

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(National Railroad Passenger Corporation - (Amtrak)
Northeast Corridor

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

(1) The discipline (time held out of service) imposed upon EWE-C Pettibone Operator K. Bigham for alleged violation of Rules 'I' and 'J' was on the basis of unproven charges and in violation of the Agreement (System File NEC-BMWE-SD-1101D).

(2) The claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

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 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.

At the relevant time Claimant held the position of Equipment Operator on the Carrier's New York Division. After trial held on October 24, 1984, and by letter dated October 31, 1984, Claimant was disciplined for time held out of service (which amounted to a 30 day suspension) for use of threatening, vulgar and insulting language.

Carrier's Project Engineer W. Faust testified that prior to the actual commencement of duties on September 22, 1984, he asked Claimant to get rid of a radio that Claimant brought on the job site. According to Faust, Claimant replied "F... y..." Faust testified that he again requested that Claimant get rid of the radio, to which Claimant repeated his earlier comment and told Faust that he was not Claimant's boss. Faust further testified that shortly thereafter Claimant stated "Don't play your power game on me Faust, I

know where you hang around. I'll kick your ass after work. ... I don't want to hear none of your" Later that morning, Faust verbally advised Claimant that he was removed from service, which action was confirmed by letter dated September 24, 1984. Claimant denies swearing at Faust or making any threatening statements towards him and asserts that he gave up the radio when asked to do so.

The Organization raises a series of procedural arguments. First, we reject the Organization's argument that the Carrier violated Rule 71 by not holding the trial "within thirty (30) days from the date the Division Engineer or his representative had knowledge of the employee's involvement." The incident occurred on September 22, 1984. The trial was held on October 22, 1984. October 22, 1984, is not the 31st day from the incident as argued by the Organization. See Third Division Award 21718:

"The general rule (in law) is that the time within which an act is to be done is to be computed by excluding the first day and including the last, that is, the day on which the act is to be done...."

Therefore, September 22, 1984, is not counted in computing the 30 day period under Rule 71. Using that method of computation, the October 22, 1984, trial was held "within thirty (30) days."

Second, the Organization argues that the Carrier erred by failing to call all witnesses who may have been present at the time of the incident. Giving the Organization the benefit of the doubt and assuming for the sake of discussion that all of the other witnesses identified by the Organization were present at the time of the critical conversations and actually overheard those conversations (an assumption that is not supported by the record), the Organization's argument cannot prevail in this case. It has been held that the Carrier is not obligated to call every possible witness to testify. See Third Division Awards 24695, 23857; Fourth Division Award 4163. Moreover, under this Agreement, Rule 71(b) places a burden upon Claimant to "make his own arrangements for the presence ... of any witnesses appearing on his behalf." Additionally, the record does not disclose that prior to the trial the Organization notified the Carrier that those witnesses now claimed by it as crucial should be present at the trial and that the Carrier failed to honor that pre-trial request. Finally, at no time was a postponement of the trial sought in order to arrange for the presence of the witnesses. Under these circumstances, we cannot say that the Carrier's failure to call all the employees now claimed by the Organization as necessary witnesses prejudiced Claimant's right to a fair trial.

Third, the fact that the testimony of one witness (Faust) was used as a basis for assessing the discipline is not fatal. See Second Division Award 9366; Third Division Awards 24388, 21290.

Fourth, the fact that the Hearing Officer at some time in the past may have participated in a counseling session with Claimant is insufficient to demonstrate bias on the Hearing Officer's part. In this regard, we do not find that the questions asked by the Hearing Officer compromised Claimant's right to a fair trial, especially since the Hearing Officer was not involved in the incident which caused this disciplinary action.

With respect to the merits, substantial evidence exists in the record to demonstrate that Claimant violated Rules "I" and "J". Rule "I" prohibits insubordinate, immoral, quarrelsome or otherwise vicious conduct. Rule "J" prohibits the use of profane or vulgar language or threatening conduct. Faust's testimony places Claimant's actions within the prohibitions of those rules. That fact that Claimant denies making the statements does not change the result. We find no basis in the record in this case to support a conclusion that in our review capacity we should disturb the rejection of Claimant's version of the incident. Third Division Award 21278.

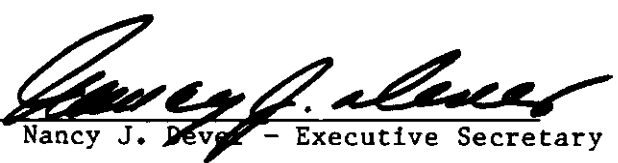
Finally, in light of the proven charges, we are unable to conclude that the amount of discipline imposed was either arbitrary or capricious.

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 20th day of November 1989.