



Award Number 17490

Docket Number CL-16663

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

G. Dan Rambo, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP
CLERKS, FREIGHT HANDLERS, EXPRESS AND
STATION EMPLOYES**

**THE DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6179) that:

1. The Carrier's action in assessing demerits on Mr. W. C. Vorpagel's record is unreasonable and unjust.
2. The Carrier shall now dismiss the charges and clear Mr. Vorpagel's record of all demerits assessed in this case.

OPINION OF BOARD: Claimant, an employee in the Traffic Service Bureau of Carrier, on May 6, 1966 was handed the following letter at his office in Denver, Colorado:

"Denver—5/5/66

W. C. Vorpagel:

Formal investigation will be held in the Conference Room, Personnel Department, Third Floor, Rio Grande Building, 1531 Stout Street, Denver, Colorado, at 9:00 A.M., Mountain Daylight Saving Time, Monday, May 9, 1966, to develop facts and place responsibility, if any, in connection with alleged irregularities in procedures in handling car SFRD 12477 which arrived Denver 11:30 P.M., March 31; and subsequent conversations in connection with this car involving customer's representatives.

Your presence as principal, in company of representative of your choice if so desired, is required.

C. J. Harbeke"

Hearing was so held with Claimant and representatives of the Organization present. At the outset of the hearing Mr. J. V. McEnany, Assistant General Chairman of the Organization, entered a protest to the sufficiency of notice served on Claimant as set out above. However, when asked by the hearing examiner if he was ready to proceed Claimant replied in the affirmative and that his Organization representatives were present.

There followed the testimony of the Claimant, a co-worker, Claimant's supervisor and the Vice President, Traffic, of Carrier.

The Examiner caused Mr. Smith, Claimant's supervisor, to read into the record the body of a letter dated May 3, 1966 purporting to be from one Marilyn Grunwald, Office Manager of McFerren, Speakes and Gustafson, Denver food brokers, another of whose employees had on April 1, 1966 by telephone requested diversion of SFRD 12477. The letter appears nowhere in the record, but the body as read into the transcript of hearing set out Miss Grunwald's version of a telephone conversation of May 2, 1969 in which she alleges that Claimant said, "I certainly wish you would," in response to a threat by her to remove the business of the Dole Corporation from Carrier. The letter goes on to attempt to carry out her threat to divert the said Dole Corporation business. See below:

"Please accept this letter as your authorization to divert trailer car number SFRD 12477, which shipped from the Dole Corporation in San Jose, California March 29, 1966, arriving in Denver April 5, 1966.

This office originally diverted the car and later that same afternoon one of your employees called saying no diversion was necessary as the car was consigned to Imperial Warehouse. We thought this rather odd, but as we did not have the original shipping papers could not check. A few days later your Mr. Will called wanting the letter of diversion. This being contradictory to previous instructions, we asked Dole on the west coast to send us shipping papers, of which to this date we have not received, therefore, the delay in the diversion letter. I hope you can appreciate our position as we are a Dole Corporation employee and not a D&RGW employee.

Today, after my office having been insulted by your Mr. Will (of which we are not accustomed) and threatened that our organization would be in jepordy, I personally talked to your Mr. Will. At the time of this discussion I mentioned we could eliminate this problem in the future with D&RGW by shipping Santa Fe or Union Pacific and he said 'I certainly wish you would.' You will note that there is a carbon copy of this letter going to the Dole Corporation in San Jose, which at their descretion can pass on to their traffic department, whereby, we recommend to ship by other lines, therefore, not causing the D&RGW any further problems per Mr. Will's request."

Hearing transcript reveals that there were numerous attempts made by phone by Carrier's Traffic employees to secure the needed written confirmation of diversion and it was finally secured as set out above as part of the Grunwald letter.

There is no testimony by anyone or evidence of any nature supporting the allegations made in the Grunwald letter. In fact those allegations are denied and contradicted by the testimony of Claimant and placed in doubt by the testimony of Claimant's supervisor who concluded the subject telephone conversation with Miss Grunwald and found her to be calm, cooperative and uncomplaining. Neither Miss Grunwald nor any other person appeared to introduce, verify or substantiate the allegations in the letter which

neither Claimant nor his representatives had seen or heard of prior to the hearing.

Carrier correctly points out that any consideration of this matter by this Board is restricted by the wording of the submitted claim, i.e. whether the assessing of demerits was unreasonable and unjust. Carrier further correctly points out that it is not the function of this Board to determine the credibility of witnesses, weigh evidence or substitute the Board's judgment for that of the Carrier in the absence of a showing that Carrier acted in an arbitrary and capricious manner. It is the opinion of this Board that such a showing has been clearly made.

The exception of Claimant's representative to sufficiency of notice served on Claimant was well taken. The short time period, Friday to Monday, was hardly reasonable and by no stretch of the imagination could the wording of the notice be construed to be a precise charge. Carrier has cited many Awards where other notices have been held sufficient, but none so vague as herein. However, Claimant by announcing that he was ready to proceed certainly waived his right to additional time and may have waived the jurisdictional defect of unprecise charge.

The opinion of the Board is based on the whole record wherein Carrier wholly failed to establish acts of impropriety by Claimant. On the contrary all evidence introduced, including in large part the surprise Grunwald letter which was apparently never introduced, since it does not appear in the record, point to acts or impropriety or failure to act on the part of Claimant's accuser or her fellow worker. The only sin alleged to Claimant is the unsupported, challenged statement included in the subject letter.

This is manifestly insufficient to assess any punishment whatsoever on Claimant, whatever gains in customer relations might result therefrom.

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 Carrier's action in assessing demerits on Claimant was unreasonable and unjust.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of September 1969.

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