

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26194  
Docket Number MW-26231

Edward L. Suntrup, Referee

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

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

(1) The suspension of sixteen (16) days imposed upon Painter A. McCullough for alleged violation of Rules 'I' and 'J' was without just and sufficient cause and on the basis of unproven charges (System File NEC-BMWE-SD-729D).

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

OPINION OF BOARD: The Claimant was charged with violation of Carrier's Rules I and J in connection with an incident which allegedly occurred on October 24, 1983. The Claimant's General Foreman signed a statement on that day stating that the Claimant had refused a direct order when he was asked to help carry some pipe. According to this statement, the Claimant made both verbal and physical threatening gestures which were directed toward the Foreman while refusing the order. After a Hearing was held on November 9, 1983 the Claimant was advised that he had been found guilty as charged. He was assessed a sixteen (16) day actual suspension.

During the Hearing the General Foreman repeated testimony consistent with his October 24, 1983 statement. He testified that he instructed the Claimant to help his co-workers carry some pipe but that the Claimant refused on the grounds that the pipe was "... too heavy for him ... and not in his line of work (and that it was) plumbers' work". After continuing to refuse to do the work even after the Foreman told him that "... he would give him plumbers' rate" for the day the Foreman then told the Claimant that "... in that case (he would) have to stop (the Claimant's) time ... (and) send (him) home." It was at this point, according to the Foreman, that the Claimant threatened him with profane and vulgar language and jabbed his finger into his chest. This version of the facts is contradicted by the Claimant who testified that when the Foreman "... told (him) to pitch in and help" he did so. The Claimant also testified that he did not refuse a direct order from the Foreman, did not make physical contact with him, and did not use abusive language toward him. This is somewhat corroborated in the record by two witnesses who testified for the Claimant. Both stated that they did not hear the Claimant refuse an order nor use abusive language toward the Foreman.

A review of the total record fails to show any reason why the Foreman, out of self-interest, would have fabricated his testimony. On the other hand, there is cause for reasonably concluding that the testimony by the Claimant and by his two fellow workers was self-serving. Further, by long established precedent, this Board cannot set itself up as a trier of fact when performing its appellate function so long as the testimony by a Carrier's witness is not so clearly devoid of probity that its acceptance would be "... per se arbitrary and unreasonable" (see Third Division Award 21612; also earlier Awards 10791, 16281, 21238). On the basis of the evidence of record, therefore, disturbance of the Carrier's actions in this matter is not warranted and the Claim cannot be sustained.

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

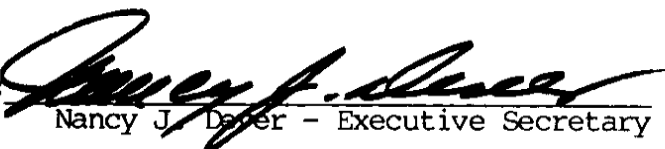
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 24th day of November 1986.