NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25058

THIRD DIVISION

Docket Number MS-24381

Edward M. Hogan, Referee

PARTIES TO DISPUTE: (M. J. Loftus
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(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

"This is to serve notice, as required by the rules of the National Railroad Adjustment Board, of my intention to file an ex parte submission on or before November 14, 1981 covering an unadjusted dispute between myself and the Burlington Northern, Inc. involving the question of whether or not dispatcher M. J. Loftus was dismissed from the service of the Burlington Northern, Inc. without cause as required by contract."

OPINION OF BOARD: Claimant was dismissed from the service of the Carrier effective May 29, 1981, following a formal investigation which was conducted on May 12, 1981. Claimant had been cited for violations of Rules 700 and 702(B) of the Carrier (failure to comply with instructions of supervisor). Rules 700 and 702(B) state:

> Rule 700. "Employees will not be retained in the service who are careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who do not conduct themselves in such a manner that the railroad will not be subjected to criticism and loss of good will."
>
> Rule 702(B). "Employees must comply with instructions from the proper authority."

Three procedural objections have been made on behalf of the Claimant. They are: (1) that the notice of investigation was deficient in that it did not contain specific references to rule violations, (2) that an improper Carrier officer conducted the investigation and assessed the discipline, and, (3) that the Carrier violated the 60-day time limit rule by not responding in a timely fashion. We cannot agree with any of the above contentions raised on behalf of the Claimant. First, numerous Awards of this Division, and other Divisions of this Board, have held that adequate notice contemplates that the Claimant is sufficiently apprised of the allegations placed against him so that he/she can properly prepare and maintain a defense to these charges at the investigation. As this Division has stated in Award No. 17998:

"...A notice is sufficient if it meets the traditional criteria of reasonably apprising an employee of what set of facts or circumstances are under inquiry so that he will not be surprised and can prepare a defense... A careful review of this record...does not disclose that the Claimant's substantive rights were violated by reason of the notice he received not containing a direct charge that he violated a specific rule..."

We can also not agree with the Claimant's second procedural objection. Rule 24(b) of the controlling Agreement states:

"... and he shall be given a fair and impartial investigation by the Superintendent or a designated representative..."

Our review of the record indicates that the Carrier has complied with this provision. Lastly, with respect to the third procedural objection of the Claimant, we are not persuaded by the arguments propounded on behalf of the Claimant.

With respect to the merits of the claim before this Board, the incident which gave rise to this dispute occurred on May 2, 1981. On this date, the record indicates that the Carrier's Trainmaster was contacted and informed by one of the Carrier's Roadmasters that the dispatcher would not give the Roadmaster time for his work train to work. Subsequent to this phone call, the Carrier's Trainmaster contacted the Claimant and instructed the Claimant to hold trains for certain periods of time so that the work train could operate. Testimony on the record indicates that the Claimant responded to the Carrier's Trainmaster that he would not comply with his instructions. On May 5, 1981, the Claimant was notified that a formal investigation would take place with respect to the incident of May 2, 1981.

In reviewing the entire record before this Board, including the conflicting testimony as cited by the Claimant, we can come to no other conclusion than to deny the claim before us on its merits. Indeed, notwithstanding the opinion of this Board expressed above as to the procedural questions, the Board prefers to consider this matter on the merits of the record before it rather than upon the procedural questions raised by both parties. It is a well-established principle of this Board that we will not upset the findings of the hearing officer and assessment absent arbitrary, capricious or discriminatory behavior on the part of the hearing officer. Furthermore, our review of the record clearly indicates that there was sufficient evidence on the record in which to sustain a finding as adduced by the hearing officer and the subsequent discipline imposed.

"Numerous awards of this Board have established the principle that in discipline cases the Board will not substitute its judgment for that of the Carrier, i.e., will not reverse or modify the Carrier's discipline action unless the employes and/or their representative are able to produce substantial evidence of probative value that the Carrier, in the exercise of its managerial prerogatives, has abused its discretion by proceeding in an unfair, arbitrary, or capricious manner." (Second Division Award No. 1571)

"The precedent is 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. While the administration of disciplinary action should not seem haphazard or capricious, it is clear that the imposition of discipline is within managerial discretion." (Third Division Award No. 17914)

Consistent with the principles and standards as enumerated above, this Board, in its thorough review of the entire record before us, upholds and confirms the findings as adduced at the formal investigation and subsequent imposition of discipline. Lastly, this Board has traditionally held that it will not substitute its judgment for that of the hearing officer. Again, our review of the record does not indicate facts, evidence or a pattern of behavior, consistent with the principles elaborated above, which would warrant this Board's intrusion or modification of the initial findings or discipline assessed.

In so ruling, the Board has carefully examined the five specific points raised by the Claimant as well as the other issues presented in this Opinion. Weighing heavy upon this Board's determination is the long-standing rule of the industry that if an employe disputes the order of a superior, the employe should first comply with the order and then file an appropriate grievance as contemplated by the controlling Agreement. To do otherwise would bring chaos into the employer/employe relationship, adversely affect efficiency of operations, and expose the public, as well as fellow employes, to danger. Clearly, an exception to this rule would be a situation which would expose employes or the public to danger. There being no evidence upon the record to indicate such a situation, and more importantly, no contention of such a condition made by the Claimant, this Board will not proceed further. However, we have clearly found that the Claimant violated the general rule to comply with the order and grieve later.

