

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24724
Docket Number CL-24593

George V. Boyle, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(
(Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9602)
that:

(1) Carrier violated the effective Clerk-Telegrapher Agreement when, on March 21, 1980, it imposed discipline of twenty (20) days actual suspension from service upon Agent-Operator M. L. Beach, as a result of a hearing held March 5, 1980, and

(2) As a result of such impropriety, Carrier shall be required to compensate Claimant M. L. Beach twenty (20) days' pay beginning March 22, 1980, as a result of his suspension from Carrier's service March 22, 1980 through April 11, 1980, and that his service record be cleared of all charges in connection therewith.

OPINION OF BOARD: The Claimant filled the position of Agent-Operator at the North Vernon, Indiana Telegraph Office on February 21, 1980. When he relieved the Agent-Operator on the prior shift he signed a form certifying the presence of and responsibility for a number of hand-held radios.

At the conclusion of **his shift** one radio was missing and unaccounted for. On February 27, six (6) days later, he reported this to his superior officer.

On February 28 he was notified that he was "charged with responsibility in connection with radio 023242 missing from radio cabinet, North Vernon, during your tour of duty between 7:00 a.m. and 3:00 p.m., February 21, 1980, and your failure to report the fact that the radio was missing."

After hearing he was suspended for twenty days. The **Employees**, on behalf of the Claimant, allege that the Claimant was not afforded "due process", that the Carrier's case was deficient in the burden of proof relative to the circumstances precipitating the event, that the Carrier does not consistently enforce the rules and that the suspension is arbitrary, capricious and discriminatory.

Dealing with these assertions seriatim:

- 1) The Employees assert that "essential testimony" was not heard from an employee who was on duty for 6 1/2 hours of the Claimant's tour and therefore the hearing was not "fair and **impartial**" as required by the rules. Further they assert that while one carrier representative preferred the charges he did not appear as a witness. Also although another representative heard the case, still another issued the findings.

With respect to the "essential testimony", had the Claimant desired this testimony he had ample opportunity to procure it. He declined to do so. When asked by the Hearing Officer:

"Q. 3 Do you desire witnesses on your behalf, and if so, please state the name and titles of each."

The Claimant replied:

"A. 3 No."

If this testimony was essential to the Claimant's case he must take action on his own behalf to advance or safeguard his own interests and not simply object after the hearing that his case was defective. Further, this objection was not raised in timely fashion.

Regarding the Carrier representatives who preferred the charges, heard the case, assessed guilt or innocence and issued the penalties, the Employees have offered no specific provision of the contract with respect to this nor has there been demonstrated any showing of prejudice to the "due process" protections afforded by the rules. In this respect numerous awards have addressed this issue and Third Division Award No. 21017 (Lieberman) is appropriately cited: "With respect to the procedural issue, Carrier asserts that it is its practice to have the hearing officer's review of the facts and his recommendation passed to another officer for concurrence and issuance of the final verdict, which took place in this dispute. Additionally, there is nothing in the Agreement that prescribes who shall prefer the charges, conduct the hearing or who must render the decision and assess the discipline. This Board has dealt with this issue on numerous occasions and we do not concur in Petitioner's objection . . ."

Thus the **Employees'** allegation that the Claimant was denied due process is dismissed.

- 2) The Employees' assertion that the Carrier has not ~~met~~ the burden of proof is similarly specious. The Carrier heard testimony that the Claimant had signed and assumed responsibility for the radio in question. He knew that it was missing at the end of his shift and failed to report that fact until six (6) days later, beyond the limits of when a timely investigation might have been fruitful.

Claimant was aware of his responsibilities in this regard: Questioned by the Bearing Officer:

"Q.37 Are you familiar with C&O/B&O Form CDT-74 Radio Rules, Rule 6, which reads as follows: 'Employees are responsible for radio equipment assigned to, in the possession of, or temporarily being used by them. Such employees shall be responsible for careless or willfully negligent acts which result in loss, damage or destruction of radio equipment. Damaged, destroyed or missing radio equipment must be promptly reported by the employee to his supervising officer'."

Claimant Beach responded:

"A.37. Yes, sir."

The assertion that the **Carrier** was derelict in safeguarding the radios is contradicted by the testimony of H. L. Vogel under questioning by Hearing Officer Frazier:

"Q.21 What type of locking device is the radio equipped with?

A.21 A padlock and hasp.

Q.22 Who has the responsibility of the key for the locking and unlocking of the cabinet?

A.22 The Operator on duty.

Q.23 Only that particular Operator on duty?

A.23 Yes, there is only one key in the office."

Moreover, the Claimant admitted his guilt and therefore assumed culpability. The Hearing Officer questioned the Claimant:

"Q.32 Whose responsibility is it for **the loss** of radio 023242 on date of February 21, 1980?

A.32 I suppose it is **mine**, they were in my possession.

Q.33 **On** what date did you report this fact to your supervising officer, Trainmaster Douglas?

A.33 On February 27, 1980.

4.34 Would you please state, for the record, why the extended period prior to notifying Mr. Douglas?

A.34 I had assumed that the radio was misplaced or picked up by someone and that they had failed to notify me?"

Therefore, based upon the above, the Carrier has substantiated its case; it has borne the burden of proof.

The question of consistency in rules enforcement is contained in a claim by the **Employes** that for an identical infraction, another individual was assessed only a ten (10) day penalty. This the Board finds irrelevant and not germane. Without knowing the facts, circumstances and degree of culpability in any **similar** case the Board cannot and will not make a comparison of penalties. It is sufficient in this case to determine that the penalty of twenty (20) days is not unduly harsh, repugnant to the findings, capricious or discriminatory as to application for the offense.

The Board finds that the offense has been proven, that the Claimant was afforded a fair and impartial hearing and not discriminated against in the assessment of proper disciplinary suspension and therefore finds no compelling reason to upset the penalty. Thus the claim is denied.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

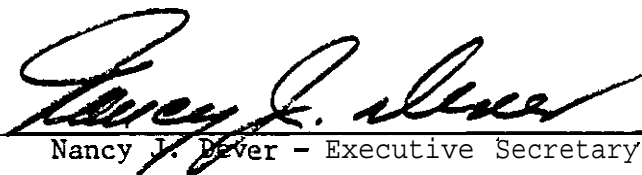
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST::


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of March, 1984.

