

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24131
Docket Number TD-24050

Herbert L. Marx, Jr., Referee

PARTIES TO DISPUTE: { American Train Dispatchers Association
{ Boston and Maine Corporation, Debtor

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that:

(e) The Boston and Maine Corporation (hereinafter referred to as "the Carrier") violated the effective Agreement between the parties, Article 8 in particular, by its actions following a hearing December 10, 1979, assessing discipline of 48 demerits to Train Dispatcher D. S. Robinson of the North Billerica, Mass. Train Dispatching Office.

Paragraph {b} The Carrier shall now rescind the discipline referred to in {a} and clear Claimant D. S. Robinson's record of any reference thereto.

OPINION OF BOARD: Claimant was subject to an **investigative** hearing on the charge of "Conduct unbecoming an employee **while on duty** October 28, 1979 as Conn. River Train Dispatcher (see attached letter)". The "attached letter" was addressed to a Carrier official and was from a **member** of the public who **recounted** his conversation with a Carrier **employee** (later identified as **the Claimant**, a Train Dispatcher), **in which** the letter writer stated that he had called to **complain** about a defective crossing bell and **that** the **employee** **"informed me that he was going off duty in ten minutes and would do nothing. He then slammed the phone down."**

The Board finds that the notice of hearing was in proper form, even though, as noted by **the** Organization, no violation of a specific rule was cited. The **Claimant** and the **Organization** were fully aware of **the** subject of the **investigation** and were not prevented from presenting a full defense despite the absence of a rule citation.

The writer of the letter did not appear at the hearing and thus could not present **direct** testimony nor be cross-examined. The Board **finds**, however, that the letter - which, by other **testimony**, was **found** to be received by **the** Carrier - could properly be introduced at the hearing. As noted in Award No. 9311 (Schedler):

"This Board, in a long line of Awards covering many years of experience, has rather consistently held that written statements of witnesses not present at the investigation are admissible."

Such reasoning-is logically applicable to the letter introduced here. Indeed, it **may** be readily **recognized** that the Carrier has the right **and** duty to investigate **complaints concerning** the conduct Of its **employees**. However, it is another **matter** whether such letter, standing by itself and without corroboration, is sufficient to prove the charge against the **Claimant**. As noted **in** Award No. **13464 (Zack)**:

'he Carrier failed to provide sufficient **corroborative evidence** to support the **allegations** in **Schirmer's** letter. As a result, we **must** conclude **that** the Carrier has failed to sustain the burden of proof beyond a **reasonable** doubt that the **Claimant** was guilty as charged."

In this instance. does the letter, even if taken at face value, show that the Claimant acted in such **a** discourteous and rude **manner** as to **be found** wanting in the proper performance of his duties? **The** Claimant **admits** to receiving the telephone call, relayed to him **from another** Carrier **employee**; **that** he did indicate that he was going off duty **in** ten minutes; **that** he was busy with his regular duties of **train dispatcher**; **and that he believed it necessary to hang up** on the **caller** when he could not **otherwise terminate** the **conversation**.

The only **corroboration** came from a witness at the hearing who was serving as Assistant Chief Pain Dispatcher co the day in question. He testified that he received a telephone call shortly after the call taken by the Claimant, **in which the caller** stated, **according to** the witness:

"He alleged that the **Conn. River Train** Dispatcher told him that he was going ham in ten minutes, that the **Signal Maintainer** for that **section** was off sick, and that he **wasn't** going to do **●** rqrthing about it, **and** that he **hung** up abruptly."

The Board notes **that** this **version** is **somewhat** at variance with the letter **introduced** by the Carrier. No **mention** is made that the telephone was **"slammed"**, for **example**.

The **Board** also finds **that the hearing was left somewhat incomplete**. It was acknowledged that the **telephone** call had first **been** received by **another** Carrier official, **most** likely one in a supervisory capacity. As strenuously noted by the **Organization**, other Carrier **employees/supervisors** **of** duty were cot called to determine what conversation, if any, had taken place with the caller prior to the Claimant being called to the telephone. There was ample shoeing that the Claimant had a full complement of train dispatching duties to perform **at the time** and **that** these **did not normally** include serving as Carrier representative with the public. Nor was any explanation offered as to why the call had been transferred to him **in** the first place.

The Assistant Chief **Train** Dispatcher characterized the caller as 'Very irate'. His irritation could understandably have been caused by his displeasure with the constantly ringing crossing bell **in** the middle of the night and his inability to have **something** done about it, despite prvious efforts.

This leaves **considerable** doubt as to whether such irritation **colored** his **characterization** of the **treatment** he received from the Claimant.

As a result of the hearing, the Claimant was assessed 48 demerits. The Board finds that the Carrier's determination of guilt was **arbitrary** and without sufficient foundation based on the **hearing** record. The **charge, to be sustained**, requires **that** adequate proof be provided. As indicated **above**, the Board **finds** such proof **lacking**, based both on the evidence itself and the failure of the hearing officer to interrogate other witnesses directly related to **what immediately** preceded the telephone call.

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 be 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 **violated**.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest : Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 27th day of January 1983.