

The Second Division consisted of the regular members and in addition Referee William O. Hearn when award was rendered.

(International Association of Machinists and  
( Aerospace Workers  
PARTIES TO DISPUTE: (  
(Grand Trunk Western Railroad Company

STATEMENT OF CLAIM:

1. That the Grand Trunk Western Railroad violated the controlling Agreement dated September 1, 1949, as subsequently amended, when it unjustly assessed Machinists M. G. Duncan and R. E. Mell, each, a five (5) working days suspension and a suspended twenty-five (25) working days suspension which would be activated in the event either of them was assessed discipline for any other rule infraction during the year beginning January 17, 1989, and ending January 16, 1990.

2. That the Grand Trunk Western Railroad be ordered to make Machinists Duncan and Mell whole for all losses incurred due to the five working days suspension and clear their records of the twenty-five suspended discipline and all reference to the investigation conducted on January 17, 1989.

FINDINGS:

The Second Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

It is the Organization's position that the charges filed were not precise and that the Organization did not understand the charges. Further, the Investigation was not conducted in a fair and impartial manner.

Upon a complete review of the evidence of record we find that the Organization had the opportunity to present witnesses and to question Carrier's witnesses. The charges in the matter were precise enough to comply with Rule 31. Both Claimants were furnished with a copy of Carrier's General Rules and the record reveals they signed for a copy of these Rules.

The Diesel Shop at Flat Rock, Michigan, is a seven (7) day operation, twenty-four (24) hours a day and during these twenty-four hours a day, seven days a week, Machinists, Electricians and Laborers are employed and on duty. Out of all of the individuals working at this facility, the Claimants were the two cited as the parties who wrote the obscene, abusive and racial language on documents on the bulletin board and on a Supervisor's clipboard. No evidence was submitted by Carrier as to what the motive was for the writing.

Carrier's Supervisors who testified stated they did not see or know of anyone else who saw the Claimants writing the abusive, obscene and racial language on the documents on the bulletin board and clipboard.

The Organization objected to Carrier introducing a handwriting expert as a witness; their contention being that they should have been notified of this witness prior to the Investigation.

See Second Division Award 10790 which stated:

"With respect to the request by the Organization for all the documents and witnesses to be used by the Carrier in the Investigation, the Board can find no practice or Rule that provides for this, and no previous Awards were submitted that would allow for this."

The Board finds nothing in this instance that would require the Carrier to comply with such a request.

Carrier introduced a handwriting expert who testified as to his qualifications which consisted of being a certified document examiner for more than twenty-five (25) years. He was a member of the Independent Association of Questioned Document Examiners, the past president of this organization and certified by them. He was also a member of the Association of Forensic Documents Examiners and certified by this organization. He further testified as to the equipment he has at his disposal. Also, he was qualified as an expert witness in Circuit Court, District Court, and Federal Court and has performed work as a private investigator for different companies. The handwriting expert admitted that other document examiners have disagreed with his opinion. In the instant case he testified that Document No. 5 and the writing on Documents F, J, and K was written by the same person. Another Machinist testified he wrote Document No. 5 to advise Machinists, Electricians, and Laborers of a meeting to be held at the Elks Hall at 3:30 P.M. on August 17th.

As stated in previous Awards of the Board, in discipline cases the burden is on the Carrier to produce substantial evidence in support of the charge. The "substantial evidence" Rule was set forth by the Supreme Court of the United States as:

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."  
(Consol. Ed. Co. vs Labor Board 305 U.S. 197, 229.)

See Second Division Awards 6419, 11179, 11180, 11184, 11239, and 11240.

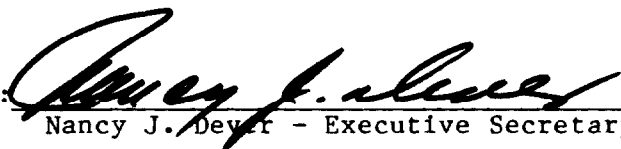
We do not disagree with these Awards, however, we feel sure that the evidence submitted in these cases falls within the substantial evidence Rule. The evidence of record in the instant case falls short of the substantial evidence Rule.

In accordance with the above, it is the opinion of this Board that the Claim should be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:   
Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 11th day of April 1990.