NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20957
Docket Number TD-20934

Louis Norris, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
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(Burlington Northern Inc.

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

CLAIM #1

(a) The Burlington Northern Inc., (hereinafter referred to as "the Carrier"), violated the Agreement in effect between the parties, Article 24 thereof in particular, by its action in assessing discipline in the form of an Entry of Censure on the personal record of Claimant Train Dispatcher R. Rose following formal investigation held February 16, 1973. The record of said formal investigation fails to support Carrier's charges of rules violations, contains evidence of prejudgment and a disregard for Claimant's right to a fair and impartial investigation;

(b) Carrier shall now be required to rescind the discipline assessed and clear the employment record of the charge which provided the basis for said action.

CLAIM #2

(a) The Burlington Northern Inc. (hereinafter referred to as "the Carrier"), violated the Agreement in effect between the parties, Article 24 thereof in particular, by its action in assessing discipline in the form of an Entry of Censure being placed on the personal record of Claimant Train Dispatcher L. E. Bath and suspension from service from March 8 to March 22, 1973 inclusive, following formal investigation held February 16, 1973. The record of said formal investigation fails to support Carrier's charges of rules violations, contains evidence of prejudgment and a disregard for Claimant's right to a fair and impartial investigation.

(b) Carrier shall now be required to rescind the discipline assessed, clear the employment record of the charge which provided the basis for said action and to compensate Claimant for wage loss sustained due to Carrier's action.

OPINION OF BOARD: This dispute involves two separate claims of two Train Dispatchers, Rose and Bath, who worked at the same dispatching office. Carrier asserts that Rose issued two identically numbered train orders to two separate trains at the same station, restricting their speed, and that this violated Train Dispatchers Manual Item 12 in that these

train orders were required to be numbered consecutively. Bath, it is asserted, also issued identically numbered train orders to two trains and, additionally, when an error was discovered, issued a new order to the second train without first annulling the previous one, as required by Rule 210 of the Consolidated Code of Operating Rules.

As a result of these alleged rule infractions, formal Investigation was held and both Dispatchers were found guilty. Entry of Censure and record suspension were assessed against Rose, and Entry of Censure and suspension of service for 15 days were assessed against Bath.

Petitioner contends, as to both Claimants, that the findings of the Investigation were at variance with the charges contained in the Notice of Hearing; that Claimants were not afforded a fair and impartial hearing, at which there was assertedly evidence of prejudgment; and that the charges against Claimants were not proven. The relief demanded is detailed in the Statement of Claim.

The Notices of Hearing were quite specific in stating that the purpose of the Investigation was to "ascertain the facts and determine your responsibility in connection with improper train orders being issued - - -". It is true that there was no reference to the specific Operational Rules which became the subject of the Investigation. Nevertheless, we are persuaded that Claimants were placed on sufficient notice as to the purpose of the Investigation in relation to stated facts and circumstances with which they were obviously familiar and which clearly implied that Operational Rules were involved. Nor do we conclude that Claimants were deprived of due process or misled in any sense, as is evidenced by their full testimony at the hearing on all questions put to them.

Accordingly, we do not sustain Petitioner's objection on this issue.

Additionally, we find that the Investigation was fairly and properly conducted. Claimants were afforded ample opportunity to present their case on direct and cross-examination, they were vigorously represented by Organization National Officer Chandler, and no evidence appears in the transcript that any of their rights were violated. Moreover, we find nothing in the record to support Petitioner's claim of "prejudgment". On balance, therefore, we find no impropriety by Carrier nor any violation of the Rules in connection with the conduct of the Investigation.

During the hearing, Mr. Chandler objected to the line of questioning on "improperly numbering train orders", contending that the notice had referred to "issuing improper orders". We do not consider this objection

to be one of substance, for the two terms are practically synonymous. The operating Rules require train orders to be numbered in a specified manner; failure to do so renders the train order "improper". In any event, we cannot conclude that this minor difference in language was so substantial in nature as to compel the finding that Claimants were not afforded a fair and impartial hearing. The record speaks to the contrary.

