NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24084
Docket Number TD-24342

THIRD DIVISION

Tedford E. Schoonover, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(Seaboard Coast Line Railroad Company

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

(a) The Seaboard Coast Line Railroad Company (hereinafter referred to as "Carrier") violated the current Agreement, Articles IX(a) and (b) thereof in particular, when Claimant train dispatcher R. J. Green was suspended for 30 days (later reduced to 10 days) as the result of an investigation held February 20, 1980.

(b) The Carrier shall now pay Claimant Green for all time lost and clear his personal record of all reference to the investigation and discipline assessed.

OPINION OF BOARD: The incident over which this claim arose occurred on January 30, 1980 when claimant was working the first trick north end Train Dispatcher position at Tampa, Florida. The territory covered by this assignment extends from Tampa to Jacksonville and includes Sanford, Florida. The incident is reported in the Carrier's submission as follows:

> "The regular scheduled departure time of northward Passenger Train No. 88 from Sanford, FL was 2:00 p.m. and scheduled arrival time of Southward Passenger Train 87 at that point was 1:10 p.m. On the aforementioned date it was developed by Claimant that, because Train 87 was operating behind schedule, the two should meet at about 2:00 p.m. Claimant discussed the meet with the Operator at Sanford and, at about 1:58 to 2:00 p.m., gave her instructions for Train No. 87, to operate by the red signal at north end of Sanford and proceed according to the Rule to First Street and leave switch in motor position. Train No. 88 had no instructions to remain at Sanford beyond his scheduled departure time and departed on the main line on time at 2:00 p.m. Shortly thereafter, the engineman and fireman on that train overheard the Operator at Sanford issue the Dispatcher's instructions by use of radio to Train No. 87. Upon overhearing the instructions given Train 87 and learning the two trains would be on a collision course if they continued, the headend crew on Train No. 88 immediately stopped their train and also contacted Train No. 87's engine crew by radio and apprised them of the circumstances. Immediately after learning of the conditions, Train No. 87's crew also brought their

"train to a stop. At about 2:02 p.m. (after Train 88 had departed Sanford) the Operator (unaware Trains 88 and 87 were on the same track) acknowledged to Dispatcher Wilson that she had given his instructions to Train No. 87 and at that time he then gave her instructions for Train 88 to clear the main line at First Street. These instructions were immediately radioed to Train 88 at which time the engineer on that train informed the Operator of what had occurred and that his train was beyond (north thereof) First Street at that time. It is estimated the trains stopped a distance of about 35 to 40 car lengths apart. However, they were not visible to each other because of the curvature of the track."

On February 4, 1980, Tampa Division Superintendent Cherry wrote a letter to claimant, Sanford Operator and the train crews assigned to Trains 87 and 88 jointly as follows:

"Please arrange to be present in Assembly Room, Division Office Building, 4020 Adimo Drive, Tampa, FL, Wednesday, February 6, 1980, at 9:30 a.m., for formal investigation to develop facts, determine cause and place your responsibility, if any, for Trains Nos. 87-88 improperly occupying the same blocks at Sanford-Rands at or about 2:00 p.m., Wednesday, January 30, 1980.

"You may, of course, have present at this investigation such authorized representation and/or witnesses as you so desire and by your own arrangement."

Because of postponement requested by the UTU(E) Local Chairman, Superintendent Cherry wrote a joint letter on the following date, February 5, 1980, to each of the principals including the claimant as follows:

"Referring to my letter of February 4, 1980, scheduling investigation for 9:30 a.m., Wednesday, February 6, 1980, in connection with Trains Nos. 87-88 improperly occupying the same block at Sanford-Rands, January 30, 1980.

"At the request of Local Chairman R. L. Appel, UTU-E, this investigation is postponed until 9:30 a.m., Wednesday, February 20, 1980. Other details of my letter of February 4, 1980, stand."

The investigation was held on February 20, 1980 as rescheduled. In a letter dated March 10, 1980 claimant was charged with failure to comply with Rule 581 and was suspended for a period of 30 days. The suspension was later reduced on appeal to 10 days.

Articles IX(a) and (b) of the applicable labor agreement, on which the claim is based are quoted below:

(a) Discipline

"Train dispatchers will not be demoted, disciplined or discharged, without proper investigation as provided in the following paragraphs. Suspension pending investigation shall not be deemed a violation of this principle.

