

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No.13806
Docket No. 13692
04-2-03-2-15**

The Second Division consisted of the regular members and in addition Referee Carmelo R. Gianino when award was rendered.

**(International Brotherhood of Electrical Workers
PARTIES TO DISPUTE: (
(Canadian Pacific Railway Company**

STATEMENT OF CLAIM:

- "1. That the Canadian Pacific Railway Company violated the current Agreement effective September 1, 1941, in particular Rule 12, when they wrongfully dismissed Communications Maintainer David E. Stoa on February 26, 2002.**
- 2. That the Carrier failed to provide Communications Maintainer David E. Stoa with a fair and impartial investigation and failed to provide an accurate and complete transcript of the investigation, as mandated under Rule 12; and,**
- 3. That the Carrier acted improperly because it failed to meet its burden of proof, and properly ascertain that Claimant was, in fact, guilty of the infractions leveled in their letters; specifically its Notice of Investigation dated January 30, 2002.**
- 4. That accordingly, the Carrier be ordered to promptly reinstate Communications Maintainer David E. Stoa to service with all seniority rights unimpaired, and make him whole for any wages and benefits lost including, but not limited to: vacation, insurance, hospitalization, railroad retirement rights and benefits lost commencing January 29, 2002, and continuing until Mr. David E. Stoa is returned to service.**

5. That the Carrier be ordered to promptly remove the improper Notice of Discipline, dated February 26, 2002, and that any and all reference thereto, including all relative correspondence in connection with the alleged matter(s) surrounding the investigation held February 13, 2002, be removed from Mr. Stoa's personal record."

FINDINGS:

The Second 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.

On January 29, 2002, the Claimant, a 12-year employee, was advised he was being held out of service pending formal Investigation into allegations of inappropriate use of company equipment while working as a Communications Maintainer. By letters of January 30 and 31, 2002, the Claimant was instructed to attend the formal Hearing scheduled for February 13, 2002. On February 26, 2002, as a result of the Investigation held on February 13, the Claimant was advised by letter that he was dismissed from the service of the Carrier. All appeals were timely filed and addressed on the property. This dispute is properly before the Board for adjudication.

The Claimant's inappropriate use of company equipment, while not specifically spelled out in the Charging Letter, was for the unauthorized installation of three telephone lines belonging to other supervisory employees on his telephone. In addition, the Carrier claimed he listened in on conversations without proper

authority to do so. These violations were ongoing for a period of about 14 months prior to the Claimant's termination.

In defense of the Claimant, the Organization argues that the Carrier violated its own Rule 12, which guarantees an individual the right to a fair and impartial Hearing. It states that the Carrier was deficient in its Charging Letter when it neither specified the precise Rule(s) the Claimant violated; nor was the exact type of equipment named. As a result, the Organization states, that it was unable to prepare a proper defense.

The Charging Letter is not ideal, However, it does not lack sufficient pertinent information that would inhibit the Claimant or his representative(s) from preparing and providing a suitable defense. The Claimant knew why and for what he was being charged. The progression of the disciplinary process does not happen in a vacuum. This was not something that was sprung on him overnight. Certainly, the two-week period before his Hearing allowed him time to fully understand the situation. The Carrier, in fact, offered the Organization an opportunity for postponement and it passed. The Board sees no evidence, either before or during the Hearing, that the Claimant's rights under Rule 12 were violated or that he was disadvantaged in any way by the allegedly deficient Charging Letter.

The Claimant was not adversely affected by the Organization's contention that it was provided an incomplete transcript. This was a correctible "offense" which the Carrier could and would fix. In any event, this did not materially affect the outcome.

Regarding the merits of the case, testimony and evidence was introduced which the Carrier felt supported its position to impose discipline. The Organization conversely felt the Carrier's case was largely circumstantial. Evidence, it posits, was both speculative and testimonial hearsay. However, hearsay and circumstantial evidence can be components of the substantial body of evidence that distinguishes a successful case from one that lacks sufficient substance or unsupported probability.

In the instant claim, the Carrier produced a number of witnesses whose combined testimony gave credence to the allegation that the Claimant did, without authorization, place three supervisory telephone numbers (extensions) on his own

phone, and that he did eavesdrop on certain privileged conversations. There was no witness who actually saw the Claimant install the unauthorized lines on his phone, but the confluence of witness' testimony would lead a reasonable person to believe he did. He had the expertise and access to accomplish the installation. Witness' testimony, as well as his own actions, give the Board sufficient reason to believe that he did, in fact, also listen in on conversations of others. Why the Claimant would do this is baffling. The Panel is not quite sure what the Claimant expected to accomplish other than to advantage himself by obtaining privileged or confidential information.

An employer has every right to expect honesty and loyalty from its employees. Activity as exemplified in the instant claim ruins the trust necessary to maintain positive working relationships. The Organization argues that the penalty of dismissal is unwarranted. Given the facts, the Board will not substitute its judgment for that of the Carrier.

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 Second Division

Dated at Chicago, Illinois, this 16th day of September 2004.