

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24874

Docket Number TD-24185

Martin F. Scheinman, Referee

(American Train Dispatchers Association

PARTIES TO DISPUTE:

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(Chicago & Northwestern Transportation Company

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

(a) The Chicago and Northwestern 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 failed to give Assistant Chief Train Dispatcher D. C. McClintock (hereinafter referred to as "the Claimant") prior to the investigation held on April 2, 1980 a notice in writing of the precise charge, when the Carrier failed to give the Claimant's representative a copy of the discipline decision in writing within seven calendar days after completion of investigation (nor a copy of the investigation transcript) and when the Carrier applied the discipline of disqualification as Assistant Chief Train Dispatcher based on the investigation held on April 2, 1980. The record, including the investigation transcript, shows that the Carrier failed to notify the Claimant in writing of the precise charge prior to the investigation, that the Carrier did violate the time limit contained in the Agreement for rendering a discipline decision and fails to support the discipline assessment made by the Carrier and, therefore, the imposition of the discipline of disqualification as Assistant Chief Train Dispatcher, or the imposition of any discipline whatsoever, was arbitrary, capricious, unwarranted and an abuse of managerial discretion.

(b) The Carrier shall now be required to compensate the Claimant for 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 provided the basis for said action.

OPINION OF BOARD: At the time this dispute arose, Claimant, D. C. McClintock, was assigned as Assistant Chief Train Dispatcher on Carrier's Illinois Division. On March 28, 1980, at approximately 11:00 p.m., Train No. 256 derailed, apparently account of journal failure. Sometime after March 28, 1980, and before April 2, 1980, Claimant received a telephone call advising him that a formal investigation would be held on April 2, 1980 to determine his responsibility if any, for the derailment. In addition, according to Carrier, Claimant was notified via certified mail dated March 31, 1980 of the specific charge, i.e.:

"Your responsibility for your failure to properly handle hot box which resulted in journal failure and derailment of extra 6805E, between Maple Park and Geneva at approximately 11 p.m., March 28, while you were employed as Assistant Chief Dispatcher, which commenced duty at 3:30 p.m., March 28, and Train Dispatcher, which commenced duty at 3:30 p.m. March 28, and crew members of Extra 6805E, which commenced duty at Clinton, Iowa at 2:15 p.m. respectively."

The investigation was conducted on April 2, 1980 and Claimant was timely notified thereafter that he was disqualified from service as an Assistant Chief Train Dispatcher.

As a result of Carrier's disqualification of Claimant, the Organization filed this claim. In it, the Organization alleges that Carrier violated Rule 24 of the Agreement in its handling of the investigation and resulting decision. Rule 24 reads, in relevant part:

"RULE 24 - INVESTIGATION AND DISCIPLINE

(a) A train dispatcher who has been in the service sixty calendar days or more or whose application has been formally approved, shall not be disciplined or dismissed without a fair and impartial investigation, by the Division Manager or his designated representative, and prior thereto will be notified in writing of the precise charge... In cases where discipline is administered, a decision in writing, with copy to his representative, will be rendered within seven calendar days after the completion of the investigation.

(d) Except when no discipline is administered, a copy of all transcripts and statements made a matter of record at an investigation shall be furnished to the employe and if he is represented to his representative."

The Organization contends that Claimant never received a written notice of the charges prior to the hearing held on April 2, 1980. Thus, in the Organization's view, that hearing was void from the beginning and any discipline imposed as a result of it must be overturned.

In addition, the Organization argues that Claimant's representative did not receive a written copy of the decision within seven days of the hearing. Finally, the Organization asserts that the Claimant's representative did not receive a copy of the transcript of the hearing until he himself asked for one on April 28, 1980.

For these reasons, the Organization argues that Carrier violated Rule 24 in it's administration of the procedures surrounding the investigation held on April 2, 1980. According to the Organization, such violations by the Carrier so prejudiced the Claimant's rights as to require that the claim be sustained on procedural grounds alone.

As to the merits, the Organization contends that the Claimant violated none of Carrier's rules on March 28, 1980. Rather, he performed exactly as those rules require. Thus, the Organization asserts that no discipline should have been imposed upon the Claimant as a result of his action on March 28, 1980.