(b) Investigation

"A train dispatcher against whom charges are preferred, or who may consider himself unjustly treated, shall be granted a fair and impartial investigation before the Superintendent, or his designated representative, within ten (10) days after notice by either party. Such notice shall be in writing and shall clearly specify the charge or nature of the complaint. He shall have the right to be represented by any member and/or officer of the organization party hereto at all investigations, and be given a reasonable opportunity to secure the presence of necessary witnesses. The decision shall be rendered within thirty (30) days from the date the investigation is completed, unless extended by agreement between the Company and the General Chairman."

The sole argument of the Organization against the discipline is the alleged violation by the Carrier of the time limit provisions of Article IX. Thus, we note in Organization's Statement of Position:

"The Carrier's failure to hold the investigation within the 10-day time limit prescribed in Article IX(b)--without concurrence of the Employees-is a fatal procedural error that renders the investigation and consequent assessment of discipline a nullity."

This position was first enunciated during the Investigation on February 20 and has been consistently adhered to in subsequent handling of the dispute through the various appeals steps on the property. Carrier's response to this position is contained in its letter of April 25, 1980 over the signature of D. C. Sheldon, Carrier's highest appeals officer:

> "Postponement of the investigation was not prejudicial to Claimant and he was not unduly penalized because of the postponement. In addition, he had ample time to object to the postponement after being notified, but he chose not to do so. To have conducted the investigation privately for Mr. Green would have rendered an injustice to all concerned."

In connection with the stated positions of the two sides it is important to note that neither claimant nor the Organization made any complaint over the postponement from February 6, 1980 to February 20, 1980. The Carrier notified all concerned of the postponement by letter of February 5, 1980. The first complaint made by the Organization over the postponement was not made until the formal investigation hearing started at 9:45 AM on February 20, 1980. The complaint was made by H. T. Storey, General Chairman, American Train Dispatchers Association. On the basis of this complain he also stated at conclusion of the investigation hearing, that he did not consider the investigation to have been fair and impartial.

Carrier admits there may have been a technical violation of time limit provisions of Article IX (b) but points out that there were a great number of employees involved in the incident, especially the engine crews and that it would not have been possible to conduct a fair and impartial hearing without their presence and testimony at the hearing. Substantiating this point it is noted there were some twenty four employes involved in the hearing including the various employe representatives. It lasted from 9:45 AM to 12:05 PM and included testimony; direct and cross-examination of the many persons present. Organization's claim that the investigation was fatally flawed by Carrier's failure to comply with the ten-day requirement of Article IX(b) is not sustained by the facts, prior awards of the Board, nor a reasonable consideration of the overall issues involved.

In the first place it is necessary to distinguish between the ten-day requirement, a procedural provision and the substantive requirement that he be granted a fair and impartial investigation. There are many decisions sustaining the principle that procedural flaws do not invalidate substantive considerations. A particular case in point is a court action 210 Fed 2nd 812 (1954) involving a dispute on the ACL v BRAC:

"The purpose of the ten day provision is to expedite proceedings,...not to serve as a limitation upon their being held;

Collective bargaining agreements, like other contracts are to be given a reasonable construction, not one which results in injustice and absurdity."

In this case it is noted the postponement was not a deliberate or dilatory action of the Carrier, nor did the postponement prejudice the rights of the claimant to a fair and impartial hearing. The postponement granted by the Carrier on request of the representative of the UTU(E) was reasonable and necessary. If claimant or his representative had any objection to the postponement they had plenty of time to register objection in the period of two weeks between February 6, the date originally set for the investigation and February 20, when it was actually held. Contention that the postponement, a procedural point, resulted in claimant being denied a fair and impartial hearing, an important substantive point, flies in the face of a reasonable construction of the provisions of the Article IX(b). It was patently unreasonable to develop facts, determine cause and establish claimant's responsibility, if any, for Trains Nos. 87-88 improperly occupying the same blocks at Sanford-Rands without the participation in the investigation of all the many employes involved.

At the time the notice of investigation was issued to all involved (claimant, the operator and the train crews) it was not known as fact where responsibility rested for the highly serious situation of two trains facing each other and brought to a stop when only some 35 to 40 car lengths apart, thus avoiding a possible head-on collision with all the potential loss, damage and injury or death to passengers, employes and property. Testimony at the hearing and claimant's frank admission of his actions clearly established his responsibility. Thus, in the circumstances the discipline assessed cannot be properly characterized as excessive, arbitrary or unfair. Added to this is the fact that the original 30-day suspension was reduced on appeal to 10 days with Carrier comment as to claimant's good attitude.

