

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24525
Docket Number TD-24135

George S. Roukis, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(Chicago and North Western Transportation Company

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

(a) The Chicago and North Western Transportation Company (hereinafter referred to as "the Carrier") violated the current Agreement (effective July 1, 1976) between the parties, Rule 24 thereof in particular, when the Carrier applied five (5) days' actual suspension on Train Dispatcher L. D. Diersen (hereinafter referred to as "the Claimant") allegedly based on the investigation held on January 24, 1980 and also, as a result of the January 24, 1980 investigation, required the Claimant to serve ten (10) days' deferred suspension which equaled fifteen (15) days actual suspension effective January 31, 1980. The record, including the transcript of the investigation fails to support the discipline applied by the Carrier and, therefore, the imposition of this fifteen (15) days' actual suspension was arbitrary, capricious, unwarranted and an abuse of managerial discretion.

(b) The Carrier shall now be required to compensate the Claimant for all losses sustained as a result of this action in accordance with Rule 24(c) and clear the Claimant's personal record of the charges which allegedly provide the basis for said action.

OPINION OF BOARD: An investigation was held on January 24, 1980 to determine whether Claimant, a Train Dispatcher, was responsible for using profane and abusive language on the dispatchers' phone in conversation with Conductor R. L. Burkhart on June 16, 1980. Based on the investigative record, Carrier found Claimant guilty of the asserted charges and he was assessed five (5) days actual suspension. In addition, he was required to serve the ten (10) days deferred suspension assessed on August 1, 1979. This disposition was appealed on both procedural and substantive grounds.

In defense of his position, Claimant contends that Carrier violated Agreement Rule 24(a) by not providing in the January 18, 1980 Notice of Investigation a precise statement of the charges. He argues that the investigative notice did not cite any specific rule violation, thus depriving him of the opportunity to prepare a competent defense. He avers that the investigation was not fair and impartial since the hearing officer asked several leading questions that reflected noticeable bias and asserts that the investigative record was not contextually accurate since certain statements were left uncompleted.

As to the substantive nature of the dispute, Claimant argues that his language was quite acceptable and not unusual when it is considered that Conductor Burkhart refused to comply with his instructions in a stressful situation. He admits that his language was somewhat profane, but maintains that it was not directed personally at the conductor.

Carrier contends that the Notice of Investigation comported with the requirements of Agreement Rule 24(a) since Claimant was fully apprised that the investigation was concerned with his use of profane language on a certain date and time. It argues that he had ample opportunity to prepare an intelligent and comprehensive defense and avers that he was not prejudiced by the wording of the investigative notice. It disputes his position that the hearing officer conducted a biased investigation and asserts that the trial record fully confirms that the hearing was properly administered in accordance with the requirements of Rule 24. It argues that the testimony of Conductor Burkhart as corroborated by D. W. Urwin, the Operator at Clinton, Iowa, pointedly shows that Claimant used profane and vulgar language.

According to Mr. Burkhart, Conductor on the East Way Freight Extra 4543, he was instructed by Trainmaster Ray Farr that if he could not make it back to Clinton before his time under the Hours of Service Law expired, he was to clear the Main Line, stop the train and call the Train Dispatcher, who would obtain taxi cab transportation for the train crew. He stated that as he related this information to Claimant, he was told, "that I wasn't going to die on his '---' main line" and "who in the hell was running this god damned railroad, him (Claimant) or Farr?" Operator Urwin testified that he heard Claimant say, "I don't give a damn what Farr said" and "I don't want you to die on my god damned eastbound", but he could not provide a detailed account of the conversational incident. He did state that he heard the word "---", but he could not "put a phrase on it".

In our review of this case, we find no evidence that Claimant's procedural due process rights were violated. The January 18, 1980 Notice of Investigation was properly written and Claimant was under no illusions as to the purpose of the investigation. The non-citation of a specific rule violation under these circumstances did not prejudice his position or preclude him from conducting a thoughtful and vigorous defense. In fact, close reading of the investigative transcript indicates quite clearly that he was provided every reasonable opportunity to defend himself against the purported charges.

On the other hand, there is no doubt that he used profane language. We are not convinced that it was personally directed toward Conductor Burkhart, but find that his statements reflected a response to a potential problemsome situation. Claimant was apparently not informed of Trainmaster Farr's earlier instructions to Conductor Burkhart and understandably was surprised when Mr. Burkhart told him he was going to "die" at DeWitt. As a rule, Extra 913 West would proceed to Clinton, but Claimant was unaware that two coal trains were blocking passage to this location. He did not want Extra 913 West stopping on the main line and his judgement was correct. Not being aware of Trainmaster Farr's directions, he wanted to insure that the main line was clear and this was an operational determination. His choice of words, however, were improper. We find no reason to question Operator Urwin's testimony that he heard Claimant use the words "---" and "god damned eastbound" which affirms Conductor Burkhart's testimony. Claimant even acknowledged that he used mild profanity. The disparity, of course, lies in defining profane.

From the record, we cannot agree that a five (5) day suspension was warranted under these facts and circumstances, since Claimant's response did not reflect insubordination or personal rudeness which was strikingly at odds with the applicable operating rules. His concern for safety of the main line was indeed genuine and for the benefit of the Carrier, but he expressed his uneasiness in the wrong way. As an experienced Train Dispatcher, he was mindful of the Operating Rules regulating employe deportment, particularly Rule 309 of the Rules and Instructions Governing Train Dispatchers and Operators which reads in part: "Train Dispatchers and Operators must be courteous in their telephone conversations", and some form of corrective discipline is justified. A five (5) day suspension, however, is excessive. We will reduce the instant penalty to a Letter of Reprimand with the added admonition that we will not tolerate such behavior in the future. Claimant is advised that, however noble his intentions, he is still expected to observe the operating rules.

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

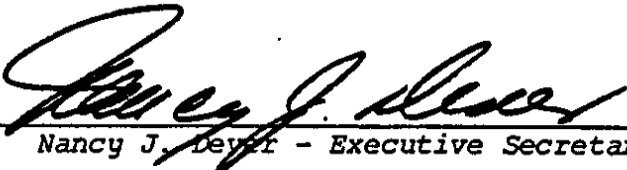
That the discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 29th day of September, 1983.