

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 27924
Docket No. CL-27997
89-3-87-3-526

The Third Division consisted of the regular members and in addition Referee Paul C. Carter when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(The Atchison, Topeka and Santa Fe Railway Company

PARTIES TO DISPUTE: "Claim of the System Committee of the Brotherhood
(GL-10189) that:

(a) Carrier violated the provisions of the current Clerks' Agreement at Fort Madison, Iowa, when it assessed the personal record of Mr. J. A. Nelson with thirty (30) demerit marks as result of formal investigation held July 1, 1986, and

(b) Carrier shall now expunge the thirty (30) demerits and all relating correspondence from the personal record of Mr. J. A. Nelson."

FINDINGS:

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

The carrier or carriers and the employe or employees 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.

At the time of the occurrence giving rise to the dispute herein, Claimant, with a seniority date of November 8, 1968, was employed by the Carrier as Crew Clerk at Fort Madison, Iowa, with assigned hours 11:30 P.M. to 7:30 A.M. He was Local Chairman of the Organization.

Following an investigation conducted on July 1, 1986, Claimant was assessed thirty demerit marks for violation of General Rules 14, 17 and 19 of Carrier's General Rules for the Guidance of Employees. The charge against Claimant's alleged failure to comply with Carrier instructions regarding improper use of the Carrier's communication system, and conducting Union business at Fort Madison Division Office Center while on duty on April 24 and 26, 1986.

While the Board recognizes the right of the Carrier to restrict its employees from conducting Union business while on duty, the matter of proof in the present case gives us serious concern. The Board has issued numerous Awards that in discipline cases the burden is upon the Carrier to adduce substantial evidence in the investigation 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).

In the investigation of July 1, 1986, the Carrier relied primarily on tapes of two recorded telephone conversations between another employee and Claimant, one on April 24 and one on April 26, 1986. The tape used in the conversation of April 24, 1986, shows that Claimant was called on the telephone by the other employee. It shows that the tape started at 9:16 A.M. and "Tape shut off, end of conversation, 9:21 A.M." The tape of the second conversation shows "inserted and began at 9:22 A.M." and "tape shut off at 9:26 A.M." It was developed in the investigation that the tape used was not the original, but was a copy of the original tape. Claimant's representative requested that the original tape be entered into the investigation. The investigation was recessed to locate the original tape, but the Carrier witness stated that he was unable to locate it. The Organization protested the use of the copy of the tape, contending "We feel there is a deletion in the tape."

In the investigation the Claimant admitted the two conversations with the other clerk, one on April 24 and one on April 26, 1986, but contended that the tape of the first conversation used in the investigation was not complete, that there was a deletion. It is clear from the investigation that the telephone conversations on April 24 and April 26, 1986, were initiated by the other employee and not by Claimant.

With the challenge of the Claimant and his representative as to the accuracy of the tapes introduced by the Carrier into the investigation, we consider that it was the responsibility of the Carrier to have made available in the investigation the original tapes, or submit proof that the copies were accurate, which it failed to do.

There is nothing in the investigation to indicate that the Claimant initiated conversations with other employees or that he encouraged other employees to contact him while on duty concerning Union business. The evidence is to the contrary.

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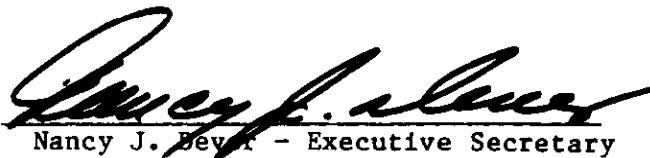
We find and hold that the Carrier failed to meet the burden of proof required of it in support of the charge against Claimant. The claim will be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 6th day of June 1989.