

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13507

Docket No. 13346

00-2-98-2-36

The Second Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

**(Brotherhood Railway Carmen Division
(Transportation Communications International Union**

PARTIES TO DISPUTE: (

(Delaware and Hudson Railway Company

STATEMENT OF CLAIM:

“Claim of the Committee of the Union that:

- 1. That the Delaware and Hudson Railway Company violated the terms of our current agreement, in particular Rule 26.1 when they arbitrarily assessed the record of Carman John E. Kinsey with Twenty (20) demerits as a result of an investigation held on June 11, 1997.**
- 2. That accordingly, the Delaware and Hudson Railway Company be ordered to remove the discipline, including all correspondence relative to this investigation from the file and record of Carman John E. Kinsey.”**

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

Parties to said dispute were given due notice of hearing thereon.

The Claimant, who was assigned on the claim date as a Car Inspector/Repairman at Kenwood Yard, Kenwood, New York, was mailed a Notice of Investigation on June 4, 1997 as a result of an alleged altercation between him and Conductor William F. Bombardier. While the subject of some debate, the date of the incident was almost certainly the morning of May 30. Following Investigation, the Carrier determined that the Claimant had verbally threatened Bombardier and notified him on June 24, 1997 that he was being assessed 20 demerits for violation of NORAC Operating Rules D, E and N. By letter dated July 3, 1997, the Organization submitted this claim contesting that discipline.

Preliminarily, the Organization's challenge cites several procedural irregularities in the Carrier's handling of the matter. First, it argues that the Claimant was never informed that he was governed by NORAC Rules. Secondly, it asserts that neither the Local Chairman nor the Claimant was formally notified of the Hearing scheduled for June 11, 1997. Third, the Carrier violated the Claimant's right to a fair Hearing by refusing to produce two witnesses he requested. On the merits, the Organization maintains that the Carrier failed to bear its burden in establishing that the Claimant ever threatened anyone.

Addressing the first of the Organization's procedural arguments, the Board finds that the record establishes beyond question that the Claimant was either aware of the posting of Division Notice No. 6-30 with respect to NORAC Rules, or should have been; that his failure to regularly check the bulletin board does not insulate him from his responsibilities as an employee; and that, in any event, threatening conduct directed toward a co-worker is so fundamentally inappropriate that disciplinary action for it normally is not contingent upon the publication or knowledge of express written prohibition of such.

With regard to adequacy of Hearing Notice, the Board finds that the Organization clearly had ample advance notice of Investigation. No request for postponement was directed to the Carrier after it learned that the Claimant had not been so notified. The Hearing Officer made ample provision for recess, if desired, when the issue was raised. The Claimant in response to the Hearing Officer's inquiry effectively waived such defect with respect to his receipt of the Notice of Investigation. And lastly, this alleged irregularity did not compromise the Claimant's ability to make his case, or otherwise result in prejudice to him.

Lastly, with respect to the Carrier's failure to call the Claimant's witnesses, there were no witnesses to the altercation at the heart of this dispute. Thus, neither Engineer J. Sabatino nor Brakeman B. Jones was likely to have contributed any factual information

material to the outcome of the debate had they been produced. If the Carrier's failure to call them was error, in the context of this dispute the Board finds that it was harmless error.

On the merits, the facts giving rise to this discipline are not complicated. From the Claimant's perspective, at approximately 7:30 A.M. on the date in question, "Billy [Bombardier] and I had a disagreement about the way I was doing my job . . . He questioned my ability to perform my duties, which include coupling hoses, pre-departure inspections, inbound inspections and doing air brake tests, and that's kind of what stemmed from it."

Bombardier, who was the Conductor on local freight train SC1 being made up in the Kenwood Yard on May 30, testified that after reporting for work at 6:30 A.M. on that date, he, his Flagman and the Engineer began the process of making up their train. Because the Car Department personnel did not come on duty until 7:00 A.M. and the train was not yet together, the Flagman did a walk-through, coupling hoses, checking pins, establishing the end of the train, assisting with coupling onto additional cars and performing other normal assignments. Around 7:00 A.M., approximately 30 minutes into this process, the Yardmaster notified Bombardier that an additional hazardous car would have to be placed into the train. Minutes later, around 7:02 A.M., Bombardier saw the Claimant getting into a truck and heading south down the Lead to give Train SC1 its air brake test. Recognizing that neither the Engineer, the Flagman nor the Car Department knew yet that there was another car to be added to the train, via yard radio he then directed his crew "Do not let the Car Department, John Kinsey, in on our train."

