

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24989
Docket Number TD-24937

Paul C. Carter, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(Boston and Maine Corporation

STATEMENT OF CLAIM: "Appeal of Train Dispatcher D. W. McMasters, requesting that he be immediately returned to service, that all references in connection with the collision of Train No. 570 and Extra 1731 East in the vicinity of Prides, Beverly, Mass. on August 11, 1981 be removed from his personnel file, that the matter never be referred to again, that he be compensated for all time lost in connection with this incident, including the subsequent discipline, and for all expenses incurred by him in attending the investigation."

OPINION OF BOARD: The record shows that Claimant had been in Carrier's service since August 13, 1972, when he was employed as a yard clerk. He was subsequently promoted to operator and then to train dispatcher. On the date of the occurrence giving rise to the dispute herein, Claimant was working as an extra or spare train dispatcher on Carrier's Boston East position in the train dispatching office at North Billerica, Massachusetts, from 1530 to 2330 hours.

On August 11, 1981, there occurred a head-on collision between Eastward (outward from Boston) Freight Extra 1731 East, composed of a GP-9 freight locomotive and four freight cars, and Westward (inward toward Boston) passenger train No. 570, composed of a control car, three coaches and an F-40 PH passenger locomotive, on Carrier's Gloucester Branch. The Carrier advises that four people were fatally injured, the passenger engineer, two freight trainmen, and an unauthorized person aboard the freight locomotive; that four employees and fifty-eight passengers were injured, that damage to passenger equipment totaled \$808,000 and damage to the freight locomotive of \$875,000. At the time that the Carrier's submission to the Board was prepared, pending legal liabilities as a result of the collision exceeded \$15,000,000, and associated costs, such as removal of damaged equipment and other expenses were estimated at \$65,000. The location where the accident occurred on the Gloucester Branch, near Prides, Mass., was on Claimant's assigned train dispatching territory.

On August 12, 1981, a Notice of Hearing to be held at 0900 hours, Tuesday, August 18, 1981, was addressed to the Claimant, and six other employees, over the joint signatures of Superintendent Boston Division, E. R. Towle, Superintendent Commuter Service, E. E. Rowland, and Superintendent Operations, B. A. Cardwell. The notice to Claimant read:

"This is notice for you to attend a hearing.

You may, if you desire, arrange to be accompanied by a representative as provided in the applicable schedule agreement, without expense to the Company.

You may produce witnesses on your own behalf, without expense to the Company, and you or your representative may cross-examine the witnesses. You are expected to be present throughout the entire proceeding.

<u>Dennis W. McMasters</u>	<u>Train Dispatcher</u>
Employee Name	Occupation
<u>43 Sargent Circle, Attleboro, Ma. 02703</u>	
Address	
Billerica Elks Lodge	
Webb Brooke Road	
<u>Billerica, MA</u>	<u>0900 Hours</u>
Place hearing to be held	Time
	<u>Tuesday, August 18, 1981</u>
	Day and Date

This Notice is issued to develop the facts and place responsibility, if any, concerning collision between Passenger Train 570 and Freight Extra 1731 at approximately 1610 hours in the vicinity of Mile Post 22, Beverly (Prides) MA on August 11, 1981."

The General Chairman requested a postponement of the hearing because Claimant desired to be represented by a certain officer of the Organization, who would not be available until the week of August 23, 1981. The Carrier declined the request:

"Due to the serious nature of the matter under investigation, it is necessary that the hearing proceed as scheduled."

When the hearing commenced on August 18, 1981, the Organization officer that Claimant desired was present, as well as his General Chairman and an outside counsel, the Agreement rule providing that in such hearings the accused dispatcher would have "the right to be represented by counsel of his choice."

The General Chairman also complained that Claimant had not been issued a "precise charge" as required by the Agreement. Numerous awards of this Board have held that it is not necessary to specify an exact violation in the notice to attend an investigation or hearing, but such notice must include definite information concerning the incident subject to investigation so that the accused or his representative may prepare a defense. See Third Division Awards Nos. 18872, 20957, 16121, 14123, 4979 and 3220 among others. We find that the notice issued to the Claimant herein met the requirement of the rule.

