

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25865
Docket Number SG-25950

John E. Cloney, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(Seaboard System Railroad

STATEMENT OF CLAIM: "Claim of the General Committee of the Brotherhood of Railroad Signalmen on the former Louisville and Nashville Railroad Company:

On behalf of Leading Signalman R. C. Jones, who was suspended thirty calendar days July 13 - August 11, 1983, following an investigation held on June 20, 1983, for pay for all time lost including time spent in the investigation, plus any expenses incurred by Mr. Jones to attend the investigation, and that his record be cleared of all the charges." [Carrier file: 15-55(83-36) 11 R]

OPINION OF BOARD: The Claim involves a suspension growing out of alleged misconduct by Claimant while checking into a motel while on Company business and for which motel stay the Company was paying.

The only real issue is whether this Board may find an investigation established substantive evidence to support a charge of violation of a specific Rule where the evidence consisted entirely of a letter of complaint of a non-employee who did not testify, the testimony of a Supervisor who interviewed the letter writer but who did not witness the alleged incident and the testimony and statement of the charged employee.

Rule G, which Claimant is alleged to have violated reads in pertinent part:

"Employees must maintain good moral character and avoid violations of the law, and failing to do so, will be subject to dismissal.

Employees who are vicious, profane, or uncivil in deportment, will be subject to dismissal."

On June 1, 1983 Claimant was notified that:

"You are charged with violation of Rule G . . . where report was received from Downtown Motor Lodge . . . advising that when you checked into motel about 2:00 A.M. . . . to occupy one of the rooms rented for . . . Gang #4 . . . your conduct was violent and you called the night desk clerk . . . several obscene names. . . ."

At the subsequent investigation a letter from the Night Clerk was read into the record over the objection of the Organization. In the letter the Clerk stated the office is locked at night. Claimant came to the walk-up window, insisted on being let into the office and "became violent, beating on the glass with both fists and calling me obscene names." The letter went on to say Claimant again became agitated when she told him his room was on the second floor. When she said a first floor room was not authorized he again called her "obsence names" and on learning who he would be rooming with, called that man "a name." She reports she was "terrified of him" and believes he would have beat her up if he could have gotten in the office.

R. W. Muse, System Signal Construction Foreman testified the Clerk told him of the incident about 6:30 A.M. the next morning. She stated she was going to report Claimant. Several days later Muse again spoke to the clerk. She then told him Claimant had called her a "pig" and a "bitch" and said "I am not staying with that _____" when he learned his roommate's identity. He then left calling her a "fat ass."

At the hearing Claimant presented a four page statement dated June 3, 1983. In it he contended he arrived at the Motel late at night. The lobby door was locked but the Clerk "ignored" him. He knocked again and finally noticed a night check-in window to the side. He went to the window but couldn't hear the Clerk through the small hole. Eventually he heard her and when told he would be on the second floor he questioned that as unusual. He contends the Clerk then told him he could take his "junk and go someplace else." She then told him his roommate's name and he asked the Clerk to write his name in the hotel records so he could receive phone calls. He states she at first refused and did so only after he said he would not leave the window until she did. He denied he was at any time "obscene" or "vicious".

Claimant testified he went to the Clerk after learning she had written the letter of complaint and apologized to her, not because he had done anything wrong, but because he may not have been "gentlemanly" and may have raised his voice.

On July 11 Claimant was informed the investigation which resulted from reports that his "conduct was violent (he) called night desk clerk . . . several obscene names" had been reviewed by Management and he was suspended for thirty days as "a result of these charges and investigation."

10 The Organization argues the only evidence against Claimant is the written statement of the Hotel Clerk and the hearsay testimony of Muse and, therefore, no substantial evidence against him was produced.

Carrier contends it "has sustained its burden of producing substantive evidence" of Claimant's guilt. It points out Rule 55 does not prohibit use of written statements nor does it require that a witness who submits a written statement must be present at the investigation. Carrier argues the written statement was corroborated by Muse and is also supported by admissions of Claimant. 11

This Board views this as an extremely troublesome case for many reasons. Carrier is correct in stating that numerous decisions of this Board have held written statements to be admissible in investigations even when the author is not available for examination. A review of the cases to which this Board has been directed in which discipline was upheld based upon written statements all seem to fall within certain categories such as (1) Those in which the written statement was corroborated by the testimony of others (PLB 820, Award 68) or (2) Those in which one written statement is corroborated by the written statement of others (Third Division Awards 17424 and 10596) or (3) Those in which the written statement is not contested or denied (Third Division Award 24880). 12

We cannot agree with Carrier that the testimony of Muse is in any way corroborative of the Clerk's written statement as the term "corroboration" is generally understood. Muse contributed nothing of his own knowledge. He was not a witness to the event. He interviewed the Clerk after her letter was received and merely testified to what she told him then. From the testimony of Claimant it is apparent there had been a confrontation but this does not mean his testimony is in any way corroborative of that of the Clerk. In fact, on almost every significant point it is directly contradictory. We conclude that the statement of the Clerk which was introduced at the Hearing was not corroborated or supported by testimony or statements from any witness to the event. 13

The evidence against Claimant was limited to (1) the written statement and (2) a greatly expanded and particularized version of the written statement related by a witness whose entire testimony consisted of what he had been told by the author of the statement. It is not possible to determine now the relative weight given to each by Carrier in reaching its decision, but it appears from the finding that Claimant's conduct was violent and obscene that Muse's testimony was considered important and perhaps persuasive. 14

We have noted above the line of cases approving use of written statements at investigations but this Board is of the view that those cases are not dispositive of our issue. 15

16 In this case after receipt of the written statement a Carrier Supervisor interviewed the author of the statement and then testified as to what he had been told. The testimony greatly expanded on the contents of the written statement. It appears that testimony was accorded considerable weight in reaching a decision.

17 Rule 55 of the Agreement provides employees shall not be disciplined without investigation and at the investigation "he and his representative shall have the right to cross-examine witnesses who are used in support of the charges." While Muse was testifying at the investigation the letter from the Clerk was read into the record. The Organization asked it be stricken as she was not present for examination. At least twice during examination of Muse the Organization representative described the testimony as hearsay. Thus there was an objection raised as to procedure.

18 The Board considers the Rule requirement that there be a right to cross-examine witnesses must be read as mandating a meaningful opportunity in the traditional sense. We conclude Claimant had no opportunity to cross-examine Muse. True, he was on the stand and was asked questions but as he stated when asked about the incident, "All I know is what Ms. Good said to me."

19 It may be argued that a written statement cannot be cross-examined but this Board accepts such statements into evidence. That is true but we deal only with the case before us. In it a written statement was introduced. The statement was then expanded and amplified by proxy. In effect, Carrier was allowed to have Muse examine the maker of the statement and then present the results of that examination.

20 This Board must bear in mind what its functions are. We are not a Court enforcing Criminal Laws. It is not for us to say parties must establish their positions in accord with Rules of evidence applicable elsewhere. We do not attempt to do so here. We must not be understood to hold written statements inadmissible or to lack probative value. What we do hold is that in the circumstances of this case the charge was not proven by substantial evidence.

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 Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of January 1986.