

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32643
Docket No. TD-32871
98-3-96-3-204**

The Third Division consisted of the regular members and in addition Referee Jonathan S. Liebowitz when award was rendered.

**(American Train Dispatchers Department/International
(Brotherhood of Locomotive Engineers
PARTIES TO DISPUTE: (
(Burlington Northern Railroad**

STATEMENT OF CLAIM:

"This is to advise that your decision, as representative of the Burlington Northern Railroad (referred to as the carrier), to suspend dispatcher M. J. Royce for five (5) days is not acceptable. By this appeal, The American Train Dispatchers Department/Brotherhood of Locomotive Engineers (referred to as the organization) requests reconsideration of this matter and demands that full compensation be afforded Mr. Royce for all time lost and any reference to this unfair discipline be stricken from Mr. Royce's personal record."

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 were given due notice of hearing thereon.

By letter dated October 7, 1994, Carrier directed Claimant to attend an Investigation on October 12 "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to properly provide the required information on Train Sheets while assigned as a Train Dispatcher in the Seattle Dispatcher Office." At the outset of the Investigation held on October 19, 1994, the General Chairman objected that the Notice of Investigation did not contain any specific times of violations or any specific Rules, stating that the Organization could not prepare a defense without specific violations. But both Organization and Claimant stated that they were ready to proceed with the Investigation.

On October 4, 1994, Carrier conducted an audit of Claimant's Train Sheets for September 1994 and determined that Claimant had shown incorrect Chief Dispatcher's Bulletin numbers in two instances, on September 25 and 26, had not shown the weather condition on September 3 and September 18, had not shown total time on duty, September 6, and had not shown time off duty prior to entry on duty on September 20. According to Carrier, it delivered letters to Claimant dated April 12, September 9 and October 4, 1994, stating exceptions to entries on Claimant's Train Sheets. Claimant denied receiving two of the letters. At the Investigation, Claimant asserted that he was unfamiliar with the requirements as outlined in the Train Dispatchers Manual, but stated that a copy of the Manual was readily available to him. Carrier cited Rule 50.2 as stated in the Manual Rules concerning Train Sheet Information; Claimant answered that he knew and understood that Rule. Carrier cited Rule 48.2.1 concerning review instructions as to general orders, notices, Chief Dispatcher's Bulletins and other instructions for the territory being handled. Claimant said that he knew and understood that Rule. Carrier cited Rule 1.3.1 of the General Code of Operating Rules which states:

"The Train Dispatchers and Control Operators must have a copy of the rules and instructions for Train Dispatchers and Control Operators. They must be familiar with and obey these rules and instructions."

Claimant testified that he knew and understood that Rule. Carrier cited Rule 1.13 of the same Operating Rules concerning reporting and complying with instructions from Supervisors who have the proper jurisdiction and Managers of various departments when the instructions apply to their duties. Claimant answered that he knew and understood that Rule.

When asked about the alleged omissions from the Train Sheets, Claimant responded that he would let the exhibits (the Train Sheets) speak for themselves as to two exhibits and appears to have claimed that he did fill in the necessary information on the other Train Sheets. A General Guideline in Carrier's Bulletin No. 37 states 13 different items that could be audited. D. L. Burns, Managing Dispatcher Performance, testified that the specific audit only looked at three of those categories. The Organization objects to consideration of only three of 13 categories. But there is substantial evidence in the record that Claimant failed to complete the requisite information on the Train Sheets.

Claimant was offered alternative discipline (a one-day suspension) pursuant to Paragraph No. 3 of the parties' Memorandum of Agreement dated May 2, 1991. The record shows that Claimant left it to Carrier's discretion whether or not to convene an Investigation. Claimant did not decline the alternative discipline in writing as required by Article 24(c) of the parties' Agreement. But he did decline it because he believed that by accepting it, he would have admitted failure to meet Carrier's 90% standard for passing an audit.

By letter dated November 7, 1994, R. L. Danielson, Superintendent Dispatcher Operations, Seattle, Washington, advised Claimant that as a result of the Investigation, he was being suspended from Carrier's service for five days starting on November 9, 1994 and ending on November 13, 1994 for Claimant's failure to properly provide the required information on Train Sheets on September 3, 6, 18, 20, 25 and 26, 1994, and that an entry to that effect, stating violation of Rule 50.2 of the Train Dispatchers Manual, would be made in Claimant's personal record.

The Organization maintains that the discipline process was fatally flawed because of the multiplicity of roles of Superintendent Danielson. While the Organization cites Superintendent Danielson's involvement with Claimant's decision not to accept alternative discipline, with noticing the Investigation, and with conducting the Investigation, and with issuing the Letter of Suspension to Claimant, and cites statements by Mr. Danielson during the Investigation, contending that Superintendent Danielson investigated the alleged incident, deciding that a formal Investigation was warranted, conducted the Investigation, determined Claimant's guilt, assessed discipline, and denied the initial appeal, our careful review of the record shows that the Investigation was fairly and impartially conducted and that Claimant admitted the charges in part. It has been held that when the same officer assesses the discipline.

prefers the charge and denies the first level of appeal, the Carrier creates an appearance that it is not independently evaluating at each step of the disciplinary process, but that while the Carrier combines functions into one person at its own peril, there is no denial of contractual due process so long as Claimant's rights are not prejudiced. SBA Appendix K Board Award No. 146. On this record, we find that Claimant was afforded procedural due process. We do not discern any prejudice to Claimant's right to present a defense arising from the claimed multiple roles played by the Conducting Officer. Second Division Awards 8367, 10325, 11496.

The Organization avers that Claimant could not be disciplined for violation of Rule 50.2 because said Rule was not cited in the Notice of the Investigation. The question is whether the charge was sufficiently worded to place Claimant on notice as to the subject matter of the charge and to enable him to prepare a defense. We note that Agreement Article 24 does not require reference to the Rule numbers allegedly violated but does require that the charge be "precise." In this instance, we are satisfied that the charge against Claimant was specific as to the allegations of wrongdoing and that Claimant received adequate notice of the charges against him. Here, the charge alleged conduct which incorporates the substance of the Rules. Therefore, the charge was sufficiently "precise." Third Division Award 26276.

Carrier's procedural objections that the claim was improperly filed because it was not sent to its General Superintendent Operations (Seattle Office) and that the Organization failed to reject Carrier's denial in writing as required by Agreement Article 24(c), and its contention that the claim must be dismissed, therefore, have been considered. The record shows that Carrier did receive the Organization's rejection of the Carrier's denial and that Carrier timely received the claim at issue. Even if sustained, Carrier's procedural objections would be cumulative as to our decision.

With respect to the merits, we find that the record contains substantial evidence in support of Carrier's determination. Issues of credibility must be determined by those who received the evidence and testimony and are not properly within the purview of this Board. Second Division Award 9393.

We note that Claimant was on prior notice as to like deficiencies and that alternative discipline was offered and declined. On this record, we do not find that the five-day suspension imposed was unreasonable or exceeded the discretion of the Carrier once guilt of the charge had been determined. Third Division Award 21245.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

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

Dated at Chicago, Illinois, this 20th day of July 1998.