The other employees who were sent notices similar to the one sent Claimant were:

Conductor W. S. Ring (Commuter Train No. 570)
Trainman Angus C. Moore (Commuter Train No. 570)
Conductor Robert S. Moccia (Extra 1731 East)
Engineer E. C. Grundstrom (Extra 1731 East)
Train Director Paul R. Poley (Salem Tower)
Clerk-Operator Michelle Matte, (Congress Street).

All were present at the investigation, that began on August 18, 1981, continued through August 22, was recessed and resumed September 25, 26, 27, 1981. There were a total of twelve employee representatives present, three for the A.T.D.A. representing Claimant, three for B.R.A.C., representing Paul R. Poley and Michelle Matte; two for the U.T.U. representing A. C. Moore; two for the U.T.U. representing R. S. Moccia and W. S. Ring; and two for the B.L.E., representing E. C. Grundstrom. The hearing officer was John T. Walsh, Superintendent of Freight, New England Division. All of the representatives actively participated in the investigation. The transcript of the investigation consists of 1,788 pages. A copy of the transcript has been made a part of the record. This referee desires that all concerned know that he has read completely the 1,788 page transcript, as well as the submissions of each party hereto. From our review, we find that the investigation was conducted in a fair and impartial manner. Each representative was given ample opportunity to examine and re-examine witnesses. The hearing officer exercised remarkable control. He evidenced the endurance of the Rock of Gibraltar and, in the words of one of Claimant's representatives, "the patience of a Saint."

The investigation was replete with repetitions and objections. The Board has considered all objections raised in behalf of Claimant prior to the investigation, during the investigation, during the appeal on the property and in the submissions to this Board. We consider none of them, or all of them, of sufficient significance to invalidate the proceedings. In its rebuttal statement the Petitioner offers strong objection to Carrier's Exhibit No. 50, enclosed with its submission, a report of National Transportation Safety Board, Bureau of Accident Prevention, dated March 9, 1982. The Petitioner contends that such report was never discussed or made a part of the record in the on-property handling. The record shows that the dispute herein was discussed with Carrier's highest designated officer of appeals on January 12, 1982, and the conference confirmed on January 29, 1982, prior to the issuance of the report of the National Transportation Safety Board on March 9, 1982. However, the report of the National Transportation Safety Board is a matter of public record, and, as such, is admissible in proceedings before this Board at any time.

The applicable collective bargaining Agreement defines Trick Train Dispatchers, Relief Train Dispatchers and Extra Train Dispatchers:

"SCOPE AND DEFINITION

* * *

(b) Definitions

* * *

(2) Trick Train Dispatchers, Relief Train Dispatcher, Extra Train Dispatcher; These classes shall include positions in which it is the duty of incumbent to be primarily responsible for the movement of trains by train orders, or otherwise; to supervise forces employed in handling train orders; to keep necessary records incident thereto; and to perform related work."

In Third Division Award No. 17338, the Board found:

"... prime responsibility devolves on a train dispatcher to insure the safe movement of trains operating within his jurisdiction."

Following the lengthy investigation, Claimant was dismissed from Carrier's service on October 7, 1981 for "Improper issuance of Form D-R Train Orders on August 11, 1981 resulting in collision of passenger train 570 and freight extra 1731."

We will not attempt in this award to analyze all the testimony in the investigation; but suffice it to say that we do find substantial evidence to support the Carrier's dismissal of Claimant. Many awards of all Divisions of the Board have upheld the dismissal of employees where there was produced substantial evidence in support of the Carrier's action. In Second Division Award No. 6419, it was held:

"The substantial evidence rule referred to was set forth by the Supreme Court of the United States as follows:

'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'
(Consol. Ed. Co. vs. Labor Board 305 U.S.197,229)."

It is well settled that railroad disciplinary proceedings are not court proceedings and that strict rules of evidence do not apply. There is no requirement that the Carrier prove the charge by a preponderance of evidence, as contended by the Petitioner herein, and as applicable in certain types of court proceedings. The substantial evidence rule is so well established in railroad disciplinary proceedings as to require no citation.