Further objection was raised at the hearing in connection with the Organization request that an "expert witness" be called to testify on the Rules, and "that it is Carrier's clear duty and responsibility to provide all witnesses at an investigation whether they are material or expert."

We cannot agree. Article 24(b) of the Agreement, which relates to "Investigations", specifically provides that "The train dispatcher - - -- shall be given reasonable opportunity to secure the presence of witnesses". Thus, Claimants had the right to call such witnesses as they deemed pertinent, but the burden of doing so was theirs. They cannot shift this burden to Carrier and we have repeatedly so held in many prior Awards.

See Awards 13643 (Bailer), 16261 (Dugan) and 17525 (Dugan), among others.

On the merits, therefore, the principle has been enunciated in many prior Awards that this Board will not substitute its judgment for that of the Carrier in evaluating the evidence; provided, however, that substantial probative evidence is presented in the record supporting the charges against Claimants.

See Awards 20245 and 6387 (Lieberman), 19487 (Brent), 17914 (Quinn) and 15574 (Ives), among many others.

Such substantial probative evidence is present in this record, particularly in view of the admissions of Claimants contained in their testimony. Claimant Rose admitted that he had failed to comply with the provisions of Rule 12 in regard to proper numbering of train orders. Claimant Bath admitted the same violation as to failure to properly number train orders, and further admitted his failure to comply with Rule 210 in that he failed to annul an erroneous train order before issuing a new order. These are precisely the findings of guilt upon which the respective disciplines were assessed. We conclude, therefore, that the record evidence supports these findings by Carrier.

Petitioner cites a number of prior Awards as precedent. However, these cases are either factually dissimilar from the dispute before us or are based on entirely different principles. Thus, for example, Award 20766 dealt with evidence of falsification and uncorroborated testimony; 20686 related to two aspects of violation remote from each other, one of which was not specified in the notice.

Award 20387 sustained the claim because the evidence clearly established lack of fault; whereas here fault is admitted. Award 20028 found contributory fault by the Assistant Superintendent and held the discipline of dismissal excessive; 19771 related to failure to report an incident promptly, but since only 15 minutes delay was involved the discipline was deemed unwarranted. In 14778 claimants were found guilty of a charge not specified in the Notice and of which they were not advised during the hearing. This is not the case here. In 6329 (2nd Div.) the claim was sustained because the hearing officer preferred the charges, prosecuted the case, "testified and was judge and jury". Certainly, not the case here. Finally, in Award 13576 the claim was sustained because "neither claimant nor his representative was afforded any opportunity for cross-examination". This is a far cry indeed from the manner in which the investigation was conducted in the instant case.

It may be argued that the violations on the basis of which Claimants were disciplined were relatively minor in nature; but we recognize the importance and responsibilities of the duties of the Dispatcher, particularly in regard to safety of operations affecting passengers, train crews and property. Clearly, it is not the province of this Board to minimize the importance of operating Rules or to usurp Carrier's managerial prerogatives in their enforcement.

> "We are aware of the high degree of care under which a Carrier is required to operate concerning matters of safety. In order to exercise this duty, it must insist that its employees faithfully and carefully execute the responsibilities which devolve upon them. It cannot leave anything to chance or permit the slightest neglect".

See Award 19560 (Lieberman), citing and quoting Award 14066. See also Award No. 1, P.L.B. No. 1099, BRAC vs. C&O (Referee Jacob Seidenburg).

To the same effect, see Award 13648 (Hutchins), Docket No. TD-14863, cited by Petitioner and in which the claim was similarly denied.

Based on the record evidence and controlling authority, therefore, we conclude that Claimants were properly notified of the charges, that the hearing was fairly and impartially conducted and with strict observance of Claimants' rights of due process, and that Claimants were properly found guilty on the basis of substantial probative evidence. Additionally, we find that the discipline here imposed was neither arbitrary, capricious nor unreasonable.

Accordingly, we will deny both claims.

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.

A W A R D

Claims #1 and #2 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: G. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 13th day of February 1976.