

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36279
Docket No. SG-35925
02-3-99-3-827

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Grand Trunk Western Railroad

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Grand Trunk Western Railroad (GTW):

Claim on behalf of J.D. Buck, Sr., for payment of all time lost and benefits and restoration of his seniority as a Signal Foreman, as a result of his discipline and for any reference to this matter to be removed from his record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 42, when it failed to provide the Claimant with a fair and impartial investigation and imposed harsh and excessive discipline without meeting the burden of proving its charges in connection with an investigation conducted on October 27, 1998. Carrier’s File No. 8390-1-118. General Chairman’s File No. 98-77-GTW. BRS File Case No. 10949-GTW.”

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

This is a discipline case in which the Claimant, who was assigned as a Signal Foreman at Flint, Michigan, was withheld from service on October 19 and notified to attend a Hearing on October 27 on a charge of harassment/intimidation on September 21, 1998. The Hearing was held as scheduled at which time the Claimant was present, represented and testified on his own behalf. Subsequently, by letter dated November 12, 1998, the Claimant was notified that he had been found guilty of the charges and was disciplined by loss of his rights as a Foreman and was suspended without pay covering the period October 19 through November 16, 1998, inclusive.

The Organization's appeal argued that not only had the charges been untimely made by the Carrier, they had not been proven at the Hearing.

Rule 42 - DISCIPLINE reads as follows:

"RULE 42 - Discipline.

An employee who has been in the service for more than ninety (90) days will not be disciplined or dismissed without a fair and impartial hearing, at which he may be assisted by a duly accredited representative. He may, however, be held out of service pending such hearing, which will be held within ten (10) calendar days of the date held from service. The hearing shall be held within twenty (20) calendar days of the date when charged with an offense when an employee is not held from service. No charge shall be made that involves any offense of which the company has had knowledge twenty (20) calendar days or more except where a civil action or criminal proceeding results from the offense, in which event the charge may be made within twenty (20) calendar days of the final judgment. Prior to the hearing the employee shall be apprised in writing of the charge sufficiently in advance of the time set for hearing to permit his having reasonable opportunity to secure the presence of necessary witnesses. A written decision will be rendered within twenty (20) calendar days after completion of hearing.

* * *

If the charge against the employee is not sustained, it will be stricken from the record. If, by reason of such unsustained charge, the employee has been removed from the position held, reinstatement will be made and he will be compensated for wage loss, if any suffered by him."

The Carrier attempted to explain away its admitted time limit violation by stating that "circumstances dictated that the Carrier act cautiously before formally charging Claimant." In addition, the Carrier contended that the transcript supported the finding that the Claimant was guilty and that the delay in making a charge and holding a Hearing "does not automatically nullify the disciplinary proceedings. . . ."

Without spending much time on the Carrier's admitted violation of the time limit requirements as outlined in Rule 42, the Board is obliged to point out that in a discipline case the Carrier has the burden of proving by substantial evidence that an accused employee is guilty of the charges made. The U.S. Supreme Court has defined the term "substantial evidence" to wit:

". . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (Consolidated Edison Co. v. NLRB 305 U.S. 197, 229).

The Board carefully reviewed the testimony presented at the Hearing and can conclude only that the Carrier's decision to assess discipline is based almost entirely on suspicion and conjecture. There was no first-hand witness testimony to be found in the Hearing transcript. The accuser said one thing. The accusee said something different. No one who testified actually saw anything. Suspicion, surmise and conjecture cannot be substituted for "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

On the basis of the record in this case, the Carrier simply did not meet its burden of proof. The claim is sustained.

AWARD

Claim sustained.

Form 1
Page 4

Award No. 36279
Docket No. SG-35925
02-3-99-3-827

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 28th day of October 2002.