Carrier, on the other hand, insists that it complied with Rule 24 in its handling of this dispute. First, it argues that it did send the Claimant written notice of the charges on March 31, 1980, two days prior to the hearing. Moreover, Carrier points out that it offered to postpone the hearing so as to allow the Claimant and his representative more time for his defense. Claimant elected to proceed. Thus, in Carrier's view, Claimant, in essence, waived his right to object to the lack of a written notice prior to the hearing.

In addition, Carrier maintains that Claimant's representatives were timely furnished with copies of the Notice of Discipline and the Transcript of Hearing. In fact, when the Claimant's representatives protested that he had not received those documents, Carrier furnished him with a duplicate set. Furthermore, Carrier argues that even if the Claimant's representative is found not to have received either document in a timely manner, the Claimant was not prejudiced thereby. His representative was still able to timely appeal the Notice of Discipline. Thus, Carrier concludes that it violated neither the spirit nor the letter of Rule 24 in this case.

As to the merits, Carrier insists that it acted properly in disqualifying the Claimant from the position of Assistant Chief Train Dispatcher. According to Carrier, Claimant committed a serious error of omission on March 28, 1980, thereby causing the derailment of Train No. 256. Claimant failed to advise the crew that based on the hot box detector reading, the train car involved should not be moved. Thus, according to Carrier, the discipline imposed was clearly warranted by the facts of this case.

The procedural issues raised by the Organization have been adjudicated by the Board on numerous occasions. We ruled in Award No. 23155 that under the facts of that case the failure of Carrier to send a copy of the Notice of Discipline to the Claimant's representative did not constitute reversible error.

Here, however, we are faced with a violation that, if proven, is more serious. Claimant denied ever having received a written Notice of Charges prior to the hearing on April 2, 1980. This allegation goes to the very heart of Claimant's due process rights. He cannot be expected to adequately defend himself if he has not seen the exact charges which are alleged.

The record evidence reveals that Claimant did not, in fact, receive the Notice of Charges prior to the hearing on April 2, 1980. First, Carrier did not produce any documentary evidence - e.g. certified mail receipt - to show that he did receive the charges. Second, at the beginning of the hearing, Claimant's representative asserted that Claimant had not yet received the charges.

Carrier contended that the charges were mailed to the Claimant on March 31, 1980, two days before the hearing took place. However, there is no evidence that Claimant received that notice even after the hearing was concluded.

It is undisputed that Claimant did receive a telephone call prior to the hearing advising him to report for an investigation to be held on April 2, 1980. However, Rule 24 explicitly provides that prior to the investigation, an employee "will be notified in writing of the precise charge." (Emphasis supplied.) Thus, Carrier clearly violated Rule 24 when it failed to notify the Claimant, in writing, of the charges against him prior to April 2, 1980. (See Award Nos. 13675 and 22748)

Carrier maintained that it afforded Claimant an opportunity to postpone the hearing on April 2, 1980, so as to prepare an adequate defense. However, Carrier's actions in this regard cannot turn an improperly held hearing into a proper one. Since Carrier violated Rule 24(a) of the Agreement, the hearing scheduled for April 2, 1980 was thereby made null and void. In addition, Claimant's representative explicitly stated that he was participating in the hearing while preserving his objection that the hearing should not have been held at all. Thus, the Organization clearly did not waive its rights to object to Carrier's failure to provide Claimant with a written notice of the charges prior to the hearing.

Accordingly, we are precluded from addressing this dispute on its merits. Rather, we shall sustain the claim on the procedural issue discussed above.

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

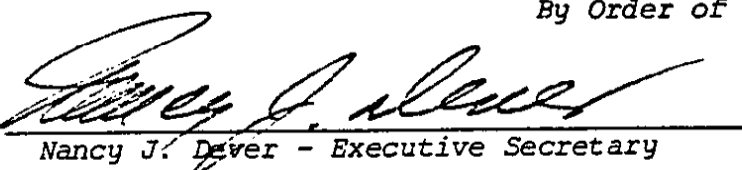
That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1984