

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26471
Docket Number TD-27201

Paul C. Carter. Referee

PARTIES TO DISPUTE: ((American Train Dispatchers Association
(Southern Pacific Transportation Company
(Eastern Lines)

STATEMENT OF CLAIM:

"This refers to Superintendent L. J. Jenkins letter of January 28, 1986, file DF 3959, wherein he dismissed Train Dispatcher T. F. **Kennelly, III** from the service of the Southern Pacific Transportation Company commencing January 28, 1986.

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This is to request that Mr. Jenkins letter be withdrawn, Mr. **Kennelly's** record be cleared, and that he be compensated for any and all time lost...."

OPINION OF BOARD: The record shows that Claimant, with a service record with the Carrier commencing July 22, 1972, was employed by the Carrier as a Train Dispatcher at Lafayette, Louisiana, at the time of the occurrence giving rise to the dispute herein. On December 19, 1985, he was notified to be present at 9:00 A.M., December 26, 1985, for formal Investigation:

"...to develop the facts and place responsibility, if any, concerning your allegedly transporting a stolen car across state lines; and your allegedly illegally transporting a security, the car's certificate of origin, for which you were indicted, and found guilty of a felony, while employed as train dispatcher, Lafayette, Louisiana.

You are charged with responsibility which may involve violation of the General Code of Operating Rules, Rule L, reading:

'**Employees** must conduct themselves in such a manner that their Company will not be subject to criticism or loss of good will.'

and Rule 607, Eastern Region Special Instructions in Eastern Region Timetable No. 2, that part reading:

'Any act of hostility, misconduct or willful disregard or negligence affecting the interest of the Company is sufficient cause for dismissal and must be reported.'

You are entitled to representation and witnesses in accordance with agreement provisions. Any request for postponement must be submitted in writing including reason **therefor** to the undersigned."

The letter was issued by Carrier's Lafayette Division Assistant Superintendent. On the same date Claimant "as suspended from service pending outcome of the Investigation.

At the request of the Organization, two postponements of the Investigation were granted, and the Investigation "as conducted on January 22, 1986. A copy of the Transcript of the Investigation has been made a part of the record. On January 28, 1986, Claimant "as notified of his dismissal from service.

In the Investigation, evidence "as presented that Claimant had been indicted and convicted in Federal Court of two felony charges in connection with the transporting of a stolen car across state lines. There "as also evidence that Claimant's conviction received considerable newspaper publicity in the Lafayette, La., area and that knowledge of Claimant's conviction "as widespread among other **employees**.

Claimant declined to answer numerous questions of the Conducting Officer in the Investigation on the grounds that his legal rights may be jeopardized. On property disciplinary investigations are not court proceedings. Strict rules of evidence are not applicable, nor is the burden of proof the same. In the Investigation, Claimant admitted to having been indicted, while the record shows that he had been indicted and convicted prior to the Investigation. We consider Claimant's actions in declining to answer questions in the Investigation to be at his peril. In Third Division Award No. 19558, it "as held:

"...**We** have stated in a number of similar cases that the rules of evidence in criminal proceedings are not applicable to disciplinary investigations. In Award 4749 we said:

'Employees charged with rule violations who avoid answers to questions touching upon the claimed offense, subject themselves to inferences that the replies if made would have been favorable to the Carrier.'

At a hearing of this kind the Carrier may properly examine the accused concerning every point bearing upon his innocence or guilt, whether or not he testifies in his own behalf. (Award 2945)."

The Organization, in its Submission to the Board, contends that the Carrier failed to prove a violation of Rule L or Rule 602, or that Claimant's actions adversely affected the interest of the Company, and that off-duty activities which take place off Company property are of no concern to the Carrier. In the on-property handling, the Organization relied primarily on the off-duty, off-property, contention. The Carrier, in the on-property handling and in its Submission to this Board, has called attention to Award No. 27 of Public Law Board No. 1952, Decision No. 5494 of Special Board of Adjustment No. 18, and Award No. 1129 of Special Board of Adjustment No. 180. Quoted excerpts from the Awards cited by the Carrier are in the record and we see no necessity of repeating them here. They covered cases of criminal conduct on the part of employees.

Third Division Award Nos. 25803, 25518, 24994 and 24608 involved off-duty, off-property, conduct by employees. In our opinion, in such cases the nature of the offense or crime must be considered. Claimant herein was guilty of serious crimes and received a prison sentence for his actions. We also note that Claimant's prior discipline record was far from satisfactory. An **employee's** prior record may always be considered in arriving at the penalty to be imposed for a proven offense.

Based upon the entire record in this case, and considering the nature of the crimes committed, together with Claimant's prior disciplinary record, we do not find Carrier's actions in dismissing him from service to be arbitrary, capricious, or in bad faith. The Claim will be 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 Employees involved in this dispute are respectively Carrier and Employees 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. Dover - Executive Secretary

Dated at Chicago, Illinois, this 9th day of September 1987.