PUBLIC LAW BOARD NO. 5046

UNITED TRANSPORTATION UNION
YARDMASTER'S DEPARTMENT

VS.

CSX TRANSPORTATION, INC.

Award No. 3
Case No. 3

QUESTION AT ISSUE:

"Claim and request that regular yardmaster A.E. Rucker of Chicago, Illinois be paid for the five (5) days' suspension, i.e., December 22, 23, 24, 25, and 26, that was assessed him as the result of an investigation held on November 14 and November 19, 1990, and also for him to be paid the punitive rate over and above the straight time rate for December 24 account of his position worked that holiday. Also, he is to be paid for November 14 and 19, 1990, the days that the investigations were held, and all entries concerning this discipline be removed from his service record."

FINDINGS:

This is a reasonably straightforward discipline case which has been expanded into a "federal case" by the "cabin-track attorney" tactics engaged in by individuals in their attempts to obfuscate the issues. Their misuse of Latin phrases added nothing to the merits of the case. Instead of working toward a discovery of the facts concerning the matter under investigation, they did their best to engage in supposed legal strategies, objections and accusations intended to confuse the situation. Their statement that "the discipline assessed was not quid pro quo to the charge" shows a complete lack of knowledge of the

meaning of the Latin expression which is nothing more than the giving of one valuable thing for another. WHAT FOR WHAT.

When the theatrics are stripped away from the 130-page hearing transcript, it becomes clear that Claimant was employed as a second-shift Yardmaster at Carrier's Barr Yard in Riverdale, Illinois. During his tour of duty on November 7, 1990, Claimant was responsible for the make-up of train R336-07. After this train eventually departed from the yard, it was discovered that a group of cars on the make-up track which were supposed to be included in the train had not been coupled to the train and did not depart with the train. As a result of this situation, Carrier was required to handle these missed cars as a special train movement for the consignee.

Subsequently, Claimant - along with other employees involved in this missed connection - were instructed to appear for an investigatory hearing on November 14, 1990. At the investigation, Claimant was present, represented and testified on his own behalf. The investigation hearing was recessed on November 14, 1990, to permit the calling of additional witnesses. The hearing was resumed and concluded on November 19, 1990. Claimant was present throughout.

Thereafter, by notice dated December 3, 1990, Claimant was notified that he had been found at fault in this situation and was assessed a 5-day suspension from service. Appeals from this assessment of discipline have been handled in the usual manner of grievance handling on the property and, failing to reach a

satisfactory resolution thereon, the matter has come to this Board for final and binding adjudication.

During the on-property appeals procedures and before this Board, the Union has argued that (1) there was no precise charge made in this instance; (2) there were witnesses which the Union requested who were not called by the Carrier to testify; (3) the hearing officer(s) failed to resolve issues of credibility and thereby denied Claimant a fair and impartial hearing; and (4) Carrier failed to sustain the burden of proof that Claimant was guilty as charged. The Union presented to the Board forty-two (42) citations of authority allegedly in support of their arguments.

The Carrier, on the other hand, contended that all pertinent witnesses were called to testify; that Claimant and his Union had the right and opportunity to call any witnesses which they wished to call; that the charge as made was precise and that the charge as made was supported by more than substantial evidence.

This Board has reviewed the hearing transcript along with the on-property exchanges of correspondence. The Board has considered the testimony of the parties and the applicable citations of authority as submitted at the Board hearing. It is our determination that the charge notice as issued in this instance is sufficiently precise to have put Claimant on notice of the action which was to be investigated. He was not surprised nor caught off-guard prior to or during the hearing on November 14 and 19, 1990. He was vociferously represented throughout the

hearing. He testified on his own behalf even to the extent of offering cavalier and less than candid answers to some of the questions put to him during the hearing. The Union's contention relative to the issue of precise charge is rejected.

On the allegation relative to absence of witnesses, this contention too is not convincing. The Claimant and the Union had every right and opportunity to call any witness which they chose. In fact, this hearing was recessed to permit the calling of additional witnesses. Claimant was denied nothing in this regard.

