

PUBLIC LAW BOARD NO. 2719

AWARD NO. 14

CASE NO. 14

NW FILE: YM-DET-80-101

RYA FILE: YM-DET-80-101

PARTIES TO DISPUTE:

Norfolk and Western Railway Company

and

Railroad Yardmasters of America

STATEMENT OF CLAIM

"That F. W. Christopher be returned to service as a Yardmaster immediately with all rights and seniority unimpaired, and that he be paid for all time lost as result of the assessed discipline of thirty (30) days actual out of service."

OPINION OF BOARD

On May 30, 1980, this Claimant was notified of an investigation concerning a charge of failure to protect an assignment from 4:00 p.m. to midnight on May 23, 1980. The charge stemmed from the assertion that the Claimant marked off for personal reasons without proper authority after a request to mark off had been denied.

Subsequent to the investigation, the Carrier assessed a thirty (30) day actual suspension.

The Claimant was regularly assigned to a 4:00 p.m. to midnight position with rest days on Wednesday and Thursday.

In mid-May, the Claimant was given permission to be off on Saturday, May 17, 1980, in order to attend a wedding. Later, in a discussion, the Claimant stated that he had also requested to be off on May 23. On the day preceding the anticipated day off, the Employee was advised that he could not be absent on that Friday. Nonetheless, in a note dated 11:30 p.m. on May 22, 1980, the Claimant wrote a "To whom it may concern" note stating:

"This is to inform the N&W that I will be unable to protect my assignment, Job #8 Boat Yd. Y.M 5/23/80 (4PM to 12M.) Due To Personal Reasons."

The Employee did not protect his assignment, which gave rise to this dispute.

The Organization asserts that the Hearing officer was biased, that time limits to render the discipline were not complied with and that the chief witness against the accused rendered the discipline.

The Board has considered the rather extensive record in this case, and although we are normally hesitant to issue a decision based upon procedural matters rather than on the merits of the dispute, we find that there is a procedural defect in this case which is contrary to the parties' agreement.

The agreement between the parties requires - in Article 6 - that no Yardmaster will be disciplined without a proper hearing. We are disturbed by the fact that a Carrier representative served as a witness in a matter of significant dispute between the Carrier and the Employee and then - as far as the record discloses - made credibility determinations and imposed the discipline against the Employee. Exhibit D attached to the Employees' Submission shows that the Assistant Superintendent - who was a witness against the accused Yardmaster - made fact determinations referring to himself in the third person. The authors of countless Awards before Public Law Boards and the National Railroad Adjustment Board have repeatedly held that it is not incumbent upon the Boards to substitute their judgment for the Carrier's concerning matters of credibility resolution. Rather, it is appropriate to accept the credibility determinations of the individual who observed the witnesses and heard the testimony.

But here, inasmuch as this Board may not make credibility resolutions, we wonder how and in what manner independent credibility resolutions were made prior to the determination of guilt concerning this Claimant, when the individual who initially assessed discipline was an advocate witness in the proceedings against the accused. Accordingly, we will sustain the claim.

#### FINDINGS

The Board, upon consideration of the entire record and all of the evidence finds:

The parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due and proper notice of hearing thereon.

AWARD

1. Claim sustained.
2. The Carrier shall comply with this Award within thirty (30) days of the effective date hereof.

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Joseph A. Sickles  
Chairman and Neutral Member

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J. N. Sailor  
Carrier Member

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T. W. Goodell  
Organization Member

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DATE