NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21227
THIRD DIVISION Docket Number TD-21285

Walter C. Wallace, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
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(Fort Worth and Denver Railway Company

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

(a) The Fort Worth & Denver Railway Company, hereinafter "the Carrier", violated the Agreement in effect between the parties, Rule 28 (a) and (b) thereof in particular, by its action in assessing discipline in the form of dismissal, at the request of the Chicago, Rock Island and Pacific Railroad Company, effective December 27, 1973 following formal hearing held November 28, 1973. The record of said formal hearing fails to support Carrier's charges of rules violations, thus imposition of the supreme penalty was arbitrary, capricious, unwarranted and indicative of complete disregard for Claimant's rights in the procedures required in industrial due process.

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

OPINION OF BOARD: On October 2, 1973, Claimant P. R. Armstrong was working as train dispatcher, assigned hours 3:00 p.m. to 11:00 p.m.. Part of the territory under Mr. Armstrong's jurisdiction extended from Belt Junction, Houston, Texas, Mile Post 57.4, to and including Waxahachie, Texas, Mile Post 270.9.

At approximately 7:55 p.m., October 2, 1973, Dispatcher Armstrong issued train order 197 over the telephone simultaneously to Operator J. W. Bishop at Teague, Texas on the Joint Texas Division of CRI&P-FW&D, and Operator M. C. Higginbotham at Belt Junction, Houston, Texas, reading:

> "Men and equipment on main track between Mile Post 91 Pole 27 and Mile Post 95, between Tomball and Karen from 8:01 a.m. until 5:01 p.m., October 3. All trains on main track proceed through these limits at reduced speed not exceeding 25 miles per hour unless a different speed is verbally authorized by employe in charge or entire train has passed a green flag."

This order was completed to the operator at Teague at 7:59 p.m. and completed to the operator at Belt Junction at 7:59 p.m., October 2, 1973.

Subsequently it developed that the operator at Belt Junction issued train order 197 erroneously listing the expiration time at 12:01 p.m. instead of 5:01 p.m., October 3, 1973.

After certain postponements Dispatcher Armstrong and Operators Bishop and Higginbotham were notified to attend an investigation of the matter on November 28, 1973. At such investigation the above individuals were represented and full opportunity was afforded each to give testimony, produce witnesses and conduct cross examinations. It was considered by one and all that the hearing was fair and impartial. Thereafter the Chicago, Rock Island and Pacific Railroad Company and the Fort Worth and Denver Railway Company determined that Dispatcher Armstrong should be dismissed for his responsibility. In assessing the discipline the claimant's prior record was taken into account. The claimant, at the time of his dismissal, had 46½ years of service.

Subsequently the claimant was dismissed, effective December 27, 1973, and a claim was filed on his behalf for reinstatement with seniority and other rights unimpaired along with pay for time lost. Carrier was accused of violating Rule 28(a) and (b) by assessing discipline in the form of dismissal following formal hearing where the "record of said formal hearing fails to support Carrier's charges of rules violations" and therefore it was claimed imposition of this penalty "was arbitrary, capricious, unwarranted and indicative of complete disregard of Claimant's rights in the procedures required in industrial due process". Accordingly, the claimant requested the rescinding of the discipline assessed, clearing of the record of such charges and compensation of claimant for wages lost as a result of carrier's actions.

We have a threshold question in that the Employes contend this claim has been adjusted on the property in that carrier failed to comply with the time limits imposed by the Railway Labor Act. Specifically, it is claimed carrier acknowledged receipt of the claimant's appeal on June 17, 1974 and suggested a conference on September 16, 1974. The Employes contend that absent a contractual time limit within which to handle appeals, the time limits imposed by the Railway Labor Act are applicable, citing various awards.

We do not find it necessary to decide the proper time limits applicable, if any, here. Instead, we agree with carrier that this issue was not raised on the property. It is incumbent upon the party making such claim to raise the issue on the property rather than make the claim before this Board for the first time. Failing in that, this Board lacks authority to consider it.

The factual issue here is whether or not Dispatcher Armstrong failed to catch the erroneous message repeated by Operator Higginbotham. It is uncontested that Operator Bishop and Operator Higginbotham received

the message simultaneously and Operator Bishop's version was correct. It is assumed that Higginbotham received the same correct message. However, the message written in his records is incorrect with respect to the expiration time. Presumably, Dispatcher Armstrong would have caught the erroneous message on repeat through proper attention to and compliance with the rules. This could be so if Higginbotham had repeated the incorrect message. Of course, claimant denies this and the other operator, Bishop, could not hear the repeat. On the other hand, if Higginbotham repeated the correct message and, somehow, later copied out the message incorrectly, then claimant would be absolved. Here we have a neatly balanced question that is impossible to resolve in the absence of some independent or corroborating evidence that would tip the scales one way or the other. Clearly, one of these men was at fault for the erroneous message.

If it was the function of this Board to evaluate the evidence and substitute its judgment for that of the trier of facts it would be difficult to speculate as to which conclusion we would reach here. But that is not our function in discipline cases and we must resist the temptation to substitute our judgment for that of the carrier, however different our view might be concerning the facts. So long as the carrier's decision is supported by substantial, probative evidence that is unrebutted, the carrier's burden is satisfied and its conclusions should not be disturbed. Here the carrier had such proof in the testimony of Operator Higginbotham and, under the circumstances, carrier could accept that testimony. In all candour, if carrier had chosen to believe Dispatcher Armstrong instead and based its decision accordingly, we would have had no basis for disturbing that result based upon this record. See Award 19696. If this seems anomalous we make reference to the observations of Referee Ables in Award 13168 dealing with a similar case. These remarks are pertinent here and we adopt them:

> "Under all the circumstances, including hearing the testimony of both employes, the carrier chose to believe the telegrapher. Since the telegrapher's testimony was direct, substantive and probative evidence on the offense charged, the carrier has satisfied whatever burden it carries in this respect to support its discipline of the dispatcher. The fact that the dispatcher's testimony was equally direct, substantive and probative merely establishes that there is another side to the story, not that the carrier has failed in its burden to support the charge. The precedent is too well established, that this Board should not substitute its judgment for that of the carrier in discipline cases where it has produced substantial evidence that the offense charged was committed, to sustain the claim here."

Under the circumstances we find the necessary support in the record for the carrier's findings that claimant was the guilty party. Further,

carrier was entitled to review the claimant's prior record for violations and infractions and in doing so it cannot be said the imposition of the penalty of dismissal was arbitrary, capricious, unwarranted or in disregard of claimant's rights.

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

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of August 1976.