In this, as in practically every discipline case, there is a marked divergence of opinion and testimony between the Carrier witnesses and the Claimant. It has been long held that Boards of this nature cannot and will not attempt to resolve conflicts of testimony or make determinations on credibility issues. While these on-property disciplinary hearings are not courts of law and while the rules of evidence in these hearings are not the same as those found in courts of law, the hearing officer in such a proceeding does have the authority and responsibility to make credibility determinations based upon his/her observance of the witnesses and his/her hearing and understanding of the testimony as it is presented. The hearing officer is more than a passive fact gatherer.

Section 3, R.L.A. Boards have repeatedly held that the hearing officer in railroad discipline situations is the officer who hears the testimony and who observes the demeanor of the

witnesses who testify. Therefore, it has been held that the hearing officer is the proper officer to make findings of credibility and make determinations of guilt or innocence of the charges.

It is disturbing, therefore, to find in this case that the hearing officer(s) stated on the record that:

> "Mr. Rogers, your objection will be noted and made part of the transcript. The investigation will continue, I will clarify one thing that you have stated that the investigating officer will determine. The investigating officer does not determine anything to do with the investigation, except to have a fair and impartial investigation, and to provide all facts under investigation relative to the moves being made on the date of November the 7th, 1990.
>
> As far as the investigating officer having anything to do with the transcript or any discipline, or anything to do with this hearing, the only thing the hearing officer is here for is to make sure that it is held in a fair and impartial manner and that all facts are presented as known to everyone available."

It is further disturbing in this case to find that the hearing officer(s) made no recommendation to the Carrier relative to their hearing of the testimony and/or their observation of the witnesses during the testimony and/or their opinion of the credibility of the testimony. Neither did the hearing officer(s) assess the discipline in this case. While this Board has not been made aware of any provision of the negotiated rules agreement which requires or dictates who will assess discipline following a hearing, common sense and common fairness strongly suggest that the hearing officer as the trier of facts should have some first-hand input into the determination of guilt and the assessment of discipline following a hearing in which the

hearing officer presided, heard the testimony and observed the demeanor of the witnesses. This Board has no authority to tell the Carrier who should assess discipline following a hearing and does not do so here. This Board does, however, find the Opinion of Referee John Dorsey in award 17901, Third Division, N.R.A.B. apropos to this situation. There we read:

> "Carrier appointed as hearing office one G.A. Street, Assistant Superintendent, Penn Central Company. After the hearing Street made no report, made no findings, made no decision.
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> The transcript of the hearing discloses numerous conflicts in the testimony of the witnesses. Only the hearing officer who observed the demeanor of the witnesses was qualified to make findings of credibility under such circumstances. See our Award No. 13180 in which we held:
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> > 'There is conflicting testimony in the transcript of the hearing as to material and relevant facts. Only the hearing officer who presided at the hearing and observed the demeanor of the witnesses was qualified to make findings as to credibility. He did not do so. In the absence of resolution of credibility by the hearing officer it cannot be determined whether there is substantial evidence to support the findings made by General Agent Key. We find, therefore, that Carrier failed to afford claimant a fair and impartial hearing. We will sustain the claim.'
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> Also see Award 13240 in which we stated:
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> > '. . . the Hearing Officer made no finding of credibility and made no decision. It is offensive to the concepts of fairness and impartially (sic) that credibility was determined and decision made by Superintendent Brewer who had issued the charge and was not present at the hearing.
> >
> > In the absence of a finding of credibility by a qualified hearing officer the statements of Complainants have no probative value. Consequently, the decision made on the property is not supported by substantial evidence. We will sustain the claim.'

Other apposite Awards are Third Division Award No. 14031 and Second Division Award No. 3266.

For the foregoing reasons we find that Claimant was: (1) not afforded due process; and (2) the charge against Claimant was not sustained. We therefore are compelled to sustain the Claim."

Therefore, it is the conclusion of this Board that the Claim as outlined in the Question At Issue, supra, should be sustained, but only to the extent and within the limitations as set forth in Article 22(d) of the negotiated agreement which states:

"(d) If the final decision decrees that the charge or charges against the employee are not sustained, the record shall be cleared of same and the employee reinstated and compensated for the difference between the amount he would have earned in service and amount he earned from outside employment during the period he was out of service."

AWARD:

Claim sustained to extent outlined in Findings.

James E. Mason
Chairman and Neutral Member

N.B. Grissom
Carrier Member

R.C. Arthur
Employee Member

Issued at Palm Coast, Florida

4/16/93