To conclude that failure to hold the investigation within the 10 days specified in the rule was basis for excusing recognition of claimant's responsibility would result to an injustice to all concerned and absurdity in recognition of the essentials of the requirement for a fair and impartial hearing. Claimant was not prejudiced by the delay, did not make timely protest against Carrier action in granting the delay although he had some two weeks to do so between the time originally set for the investigation and the date on which it was actually held. The delay was for good and sufficient reasons and claimant's silence during that two-week period amounts to tacit agreement with Carrier's action in granting the delay. This conclusion accords with that reached in Award No. 17167, a Third Division case wherein it states:

"Claimant's failure to object to the postponement would lead a reasonable man to believe that Claimant agreed to the postponement."

Nor is it reasonable to conclude that provisions of the rule for a hearing within ten days is a mandatory requirement rather than directory.

We agree with the reasoning on this point set forth in Award No. 16172, another Third Division case, as follows:

"It is a well settled rule of law that in determining as to whether a provision of an agreement is mandatory or directory, the end sought to be attained by the provisions of the agreement is always important to be considered. One of the tests for determining whether the provisions of an agreement are mandatory is whether it contains negative words which renders the performance of the act improper if compliance is not made with the provisions of the agreement. The absence of negative words tends to show that the language used is directory and not mandatory. The negative need not be expressed but may be inferred. If the agreement imposes a penalty for its violation, we may reasonably assume that the parties intended that its provisions be followed, and hence the provisions are construed as being mandatory. The fact that the agreement is framed in mandatory words, such as 'shall' or 'must' is not the determining factor as to whether it is mandatory or directory."

Article IX(b) of the Agreement in this case does not contain any such negative words. Thus, for the same reasons cited above we conclude that the provisions of Article IX(b) are directory rather than mandatory. On the basis of the discussion of this case as contained herein and precedent decisions reviewed it must be concluded that the delay in the investigation was justified because of the emergency nature of the events involved. The rights of the claimant were not prejudiced by the postponement.

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: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 5th day of January 1983.

LABOR MEMBER'S DISSENT
TO
Award 24084, Docket TD-24342
(Referee Schoonover)

The Carrier in this case failed to hold the investigation within 10 days after notice, in contravention of the first sentence of Article IX(b):

> "A train dispatcher against whom charges are preferred, or who may consider himself unjustly treated, shall be granted a fair and impartial investigation before the Superintendent, or his designated representative, within ten (10) days after notice by either party."

A protest was made at the beginning of the investigation and the employees clung to their position throughout handling of the dispute, both on and off the property.

Third Division Award 19275 (Edgett) treated the identical circumstances, same parties, same agreement, and held:

> "The record is clear that the investigation was not conducted within the 10-day time limitation of Article IX(b). There is no showing that the time limit was extended by Agreement between the Carrier and the dispatcher or his representative, or that the Carrier attempted to obtain such an Agreement. The Board must apply the Agreement as written, and as the procedural requirements were clearly violated by the Carrier, we will sustain the claim on this basis, without passing upon the question as to the responsibility on the part of the claimant for the accident involved."

It was further demonstrated to the majority that on-property handling of two similar disputes in 1973 and 1979 (subsequent to adoption of Award 19275) resulted in sustained appeals for the same reason, i.e., untimely held investigations.

Other supporting Third Division Awards given the Referee were 8432, 11340, 11757, 14496, 16262, 16586, 16632, 17145, 18536, 21996, 22162, 22258, 22682, 22898, 23042, 23082, 23459, 23482, and 23496. The majority made no reference in Award 24084 to any of the decisions referred to in this and the preceding paragraphs, not even to challenge their logic.

The matter was resolved on this property in Third Division Award 19275, but the majority not only disregarded the principles set forth in Third Division Awards 22206 and 22547, that the dispute resolution process is strengthened and made far more reliable if previous awards are accepted as determinative of new disputes which involve identical agreement provisions and fact circumstances, as well as the same parties; but it also ignored the fact that Award 19275 is a part of the parties' agreement, which fact is epitomized by the following Awards.

