

NATIONAL RAILROAD **ADJUSTMENT BOARD**

THIRD DIVISION

Award Number 24525
Docket Number TD-24135

* George **S.** Roukis, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(Chicago and North Western Transportation Company

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

(a) The Chicago and North Western Transportation Company (hereinafter referred to as **"the Carrier"**) violated the current Agreement (effective July **1, 1976**) between the parties, Rule 24 thereof in particular, when the **Carrier** applied five **(5) days'** actual suspension on Train Dispatcher L. D. Diersen (hereinafter referred to as **"the Claimant"**) allegedly based on the investigation held on January 24, 1980 and also, as a result of the January 24, 1980 investigation, required the Claimant to **serve ten (10) days'** deferred suspension which equaled fifteen **(15) days** actual suspension effective January 31, 1980. The record, including the transcript of the investigation fails to support the discipline applied by the Carrier and, therefore, the imposition of this fifteen **(15) days'** actual suspension was arbitrary, capricious, unwarranted and an abuse of managerial discretion.

(b) The Carrier shall now be required to **compensate** the Claimant for all losses sustained as a result of this action in accordance with Rule 24(c) **and** clear the Claimant's personal record of the charges which allegedly **provide the basis for** said action.

OPINION OF BOARD: An investigation was held on January 24, 1980 to determine whether Claimant, a Train Dispatcher, was responsible for using profane **and** abusive language on the dispatchers' phone **in conversation** with conductor R. L. Burkhart on June 16, 1980. Based on the investigative record, Carrier found Claimant guilty of the asserted charges and he was assessed five **(5) days** actual suspension. In addition, he was required to serve the ten **(10) days** deferred suspension assessed on August 1, 1979. This disposition was appealed on both procedural **and** substantive grounds.

In defense **of his** position, Claimant contends that Carrier violated **Agreement Rule 24(a)** by not providing in the January 18, 1980 Notice of Investigation a precise statement of the charges. He argues that the investigative notice did not cite **any** specific rule violation, thus depriving him of the opportunity to prepare a competent defense. He **avers** that the investigation was not fair and impartial since the **hearing officer** asked several leading questions that reflected noticeable bias and asserts that the investigative record was not contextually accurate **since certain** statements were left uncompleted.

As to the substantive nature of the dispute, Claimant argues that his language was quite acceptable and not unusual when it is considered that Conductor **Burkhart** refused to comply with his instructions **in** a stressful situation. He admits that his language was somewhat profane, but maintains that it was not directed personally at the conductor.

Carrier contends that the Notice of Investigation comported with the requirements of Agreement Rule 24(a) since **Claimant** was fully apprised that the investigation was concerned with his use of profane language on a certain date and time. It argues that he had ample opportunity to prepare an intelligent and comprehensive defense and avers that he was **not prejudiced** by the wording of the **investigative notice**. It disputes his position that the hearing officer conducted a biased investigation and asserts that the trial record fully confirms that the hearing was properly administered in accordance with the requirements of Rule 24. It argues that the testimony of Conductor Burkhart as **corroborated** by D. W. **Urwin**, the Operator at Clinton, Iowa, pointedly shows that Claimant used profane and vulgar language.

According to Mr. Burkhart, Conductor on the East Way Freight Extra 4543, he was instructed by Trainmaster Ray **Farr** that if he could not make it back to Clinton before his time under the Hours of Service Law expired, he was to clear the Rain Line, stop the train and call the Train Dispatcher, who would obtain taxi cab transportation for the train crew. He stated that as he related this information to Claimant, he was told, 'that I **wasn't** going to die on his **'---'** main line" and **"who in the hell was running this god dammed railroad, him (Claimant) or Farr?"** Operator **Urwin** testified **that** he heard Claimant say, **"I don't give a damn what Farr said"** and **"I don't want you to die on my god dawned eastbound"**, but he could not provide a detailed account of the conversational incident. He **did** state that he heard the **word** **"---"**, but he could not **put** a phrase on **it**.

In our review of this case, we find no evidence that Claimant's procedural due process rights were violated. The January 18, 1980 Notice of Investigation was properly written and Claimant was under no illusions as to the purpose of the investigation. The non-citation of a specific rule violation under these circumstances did **not** prejudice his position or preclude him from conducting a thoughtful and vigorous defense. In fact, close reading of the investigative transcript indicates quite clearly that he was provided every reasonable opportunity to defend himself against the. purported charges.

On the other hand, there is no doubt that he used profane language. We are not convinced that it was personally directed toward conductor Burkhart, but find that his statements reflected a response to a potential problemsome situation. **Claimant** was **apparently not informed** of Trainmaster **Farr's** earlier instructions to Conductor **Burkhart** and understandably was surprised when Mr. Burkhart told him he was going to **"die"** at **DeWitt**. As a rule, **Extra 913 West** would proceed to Clinton, but Claimant was unaware that two coal trains **were** blocking passage to this location. He did not want **Extra 913 West** stopping on the **mainline** and his **judgement** was correct. Not being aware of Trainmaster **Farr's** directions, he wanted to insure that the main line was clear and this was an operational determination. **His** choice of words, however, were improper. We find no reason to question Operator **Urwin's** testimony that he heard Claimant use the words **"---"** and **"god damned eastbound"** which affirms Conductor **Burkhart's** testimony. Claimant even acknowledged that he used mild profanity. The disparity, of course, lies in defining profane.

From the record, we cannot agree that a five (5) day suspension was warranted **under** these facts and circumstances, since **Claimant's** response did not reflect insubordination or personal rudeness which was strikingly at odds with the applicable operating rules. His concern **for** safety of the main line was indeed genuine and for **the** benefit of the Carrier, but he expressed his uneasiness in the wrong way. As an experienced Train Dispatcher, he was mindful of the Operating Rules regulating employe **deportment**, particularly Rule 309 of the Rules and Instructions **Governing Train** Dispatchers and Operators which reads in part: 'Train Dispatchers and operators must be courteous in their telephone conversations., and some form of corrective discipline is justified. A five (5) day suspension, however, is excessive. **We** will reduce the instant penalty to a Letter of Reprimand with the added admonition that we will not tolerate such behavior in the future. Claimant is advised that, however noble his intentions, he is still expected to observe the operating rules.

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 are 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

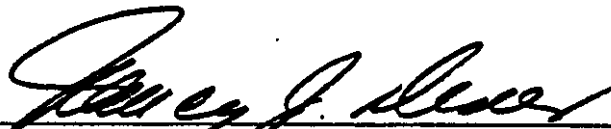
That the discipline was **excessive**.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD **ADJUSTMENT** BOARD
By **Order** of Third Division

ATTEST:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 29th day of September, 1983.