

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20973
Docket Number TD-20968

Irwin M. Lieberman, Referee

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

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

(a) 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 suspension from service of Train Dispatcher D. C. Hoenig from May 12, 1973 to May 18, 1973 inclusive. The record of formal investigation held April 25, 1973 fails to establish rule violations as charged, thus Carrier's action was arbitrary, unwarranted, and an apparent abuse of managerial discretion.

(b) Because of said violation, the Carrier shall now be required to rescind the disciplinary action referred to in paragraph (a) above, clear Claimant Hoenig's personal record of the charges involved in the investigation held April 25, 1973 and compensate him for all wage loss sustained in connection therewith.

OPINION OF BOARD: This dispute first concerns the disciplinary appeals procedure under the applicable Agreement. In this matter, after an investigation pursuant to Rule 24 (b), the Superintendent notified Claimant that he had been adjudged guilty and assessed a penalty of seven days suspension. Subsequently, Petitioner took an appeal to the Assistant Vice President of Operations and later to the highest officer designated by Carrier for this purpose. Carrier asserts that the Claim is defective since the Organization elected to initiate the claim, not at the usual first step but at the second step of the customary and usual process. Carrier argues that since the initial claim after the discipline was assessed was not presented to the Superintendent, pursuant to Rule 24 (f), the Claim must be dismissed. Rule 24 provides in relevant part:

"RULE 24

(b) INVESTIGATIONS.

A train dispatcher who is charged with an offense which, if proven, might result in his being disciplined, shall be notified in writing of the nature of the complaint against him within five (5) days from date that knowledge of the facts on which such complaint is based was received by the Superintendent, and he shall be given a fair and impartial investigation by the Superintendent or a designated representative

"within five (5) days of the date of such notice, except reasonable postponements shall be granted at the request of either the Company or the train dispatcher.

The train dispatcher shall have the right to be represented by his duly accredited representative and shall be given reasonable opportunity to secure the presence of witnesses. The train dispatcher's representative shall be permitted to hear all oral testimony, read all records referred to in the investigation and question all witnesses. The decision shall be rendered within twenty (20) days from date of investigation and any discipline must be put into effect within five (5) days from date of decision. If not effected within five (5) days, or if train dispatcher is called back to service prior to completion of suspension, any unserved portion of the suspension period shall be cancelled.

(c) APPEALS.

A train dispatcher dissatisfied with decision shall have the right to appeal to the next higher proper officer provided written request is made to such officer and a copy furnished to the officer whose decision is appealed within sixty (60) days of the date of advice of the decision. The right of further appeal in the regular order of succession, up to and inclusive of the highest official designated by the company to whom appeal may be made, is hereby established.

Decisions of the highest designated officer shall be considered final and binding unless, within ninety (90) days from date of such decision, he is notified in writing that it is not accepted, in which event the case shall be considered closed and barred unless it be referred to the appropriate tribunal provided by law within one (1) year from the date of the decision of the highest designated officer.

* * * * *

(f) GRIEVANCES -- CLAIMS.

A train dispatcher who considers himself unjustly treated shall present his grievance or claim in writing direct, or through his duly accredited representative, to the Superintendent within sixty (60) days from date of occurrence on which it is based, and decision of the Superintendent shall

"be rendered within sixty (60) days from date grievance or claim is received, or from date of conference, if one is had thereon. If the train dispatcher is not satisfied with the decision rendered, appeals may be made subject to the order of progression, time limits, etc., provided in Section (c) of this Article."

Carrier argues that Rule 24 (f) makes no distinction between claims originating from disciplinary disputes or from other circumstances. Carrier also relies in part on two letters sent to all General Chairmen of all Organizations prior to and after the merger became effective which directed all of them to initiate all claims, disciplinary and other, with the Superintendents as the employing officers.

The Organization, quite properly, argues that the two letters referred to were unilaterally promulgated and certainly do not constitute modifications of the provisions of the Agreement. Further it is argued that the decision and rendering of discipline in this matter was accomplished by the Superintendent; the Superintendent was therefore an inappropriate officer for the first appeal step in this dispute. Petitioner further contends that the distinction between disciplinary appeals and those involving other types of grievances or claims is emphasized by the language in Rule 24 (f) which refers back to Rule 24 (c) with respect to progression and time limits.

It is noted that none of the Awards cited by both parties hereto are directly applicable to this dispute since they do not contain sufficiently similar "disciplinary language" in their rules. In this case the Superintendent is specifically cloaked with the responsibility to conduct the investigation (either in person or through a designee) and render the decision by the provisions of Rule 24 (b). Quite clearly, under the terms of 24 (c), an employe dissatisfied with his decision "...shall have the right to appeal to the next higher proper officer....". In view of this language we cannot agree with Carrier's contention, since it is evident that Claimant was not required to lodge his appeal in the first instance with the Superintendent. Carrier's construction of the Rules would lead to superfluous or redundant actions by imposing a patently unproductive step in the handling of the appeal of the discipline, which would be contrary to the intent of the parties, as spelled out in Rule 24. It is apparent that the parties wished to, and indeed did, distinguish between the handling of discipline and other types of claims and grievances; this cannot be disturbed.

Carrier's position with respect to the monetary aspect of the Claim is similarly without merit. The compensation requested in the claim is an intrinsic ingredient in the appeal of the disciplinary decision as provided in Rule 24 (e). Carrier's implication that Petitioner must file two separate actions, one to appeal the discipline and a second to seek

redress for the wage loss, is equally without merit. We cannot agree that it is the intent of the parties that two concurrent claims seeking the same relief be filed arising from the same act of Carrier (see Awards 17595, 13447 and 19918). If the Carrier wishes to change its handling of disciplinary matters with this Organization to conform to the handling with other crafts, the proper forum is the bargaining table, not before this Board.

With respect to the merits of this dispute, there is no basic disagreement concerning the facts. Claimant admitted that the issuance of an incorrect track permit within his territory was the direct cause of a collision. The evidence indicates that the permit was issued by a Dispatcher Trainee under Claimant's supervision and its issuance was Claimant's responsibility. Since the evidence clearly supports the finding of guilt, there is no alternative but to 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 that the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 27th day of February 1976.