

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30926
Docket No. CL-28858
95-3-89-3-371

The Third Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

(Transportation Communications International
(Union

PARTIES TO DISPUTE: (

(Elgin, Joliet & Eastern Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Union
(GL-10383) that:

1. Carrier violated the effective agreement when, following an investigation on September 9, 1988, it assessed discipline in the form of three (3) demerits against the record of Tower Operator D.R. Lightfoot, Jr. without just cause;
2. Carrier shall now rescind the discipline assessed and shall clear Mr. Lightfoot's record of the charges placed against him."

FINDINGS:

The Third 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 waived right of appearance at hearing thereon.

This dispute concerns the Carrier's decision to assess three demerits against Claimant for not marking off from his assignment on August 3, 1988. On August 16, 1988 the Trainmaster ordered Claimant to report for an Investigation on August 23, 1988 "to develop all facts and to determine your responsibility, if any, for your alleged failure to properly mark off for your 1st turn West Gate Tower Operator assignment on date of August 3, 1988." The Investigation was postponed twice by agreement of the Parties, and was ultimately conducted on September 9, 1988. On September 16, 1988, the Trainmaster informed Claimant that:

"[f]rom the facts developed at this investigation and from a review of the transcript, it has been determined that you were responsible as charged, thereby in violation of Rule 704, Rules of the Operating Department. For your violation of the aforementioned rule, you are hereby assessed three (3) demerit marks. The degree of discipline assessed was determined, in part, upon consideration of your prior record...."

The Organization contends that the discipline must be rescinded. It argues that Claimant was denied a fair and impartial investigation. It further maintains that the record does not establish that Claimant committed any offense for which he should have been disciplined.

The Carrier asserts that the discipline should be upheld. It argues that the investigation was fair and impartial. It further contends that evidence developed at the investigation established that Claimant did not mark off from his assignment, as charged. The Carrier also maintains that the Organization's Statement of the Claim to the Board was defective.

The Board has concluded that the discipline was not supported by substantial evidence in the record, and that the three demerits must be removed from Claimant's record. As a result, the Board does not need to address the Organization's contention that Claimant did not receive a fair and impartial investigation.

Claimant has been employed as a Tower Operator with the Carrier since 1976. Prior to the date in question in this dispute, Claimant was charged with having violated traffic regulations while on his way to work, and was directed to report for an investigation on August 3, 1988. The Hearing was scheduled during his work hours on that date. It is undisputed that Claimant was not at work on that date. The Carrier asserts and the Hearing Officer apparently determined that Claimant did not notify the Chief Train Dispatcher that he would be absent from work on that date. The Organization contends that Claimant did in fact notify the Chief Train Dispatcher on August 2, 1988, and that this is demonstrated by the testimony of the Chief Train Dispatcher at the investigation.

The Board agrees with the Carrier that the Board does not resolve credibility disputes, since the Hearing Officer has had the opportunity to view the witnesses and hear their testimony. However, a careful reading of the record before the Board demonstrates that this dispute is not among those whose resolution depended upon the credibility of the witnesses. The Board further agrees with the Organization that the record contains substantial

evidence that Claimant did notify the Chief Train Dispatcher on August 2, 1988.

Claimant testified at the Hearing that he told the Chief Train Dispatcher that he would be absent on August 3, 1988, and that this occurred during a telephone conversation between the two men on August 2, 1988. The Chief Train Dispatcher confirmed that the telephone conversation occurred, and that Claimant had initiated the call. Claimant further testified that he told the Chief Train Dispatcher that he had received a copy of a letter through the tube system, and had then signed the letter and returned a copy to the Trainmaster. Claimant also testified that he told the Chief Train Dispatcher that this letter directed him to appear at an Investigation on August 3, 1988, and that he had just been informed that the August 3, 1988 Investigation was going to proceed as scheduled. Claimant then testified that he informed the Chief Train Dispatcher that he would "be off tomorrow", that the supervisor "said okay", and that the conversation ended at that point. Claimant also testified that the Chief Train Dispatcher "seemed kind of busy" during their August 2, 1988 telephone conversation.

The Chief Train Dispatcher testified that Claimant did not mark off for August 3, 1988 during their telephone conversation on the preceding day. The Chief Train Dispatcher testified Claimant only told him that Claimant had received a receipt for a registered letter, which Claimant assumed concerned an Investigation, but that Claimant was not certain of that fact. (Claimant testified that he had been notified to pick up a registered letter at the Post Office, but that he received the notice of the August 3, 1988 Investigation through the tube system before he could do so.)

After this portion of the Chief Train Dispatcher's testimony, the Hearing Officer recessed the Investigation to allow the Organization to secure the letter that Claimant testified he had received through the tube system on August 2, 1988, concerning the August 3, 1988 Investigation. The Chief Train Dispatcher was then shown a copy of the letter. He acknowledged that he had received a copy of that document, and that he was in fact aware that the Investigation had been scheduled for August 3, 1988. He further testified that he received his copy of the letter before August 3, 1988, but that he did not know if he had received it before he and Claimant had talked by telephone on August 2, 1988. The Chief Train Dispatcher also testified that when he was notified that Claimant had not reported for work on August 3, 1988, he (the Chief Train Dispatcher) "had no idea" why Claimant was not at work on that date.

The Board has concluded that the unique circumstances of this case require the Board to overturn the discipline at issue. The Chief Train Dispatcher candidly acknowledged that he knew prior to August 3, 1988 that Claimant had been directed to attend an Investigation conducted by this Carrier on August 3, 1988. There is no dispute as to this critical fact. While there is a dispute as to what Claimant told the Chief Train Dispatcher in their telephone conversation on August 2, 1988, the record is clear that the Chief Train Dispatcher knew Claimant was scheduled for the Investigation for August 3, 1988 prior to his being informed on August 3, 1988 that Claimant had not reported for work on that date. This undisputed fact contradicts the testimony at the Hearing of the Chief Train Dispatcher that he did not know why Claimant was absent when so informed on the morning of August 3, 1988. As a result, the Board has concluded that the discipline was not based on substantial evidence in the record.

The Board stresses that nothing in this decision should be taken as relieving employees of their responsibility to mark off their absences from work by whatever procedures are normally used for providing that notice. The Board does not need to determine whether Claimant did in fact mark off his absence for August 3, 1988 on August 2, 1988, since under the unique facts of this case, the Chief Train Dispatcher admitted that he knew before August 3, 1988 that Claimant was required to attend an Investigation conducted by this same Carrier.

The Board also agrees with the Organization that the second portion of the Claim presented to this Board was not defective, as alleged by the Carrier in its Statement of Position. That part of the Claim is merely a statement of the remedy requested by the Organization. It in no way introduced a new issue to the proceedings, since that remedy was requested in the proceedings on the premises.

The Agreement was violated. Accordingly, the claim is sustained. The Carrier is directed to rescind the discipline assessed and shall clear Claimant's record of the charges placed against him.

AWARD

Claim sustained.

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O R D E R

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 Third Division

Dated at Chicago, Illinois, this 8th day of June 1995.