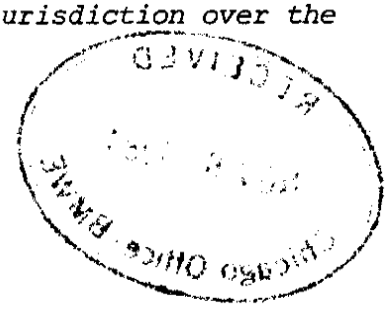
Findings: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

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: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 4th day of October 1984.

LABOR MEMBER'S DISSENT
to Award 25058
Docket MS-24381
Referee Hogan

This appeal of the extreme disciplinary penalty of dismissal should have been sustained in whole or in part for three reasons.

One. The following factual description of the incident giving rise to the discipline is uncontested in the record: On Saturday, May 2, 1981, Trainmaster Ricket requested Train Dispatcher Loftus, the Appellant, to hold train traffic on the line between St. Joseph and Kansas City to allow for the operation of a work train. This request was made without any advance notice, in contravention of the common operating practice. Mr. Loftus immediately reported the request to the chief dispatcher (his immediate superior) as required by the Carrier's rules and standard operating practices. The chief dispatcher instructed Mr. Loftus to have the work train work under traffic. Mr. Loftus complied with the chief dispatcher's instructions and informed Mr. Ricket of the decision. The chief dispatcher later changed his mind and rescinded his earlier instructions to Mr. Loftus, who again complied with the chief dispatcher's instructions. The Carrier's appointed chief dispatcher Copeland stated for the record, regarding Appellant Loftus, ". . . his actions were reasonable at the time, yes." (Transcript p. 35). Assistant Relief Chief Dispatcher Barriger, Mr. Loftus's immediate superior, stated, in response to a question:

> "Q. Could you at this time indicate to the best of your memory the extent of that conversation, as told to you by Dispatcher Loftus?
> A. He came in and told me that Mr. Ricket requested that he hold all trains and let the work train go to work between Waldron and Clarke. I told him I would look at the work train message, which I did at the time, and it did not say anything about holding trains so I told him to have the work train work under traffic." (Transcript p. 39)

Mr. Loftus complied with instructions from his proper and immediate superior, which fact should, in a reasonable mind, clear him of the charge of disobeying Trainmaster Ricket's instructions.

Two. Appellant was also disciplined for insubordination, and the Carrier disparaged Mr. Loftus for his exchange of words with Mr. Ricket, characterizing his conduct as an "ego trip". Evidently Mr. Ricket has an ego problem of his own, for we find, in his (Mr. Ricket's) own words (which we could expect would place himself in the best possible light), that he addressed himself in a provocative choice of words to Mr. Loftus:

> ". . . I explained to him that I was the Trainmaster on that territory and that I run that territory down there and he explained to me that I didn't run anything, that he ran that territory and that he would decide when to run trains and how to run trains. He indicated to me that a trainmaster did not have the authority to tell him what to do. So then I asked him if he was refusing my request for track and time and he said, yes, he was. I said then, 'You're telling me that a trainmaster is not enough

authority to tell you what do [sic] do, is that correct?' and he said, 'Yes, that's correct.' I told him that I would give him all the authority that he needed." (Transcript p. 8)

Was Mr. Loftus out of line in his response to Mr. Ricket's vexatiousness? Chief dispatcher Copeland was questioned on this subject:

"Q. Do you know of any written authorization that has ever been given to the trick dispatchers that would allow them to accept a trainmaster's direct authority over the movement of trains?
A. Trainmaster specifically; no.

Q. Any other division officer?
A. Any other division officer?

Q. Other than the Chief Dispatcher or the Superintendent?
A. No." (Transcript pp. 30-31)

"Q. Our letter from Superintendent Condotta tends to dispute that position in that he describes chain of command as trick dispatcher to Chief Dispatcher to Superintendent or Assistant Superintendent and no trainmaster in the middle; do you have any knowledge of any information that has ever been given to any trick dispatcher regarding the chain of command which would indicate to them that a trainmaster was superior to a chief dispatcher or a relief chief dispatcher?
A. No, there is no such letter out and never will be.

Q. Mr. Copeland, what in your opinion would be the result if every division officer on the division were allowed to give instructions to the trick dispatcher without going through the proper chain of command?
A. I previously stated it would be chaos on the Railroad."
(Transcript p. 32)

Clearly, arrogant condescension such as that displayed by Mr. Ricket is not calculated to do anything less than enrage and incite the unfortunate target of such insults. The majority should have seen through this exhibition of bluster and recognized mitigation when so patently displayed.

Three. Even if the majority were persuaded by the Carrier's hyperbolic account of this dispute, it is inconveivable that $10\frac{1}{2}$ years of service (nine years of that in the promoted status of train dispatcher) without even one prior instance of discipline would not merit a reduction in the amount of discipline, as a minimal determination.

This Award does an injustice to the aggrieved employee. Perhaps worse, it impairs one's faith in the basic fairness characteristic of American society. Man clings to the concept that wrongs will somehow be made right.

Incidents of this kind breed disrespect for authority and contempt for managerial integrity. In obedience to his designated and immediate supervisor, an employee finds himself assessed the ultimate economic penalty, because such obedience brings him into conflict with an overbearing tyrant. The very notion that this scenario can evolve into this result is repulsive to decent society. The Carrier's support of such baseness is only mildly confounding. We expected something better from the majority.

R. J. Irvin
Labor Member