file a "claim"; that this was a disciplinary procedure and that he properly filed his "appeal" with Carrier's Assistant General Manager, C. E. Rollins, relying on the provisions of Article VII, Sections 3 and 4 of the Agreement.

If claimant were seeking relief for alleged violations of the Agreement involving working hours or wages there is no question but that a claim should have been filed with Superintendent Briscoe. However, it is difficult to conceive of a claimant filing an "appeal" from a decision invoking a penalty in a disciplinary matter with the officer who rendered it. We feel this case is properly before the Board.

The record of investigation contains substantial evidence indicating Claimant violated Carrier's operating rules and instructions. This Board has consistently recognized the fact that carriers owe to employees and to the public a heavy legal obligation to maintain discipline among those in their employ, and we are not inclined to attempt to challenge Carrier's judgment as to disciplinary measures. We will, of course, recognize and apply restrictions created by applicable labor agreements. (Awards 5032, 9422, 10429 and many others).

As to the discipline assessed we quote from Award 10429 (Rock):

"It is not the function of the Board to determine the quantum of discipline to be imposed in any given case. That is the responsibility of the carrier, and unless the record shows that its action was arbitrary or capricious or that it acted in bad faith, its judgment should not be set aside. 9422 (Bernstein), 9935 (Weston), 9511 (Elkouri). The record before us does not support such a finding."

As to the disciplinary action taken in this case we cannot find in the record any justification for the allegation that it was "arbitrary, capricious and an abuse of managerial discretion."

It follows that this claim must be denied.

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

LABOR MEMBER'S DISSENT TO AWARD NO. 19918, DOCKET TD-20110
REFEREE HAYS

Award No. 19918 correctly finds no merit in Carrier's procedural argument that Claimant should have filed a claim for removal of the demerits with the Superintendent rather than an appeal from the Superintendent's decision, stating:

"If claimant were seeking relief for alleged violations of the Agreement involving working hours or wages there is no question but that a claim should have been filed with Superintendent Briscoe. However, it is difficult to conceive of a claimant filing an 'appeal' from a decision invoking a penalty in a disciplinary matter with the officer who rendered it. We feel this case is properly before the Board."

The Award errs in stating:

"The record of investigation contains substantial evidence indicating Claimant violated Carrier's operating rules and instructions. *** "

Claimant was notified the investigation was "concerning delay to trains 668-Q-1 and 308-P-1 by train 788-Q-1, and failure to report this delay ... ". The transcript plainly showed Claimant received a delay report from train 308-P-1 and recorded this delay information. Carrier apparently was aware that Claimant had made a record of this delay report and that fact was established in the investigation transcript. The discipline notice included the supplemental statement "or to ascertain cause for delay" in addition to "failure to report delay to train 668-Q-1 by train 788-Q-1, ... ". The transcript also shows Claimant did report the delays to train 668-Q-1. Claimant asked the operator at Barstow what the conductor on train 668-Q-1 showed on Conductors 827 (report) and was informed "no delay" and "no delay" was what Claimant reported.

Award No. 19918 states:

"As to the disciplinary action taken in this case we cannot find in the record any justification for the allegation that it was 'arbitrary, capricious and an abuse of managerial discretion.'"

This comment follows the statement in Award No. 19918 which either directly quotes or parrots from Carrier Member's panel argument brief, stating:

" *** This Board has consistently recognized the fact that carriers owe to employees and to the public a heavy legal obligation to maintain discipline among those in their employ, and we are not inclined to attempt to challenge Carrier's judgment as to disciplinary measures. We will, of course, recognize and

apply restrictions created by applicable labor agreements.
(Awards 8032, 9422, 10429 and many others)."

The Awards mentioned in this statement dealt with the quantum of discipline after proof of guilt. The quantum of discipline in this case was fifteen (15) demerit marks which admittedly is small. However, the degree of discipline, however small, does not shift or eliminate Carrier's responsibility to establish proof of guilt prior to taking disciplinary action.

Any discipline absent proof of guilt is "arbitrary, capricious and an abuse of managerial discretion". This Board is not limited to cases where the quantum of discipline reaches a certain degree nor should the Board's consideration regarding the substantial evidence required be qualified by the quantum of discipline. This Board has, on many occasions, relied on the quantum of discipline to make the discipline fit the offense after the Board has found substantial evidence that guilt had been proven. (Awards No. 19870, 19871, 19877 and others.)

I must dissent.



J. P. Erickson