On August 11, 1981, the date of the accident, the westward (inward) track on the Gloucester Branch was out of service due to rehabilitation work, from a location near the crossover in Manchester and the easterly limits of Beverly Junction interlocking, which is a junction between the Eastern Route Main Line and the Gloucester Branch. Under operating instructions in effect, the method of operation required the use of Form D-R train orders between Manchester, on the Gloucester Branch, and Congress Street Crossover on the Eastern Route Main Line west of Beverly Junction for westward (inward) trains using the eastward (outward) track. Temporary train order offices were in existence at the Crossover in Manchester and Congress Street Crossover. The Carrier advises that under the provisions of Operating Rule 221(b) an operator will place a double staff red flag at a designated point to stop traffic, which flag must not be removed until delivery of a train order or a Clearance Form A. In addition, a Form J holding order for all eastward Gloucester Branch trains and Eastern Route Main Line trains operating east of Congress Street Crossover was issued at 0550 on August 11, 1981, and was in effect on said date. A train cannot proceed beyond the point named in the Form J holding order until the order is annulled or a "May Go" order is issued to the operator.

The record shows that at 1552, August 11, 1981, Claimant issued "May Go" Train Order No. 125 authorizing the operator at Congress Street Crossover to issue a Clearance Form A to Extra 1731 East. The Clearance Form A authorized Extra 1731 East to pass the double staff red flag at Congress Street Crossover and either continue on the Eastern Route Main Line or proceed on the Gloucester Branch. Claimant was aware that Extra 1731 East had work to perform on the Gloucester Branch as train order No. 124, issued by him through the operator at Congress Street Crossover, authorized Extra 1731 East to run in single track territory on the eastern end of the Gloucester Branch until 0200 August 12, 1981.

At 1601 Claimant issued Train Order No. 126 to passenger Train No. 570, through the operator at Manchester, on the Gloucester Branch. That order gave westward (inward) Train No. 570 exclusive rights over opposing trains on the eastward (outward) Gloucester Branch track from Manchester to Beverly Junction. Copies of train orders Nos. 124, 125 and 126 are part of the record.

Claimant contended that he issued Clearance Form A to allow Extra 1731 East to get past the double staff red flag at Congress Street Crossover and then back in/on what is known as the Gulf Track, and that he instructed Train Director Poley, at Salem Tower, to put Extra 1731 East in/on the Gulf Track. Train Director Poley and the operator at Congress Street Crossover denied that Claimant issued any instructions to put Extra 1731 East in/on the Gulf Track. A dispatcher trainee, who was in the dispatching office when Claimant allegedly advised Train Director Poley to put 1731 East in/on the Gulf Track, did not corroborate Claimant's contention. It is well settled that the Board does not weigh evidence, attempt to resolve conflicts therein, or pass upon the credibility of witnesses. Such functions are reserved to the Carrier. Further, the Board may not properly reverse the Carrier's determination because of conflicts in testimony.

It is clear that when Claimant issued Train Order No. 126 to Passenger Train No. 570, he did not know that Extra 1731 East was in/on the Gulf Track siding. In fact, he so testified (Vol. 5, P. 74 of transcript).

There was also considerable discussion in the investigation about a Blocking Device preventing Extra 1731 East from entering Gloucester Branch. The Carrier does not concede that the use of a Blocking Device would be in compliance with the rules. However, here again there is direct conflict in testimony as to whether the Train Director was actually instructed to place a blocking device at Beverly Junction, and we have previously expressed our views as to conflicts in testimony.

The fact that other employees involved in the incident may have been disciplined, but to a less degree than Claimant, does not excuse Claimant from fully meeting his responsibilities as a train dispatcher. The issuance of the train orders in the manner in which Claimant did, created a lap situation which could only result in a collision unless in some manner the trains were stopped after the issuance of the orders, which Claimant was unable to do.

On the record before us, there is no proper basis for the Board to interfere with the discipline imposed by the Carrier. The claim will, therefore be denied.

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy G. Bever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of September 1984.