Third Division Award 2526 (Blake):

> ". . . Whatever may be said of the soundness of our construction of the contract, our conclusion is impelled by Award No. 1852. That involved a dispute between the same parties under the same contract and upon essentially indistinguishable facts. A different conclusion than we have reached would, in effect, over-

rule the decision in that Award. To do this would be subversive of the fundamental purpose for which this Board was created and for which it exists: settling of disputes. When a contract has been construed in an award the decision should be accepted as binding in subsequent identical disputes arising between the same parties under the same agreement."

Third Division Award 5133 (Coffey):

". . . It does not admit of dispute that the Board's interpretation of rules becomes a part of the Agreement to all intents and purposes as though written into the rule book. Thus, the parties are governed by Award 4018, subject to valid distinctions on the facts and rules at issue, or until the weight of judicial opinion shifts. . . ."

Third Division Award 15358 (Stark):

"It is important, unquestionably, that some decisions be considered controlling. Were that not the case, no issue would ever be finally settled, the purposes of the Railway Labor Act would be frustrated, and litigation would be endless. The Board, including the Referees who, from time to time, participate in the decision-making process, has a responsibility to the parties to insure a continuity of basic principles. One such principle, firmly rooted in labor-management relations and grievance adjudication, is that a controlling decision should normally not be disturbed or overturned. Certainly there are exceptions to this principle: There may be 'palpable error' in the prior decision; the decision may not contain sufficient facts to permit of comparison; the decision may omit the reasoning of the Board, thus diminishing its usefulness. However, if there is a truly controlling decision, it should normally be given truly controlling weight, regardless whether subsequent adjudicators agree or disagree, or whether, if confronted initially with the same issue, they would have decided otherwise.

These findings with respect to the importance of controlling decisions are not novel. Similar expressions may be found in many Board decisions, including Awards 5133, 10911, 4788, 8458 and 13623, among others."

Third Division Award 23589 (Marx):

"The Board reasserts here the principle which has consistently guided the Board in the past -- namely, that the rational and orderly dispute resolution process, as directed by law and agreement, is strengthened and made far more reliable if previous awards are accepted as determinative of new disputes which involve identical agreement provisions and fact circumstances (not to mention, as here, the same parties)."

Fourth Division Award 3443 (J. A. Sickles):

> "Whether phrased in terms of 'res judicata', 'stare decisis' or any other legal terminology, the fact remains that the best ends of labor-management relations are served by a basic predictibility of Awards, especially when a dispute involves the same parties, same rules and same basic evidence. Accordingly, the author of this Award is not disposed to disturb such a prior Award, absent some compelling showing of error."

See also Third Division Awards 6833, 7967, and 11790.

The Carrier argued, and the majority agreed, "Claimant . . . did not make timely protest against Carrier action in granting the delay although he had some two weeks to do so between the time originally set for the investigation and the date on which it was actually held . . . . claimant's silence during that two-week period amounts to tacit agreement with Carrier's action in granting the delay." But the Third Division held, in Award 22258:

> "Carrier is mistaken in its contention that failure of Claimant to protest the postponement when it was instituted made Claimant a party to such deferral. The action was a unilateral one by Carrier and was timely protested at hearings."

See also Third Division Awards 16121 and 16678.

The majority errantly held that the time limit provision is directory rather than mandatory, and, "The rights of the claimant were not prejudiced by the postponement." By contrast, the same Carrier argued in its submission to Public Law Board No. 2616, Case No. 3, with respect to the same agreement:

> "Article IX (c) of the Schedule Agreement provides that if any appeal is taken it must be filed in writing within fifteen (15) days after the date of decision. No appeal was made of Superintendent Satterwhite's decision within the time limits established in the agreement, therefore, the case was closed forevermore." (Underscoring in submission).

Award No. 24084 is an inexcusable aberration. It would open the door for either party to treat with contempt any agreed-upon time limit provision which does not have attached to it a penalty for violation. The concept is a ridiculous one which can only contribute to disorder, perplexity, and disarray in the parties' dealings.

Worse than that, the majority has fashioned an award that fails to conform or confine the division to matters within its jurisdiction when it ignored an interpretation of the agreement already rendered by this division, which is binding on the parties and the Board as though a part of the agreement itself.

R. J. Irvin
Labor Member