Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Referee Herbert I. Marx, Jr.

Award Number 3974
Docket Number 3980

PARTIES TO DISPUTE: Railroad Yardmasters of America

Southern Railway Company

STATEMENT OF CLAIM: Claim and request of Railroad Yardmasters of America that:

Yardmaster D. H. Kemp be paid for all time lost incident to his suspension from service February 2, 1981 to March 3, 1981, seniority unimpaired and all rights restored that he would be prohibited from as a result of this discipline.

OPINION OF BOARD: This dispute concerns the propriety of a 30-day disciplinary suspension assessed to the Claimant, a Yardmaster, after an investigative hearing, for allowing "Yard Assignment GA-22 to enter Class Track #13 for the purpose of coupling and pulling same on January 22, 1981, without the track being properly blocked". As a result of the incident, a humped car entered the track while a yard crew was at work on the track.

Apart from the incident itself, the Organization raises a number of procedural matters for the Board's consideration. One of these has to do with the assessment of the penalty by a Superintendent who was not present at and did not conduct the hearing, rather than by the hearing officer. The Organization points out correctly that there was some disparity between the testimony of the Claimant, who stated that he had given direction to block the track in question, and the testimony of others -- particularly the Yard Foreman, to whom the Claimant spoke. The Organization cited numerous awards to demonstrate that in such instances, "The trier of the facts is vested with the exclusive authority to resolve conflicts of testimony." (Award No. 3278, Lieberman).

The Board concurs with this line of reasoning, as it has done in many previous instances -- particularly those referring to instances where the Board is not to substitute its own judgment on credibility issues.

Nevertheless, it is the Carrier's position that, as a matter of common and accepted practice, the hearing officer in this instance consulted with and offered his conclusions to the Superintendent who wrote the letter assessing discipline. While no written proof of such consultation was offered, it is equally true that the Organization has no basis to show that the hearing officer's judgment was either not offered or ignored. As indication of the acceptance of this procedure, the

Carrier points to four previous investigative hearings involving the same Claimant in which discipline was assessed by a Carrier representative other than the hearing officer -- without protest on this point by the Organization. The Carrier cited numerous previous awards in which assessment of penalty by other than the hearing officer was found to be proper.

In this dispute, however, the Board does not find that the determination of responsibility rests solely on which of two versions of testimony is accepted. The Claimant himself admitted he did not follow his usual procedure in this instance, as evidenced by the following exchange with the hearing officer (Transcript, p. 15):

"Q. Did Mr. Walravan, the Yard Foreman immediately tell you that the tracks were blocked out?

"A. He told me, he say, he waited a few minutes and said, he talked in a low tone of voice, and he said #13 and #48 blocked out and I can't give you #49 because I'm humping cars in #49, and that was the extent of that.

"Q. Did you have the speaker open all this time?

"A. Yes, I had the speaker open all this time.

"Q. At any time did you hear Mr. Walraven call the retarder operator?

"A. No, I didn't hear him call the operator I don't think Mr. Heilig, I'm not sure at that point.

"Q. What is your procedure for blocking out a track?

"A. My procedure is I block out the track to the hump, and they will tell me the track is blocked out, then I will watch my panel board in the north tower, and when they open the retarders on track or such, that light, my light, will go out, and nine times out of ten I always refer back to the retarder operator and ask him if the track is blocked out.

"Q. Did you on the 22nd of January?

"A. No I did not. On that particular incident, I did not. "

The Organization also argues that the Claimant was unfairly selected by the Carrier for discipline, in that the crew involved on Track #13 failed to check a signal light which would have warned them that the track was not blocked. The crew was not charged in the investigative hearing. This does not affect, however, the Claimant's primary responsibility as the person responsible for insuring the blocking of the track in the first place.

Again, the Organization charges disparate treatment for the Claimant. It cited two other instances in which similar offenses were dealt with through a reprimand rather than a suspension. The Carrier showed, however, that in those cases the prior disciplinary records of the two employes were far less extensive than for Claimant herein.

Another issue raised by the Organization concerned the use of the Claimant's disciplinary record. Once responsibility has been determined, it needs no emphasis here to state that the employe's previous record may (and should) be consulted in determining the severity of penalty; only on this basis may progressive disciplinary steps be taken. The record here includes discussion as to when a copy of the Claimant's disciplinary record was supplied to the Organization. This is entirely beside the point. The disciplinary record clearly existed, and the Carrier properly states that such record was consulted in determining the penalty.

As to the merits of the dispute, the Board concludes that the Carrier had sufficient grounds to show that the Claimant failed to assure himself in proper manner that his direction to block Track #13 was carried out. In assessing the degree of penalty, the Carrier properly reviewed the Claimant's disciplinary record as noted above. This shows two letters of reprimand, a letter of warning, and a 15-day suspension all within three months prior to this incident, as well as numerous previous suspensions and warnings since establishing Yardmaster seniority in 1975. Under these circumstances, the 30-day suspension may not be found inappropriate.

FINDINGS:

The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds 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.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

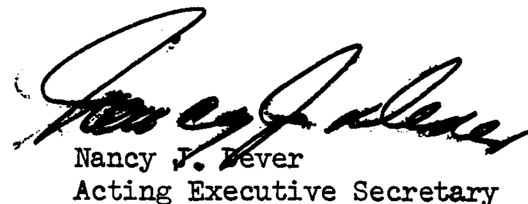
The parties to said dispute waived right of appearance at hearing, but were granted privilege of appearing before the Division with Referee sitting as a member thereof, to present oral argument.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:



Nancy J. Dever
Acting Executive Secretary

Dated at Chicago, Illinois, this 17th day of March 1983.