After getting his paperwork, Bombardier then boarded the locomotive in time to hear the Claimant on the radio saying "SC1 okay to set your brakes." Bombardier ignored the communication and "went about his business," moving from track nine to track six to couple onto the hazardous car. Kinsey then pulled up in his truck and, according to Bombardier, said "something to the effect 'You're F-ing with the wrong person. I'm nobody to F with.'" Bombardier walked away, met his Flagman at the cut of the cars and told him, "I have a dilemma, I was just threatened by a fellow employee, I don't know what to do about it." To which his Flagman replied, "You two guys got to put an end to this, kick some dirt over it and bury it."

After positioning cars for some minutes, Bombardier then wound up again in the area near the Claimant's truck. At that point, Bombardier says the Claimant commented to him "I don't know what your problem is, I've been here for 30 years." Bombardier made no reply and again walked away to finish up the work of putting the new car into his train.

He then went to the yard office, where he advised the Yardmaster, "The train's complete, it's alright for the Car Department to do their job."

Sometime later that same day, according to Bombardier, the Claimant remarked to him, "We ought to settle this up right like Marines." Bombardier replied, "I have no idea what that means, I was never a Marine." To which the Claimant replied, "I can believe that."

The record evidence reflects that this is the second instance in the Claimant's 30 years of employment for which discipline has been imposed as result of outbursts directed at his co-workers. While we are troubled by that fact and believe the Claimant's comportment here is incompatible with workplace harmony, the Board does not fully share the Carrier's assessment of the seriousness of the lapses described.

As is apparent, the Carrier is not alleging physical assault, nor is it required to do so to make its case. The Claimant testified without contradiction that neither he nor Bombardier pushed, shoved or touched one another. And, although Bombardier insists and the Claimant admits he "may have" cussed, it is cliché to state that profanity is the warp and woof of shop talk. There are meaningful distinctions to be drawn between threats and zingers, and different ways of uttering both. Here, after wrongly concluding that Bombardier had questioned his ability to administer a brake test—while, in fact, the train was simply not yet together - the Claimant told the Conductor not to play games with him. That exchange was disagreeable, coarse, and in words the clergy does not know, but it does not appear so menacing as to inspire fear. In support of that conclusion, we note that the two men both saw each other and worked together without any problems between the date of these incidents and the time of the Investigation. At the end of the day, it was a small-bore matter, and one that two mature men apparently were able to "kick the dirt over" as suggested by the Flagman.

More serious, in our judgment, than the "you're F-ing with the wrong person" remark was the Claimant's later invitation to Bombardier to "settle the matter like Marines." We take that as about as close to the edge as can be had without falling off, but whether it goes so deeply into the threat zone, measured against any conventional standard, so as to warrant the penalty imposed is less clear.

The Claimant emerges as a man with an exaggerated sense of his own importance, throwing his weight around unrestrained by any memory of his potential for giving offense. But the charges upon which the demerits were levied cite violations of NORAC Rules D, E

and N, viz., refraining from conduct that adversely affects the performance of duties of other employees; fighting; or complying with orders and instructions of the Carrier. Based upon its review of the record evidence, the Board concludes that the Carrier has come up short in proving violations of those Rules, at least so far as would justify the imposition of 20 demerits on a 60 demerit system. For re-engaging Bombardier with the aggressive invitation to settle matters like a Marine after the parties had broken off their dispute, the Board views the imposition of ten demerits as appropriate in this case.

At the risk of seeming to look down from its moral high horse on the Claimant, the Board believes it is justified in urging the Claimant to view ten demerits for these events as a hot rinse of basic training in civility. If not, the next time such a redoubtable performance occurs on the job, the piper is apt to appear one final time and insist upon being paid.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 17th day of April, 2000.