

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25107
Docket Number TD-25180

Thomas F. Carey, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

Case No. System Docket CR-187

"...[r] requests that Appellant C. N. Smith be restored to service and the discipline 'Dismissed In All Capacities' be removed from his record and appellant made whole for time lost."

OPINION OF BOARD: The Claimant had been employed as a Train Dispatcher with approximately thirty-three and one-half (33 1/2) years of service. He was assigned to the second trick at the Pittsburgh, Pa. train dispatching office.

On August 11, 1982, the Claimant was notified to attend a hearing to determine his responsibility, if any,

"...in connection with your alleged failure to properly issue Form M and arrange for proper blocking devices for track Car No. 7019, TC Driver V. L. Terziu on August 9, 1982 at approximately 4:35 P.M. at West Pitt and Pitt.

Rules and instructions which may apply are as follows:

Rule 808,
Rule 810,
Rule 824, Rules of the Transportation
Department and Supervisor of Operating
Rules instructions of July 6, 1982."

The hearing, originally scheduled for August 18, 1982, commenced on September 10, 1982. It was recessed and was concluded on September 29, 1982. Claimant was notified on October 6, 1982 that he had been assessed the discipline of "Dismissed in All Capacities", effective immediately.

The Organization contends that Carrier has committed many procedural errors in the conduct of the hearing. It points out that a transcript of the phone tape involved in this incident was introduced at the hearing, but did not accompany the Notice of Hearing sent to the Claimant. It also argues that the hearing was improperly recessed on September 10, 1982, and concluded on September 29, 1982. It also suggests that the Carrier's failure to have Superintendent Terziu present at the hearing prejudiced the Claimant's right to due process. In addition, the Organization maintains that it was improperly denied the right to present evidence at the hearing which would have exonerated the Claimant. Furthermore, the Organization asserts that Claimant's Notice of Discipline did not precisely state which rules he is alleged to have violated. Also, it asserts that new evidence was introduced at the Appeal Hearing which is not properly before this Board.

As to the merits, the Organization insists that blocking devices were applied as required. It also suggests that Carrier has exaggerated the potential risk of Claimant's technical failure to issue Form M to one of the three Block Operators. The Organization, thus, contends that Carrier's dismissal of the Claimant was unwarranted under these circumstances.

The entire record has been reviewed. Our findings, we note, are based solely upon evidence adduced on the property. Similarly, we have not considered any testimony raised for the first time at the Appeal Hearing.

The record establishes that Carrier did not commit the procedural violations alleged by the Organization. Specifically, we find that the Notice of Investigation clearly apprised the Claimant of the incident involved and his alleged responsibility therein. Thus, he had sufficient notice so as to form an adequate defense. The Carrier's failure to furnish the Claimant with a transcript of the phone tape does not invalidate the hearing. Neither Claimant nor his representatives asked for such a transcript when the hearing was conducted. Also, the hearing was not improperly recessed from September 10, 1982 to September 19, 1982. Claimant himself had made a number of requests for postponements. The unavailability of Carrier witnesses on September 10, 1982 was, thus, not a result of its own making and Carrier should not be disadvantaged thereby. Carrier's failure to call Superintendent Terziu at the hearing did not deny the Claimant his rights. Claimant, had he chosen, could have required Superintendent Terziu to be present. Carrier is not required to have present every individual who has some knowledge of the incident. In sum, then, we find that Carrier has not committed procedural violations here.

On the merits, the record reveals that Claimant did fail to give the Form M to the Operator at Pitt.

"Q. Why wasn't he (Operator at Pitt) given a form M?

A. ...I left the Operator at Pitt, went back to the Operator at Esplen after being assured the BDA's were on and the switches were aligned. I issued a Form M to the operator at Esplen to be delivered to Superintendent Terziu. I also gave a Form M to the TCS Operator at another time. This required two separate communications. A third communication would have been necessary to give the Form M to the operator at Pitt. I became distracted before I was able to accomplish that.
(Emphasis added)

Claimant's failure to issue a Form M to the Operator at Pitt was a serious breach of the Carrier's safety rules. Claimant knew of this obligation but failed to carry it out.

However, the record also reveals that Claimant did issue two other Form M's as required. In addition, the record also indicates that blocking devices were applied as required (see Transcript pp. 11, 13 & 17). Accordingly, while Claimant was guilty of one offense as charged, the record fails to establish his guilt of the several other offenses of which he is charged.

In addition, the record establishes that Claimant has 33 and 1/2 years of service with the Carrier. In that time, he has had but one prior offense -- some thirty-three years ago.

Under these circumstances, we view the penalty of dismissal as harsh and excessive. As this Board noted in Award No. 16467, "We do, however, think that in deference to Claimant's long period of service, and in the absence of any evidence showing similar malefactions by this Claimant, the original dismissal from the service was a gross and flagrant abuse of the power vested in the Carrier." In our view, Claimant's dismissal should be converted into a six (6) month disciplinary suspension without back pay but with his seniority unimpaired. At the end of the six-month suspension, he shall be reinstated, with seniority, but without any back pay for the period from the end of his suspension to the date he physically returns to work. Arguments concerning settlement offers that were not agreed upon, are not properly before the Board.

Claimant's restoration is subject to his passing a return to work physical examination, a Rule Book examination, and other such examinations as are normally required.

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

The 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.

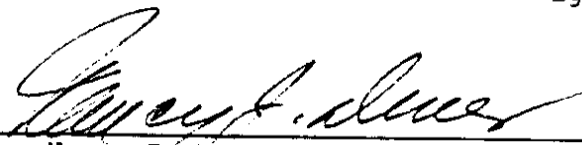
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A W A R D

The claim is sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 9th day of November 1984.



CARRIER MEMBERS' DISSENT
TO
AWARD 25107, DOCKET TD-25180
(Referee Thomas F. Carey)


We respectfully dissent to that portion of the decision which holds that dismissal was "harsh and excessive".

The Claim was handled by the Organization, in the usual manner on the property up to the Senior Director and denied on January 14, 1983. The Carrier offered to return Claimant to service as a Block Operator, however this offer was rejected and was no longer open for acceptance, nor could it be considered by the Board in making a decision. The Claimant rejected this offer at his peril. See Award 23559 (Dennis) and 22963 (Dennis). Had the Claimant accepted the offer he would have been returned to service within three months of his dismissal.

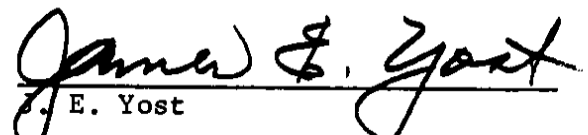
We would emphasize that dealing with the question of alleged excessive discipline the Claimant's years of service did not give him the right to ignore Carrier's operating rules. See Award 16168 (Perelson) and 16286 (Devine); Second Division Award 9140. See also 13704 (Mesigh); 14442 (Dolnick); 16699 (Devine); 18006 (Dugan). As stated in First Division Award 11727, in a different context, the Division may direct justice, it cannot demand generosity from the Carrier.

For the reason set forth above among others, we respectfully dissent.


W. F. Euker


P. V. Varga


J. R. O'Connell


J. E. Yost


T. F. Strunck