NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26365
THIRD DIVISION Docket Number MW-26975

John E. Cloney, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Kansas City Southern Railway Company
(Milwaukee-Kansas City Southern Joint Agency)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Welder T. L. McKown for alleged '... violations of General Rules B, D, N, Q and Rule 618....' was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (Carrier's File 013.13-322).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: By letter dated February 12, 1985, Claimant, a Welding Foreman, was notified to be present at an investigation on February 15 to be conducted:

> "to develop the facts and ascertain your responsibility in connection with the violations of General Rules B, D, N, Q and Rule 618 of Rules and Regulations for Maintenance of Way and Signal Department . . ..during the months January through August, 1984."

After several postponements requested by the Organization, the investigation took place on March 7, 1985.

At the hearing, and over objection of the Organization, Claimant was the first witness called. He admitted having put up a fence on the farm of then Superintendent B. R. Amis on July 16 and 17, 1984. He testified he was on vacation on those dates and that Amis furnished the welding materials and equipment and paid him for his time. Claimant introduced into evidence his work time sheets for July 17 and 18, 1984, to establish he was on vacation on those days. He denied charging any time to Carrier and denied working at the farm on July 18 or 19.

Claimant also testified he built a "frog" for the Mid America Car Company on August 11, 1984. He did the work behind the Carrier's shop, where he does Carrier work, on his own time, and at the request of then General Roadmaster J. R. voss. Claimant used borrowed equipment and was paid $500.00. Mr. James Roark, a welder, testified he loaned Claimant welding equipment on a Saturday in August, 1984. Claimant told him he needed it to repair a frog.

The Claimant denied giving Voss any part of the money. Claimant introduced a notarized statement from a Mid America Foreman to the effect that Mid America arranged for the frog repair through Voss and another from Mid America's President stating payment of $500.00 was made to Claimant.

Manager of Internal Audit Brown testified that for the past year he had been the liaison with the Federal Bureau of Investigation in connection with a continuing investigation of alleged improprieties concerning the Carrier and certain joint ventures.

According to Brown, the F.B.I. informed the Carrier that Claimant had been observed doing work at Amis' farm on July 18 and 19, 1984. The F.B.I. also gave Brown $200.00 which had been turned over to it by Voss who described it as his share of the $500.00 Claimant had been paid by Mid America.

Based on this information, Brown and Assistant Vice President Otis Burge interviewed Claimant on December 4, 1984. They taped the interview without Claimant's knowledge. The tape was played at the hearing and introduced into evidence over the Organization's objections.

The tape shows Brown referred to the F.B.I. investigation and told Claimant he wanted "to find out if you know anything about any theft of Company property or anything like that and I would like to ask you some questions."

In the tape Claimant admitted working on the frog for Mid America. He said he did not use Carrier equipment except for acetylene oxygen and had given Voss $200.00 "I guess for okaying it, you know." He also admitted working at Amis' farm for two week days and a Saturday, and charging the weekdays time to Carrier. Amis paid him for the Saturday. He did no: feel this was a rule violation because he had been told to go to the farm by the Roadmaster.

Daily work reports show Claimant was on vacation on July 16 and 17 and was paid for 8.3 hours of work on both July 18 and July 19.

On February 28, 1985, Brown conducted an "exit interview" with Voss. According to Voss, he had discovered Claimant using a Company welder during non-scheduled time on August 11, 1984. Claimant told him he was repairing a frog for Mid America and was to be paid $400.00 or $500.00. The next week Claimant gave Voss $200.00 "for keeping quiet." Thereafter Claimant told Voss if he (Voss) would let him do other outside work during working hours, they could both make a lot of money. Brown reduced this to a written statement which he, Brown, had notarized. Thereafter Voss executed a notarized statement stating "I have read the foregoing and concur with it in its entirety.- This was introduced into the record without objection.

The Organization contends that from January to August, 1984, employes under supervision of Voss, Amis and Reid were instructed to misuse Carrier's credit, misappropriate Carrier's property and perform work for the personal gain of the named Supervisors. The events involving Claimant took

place in July and August of 1984. The Notice of Investigation did not issue until February 12, 1985. Rule 13-2 of the Agreement requires "If a hearing is necessary . . . it will be given promptly . ..." The Organization argues further the notice covers an eight month period without reference to specific charges, is vague and insufficient to allow preparation of a defense.

The Organization views the December 4, 1984, interview at which the tape was made as a "hearing" at which Claimant was unrepresented, and therefore his rights were violated.

This is not the first case to come before this Board growing out of thls situation. In Third Division Award 26158 it was stated:

> "In the Fall of 1984 the Carrier became aware of substantial misuse of Company credit, material and time, and charged the Claimant and several others with the violation of several Carrier Rules...."

It is obvious this investigation was an ongoing matter which, due to F.B.I. involvement, was doubtless not within the complete control of Carrier. The requirement that a hearing be "given promptly" must be viewed in the context of the nature of the investigation. In a continuing investigation the Rule does not require a hearing be held as soon as each suspected Rule infraction in a series is uncovered. To do so could easily hamper or even nullify further investigative efforts. In our view the Rule was not violated here.

Neither do we agree with the Organization that the charges were too vague to allow an effective defense. We note the interview of December 4, 1984, gave Claimant substantial notice of the details of the allegations. The interview came before the notice of charges. Claimant was clearly prepared at the hearing to introduce time and pay records regarding specific dates, to introduce statements from third parties regarding specific subjects of the investigation and to call a witness to testify regarding an important item of the investigation. There is nothing in the record to suggest Claimant was in any way disadvantaged by the wording or content of the charges.

Neither is there any evidence, or even allegation, that Claimant requested representation when interviewed by Brown and Burge although he was clearly informed of the nature of the inquiry. This alone affords an answer to the Organization's position.

The tape recording of the meeting between Claimant, Brown and Burge affords substantial evidence in support of Carrier's determination of guilt. When substantial evidence is present this Board will not interfere with Carrier's judgment.

We also believe, contrary to the Organization, that the December 4, 1984, tapes were admissible. (See Weinsteins Evidence - United States Rules - 901(b)(5)(02) and Jones on Evidence 6th Ed. Section 15:15).

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 25th day of June 1987.