

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 29773
Docket No. MW-29172
93-3-90-3-17

The Third Division consisted of the regular members and in addition Referee James E. Mason 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, thirty (30) days' suspension from service of Truck Driver V. Davis for alleged violation of Rules F-3 and O of Amtrak's Rules of Conduct on October 18, 1988, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File NEC-BMWE-SD-2339D).
- (2) As a consequence of the violations referred to in part (1) hereof, the Claimant's record shall be cleared of the charges leveled against him and he shall be paid 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 employe 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.

The fact situation in this case is convoluted and confusing. The Carrier alleges that the Claimant was absent from his assigned duties and was dishonest. Carrier contends that Claimant failed to

report to Carrier's dispensary as instructed and thereafter "could not be found nor contacted for the rest of the day." Claimant, through his representative Organization, argues that he did report at the dispensary, could locate no one there and thereafter went about his normal duties. There are claims and counter claims relative to Claimant's whereabouts and ability to be contacted by radio. There is testimonial evidence from other employees that they saw Claimant at differing times and places during the day. Unfortunately, these other employees were never called to testify in person. The single item on which there appears to be unanimity of position is that Claimant submitted a time card for pay until 3:00 P.M. on October 18, 1988, when he had, in fact, ceased activity at 2:30 P.M. on that date.

This Board has reviewed the entire record and has considered all of the arguments and counter arguments of the parties. We support the opinion as expressed in Third Division Award 17197 wherein the Board stated:

"There is, of course, a difference between an allegation and evidence. Also, it is one thing when an allegation is made by one party and not denied by the other; it is quite another thing when an allegation is made by one party and denied by the other. When the latter occurs, a mere reiteration of the allegation is no substitute for evidence and proof to support the allegation."

The Kelly and Connolly statements created a conflict of testimony which should have been resolved by the Hearing Officer. Carrier's somewhat cavalier conclusion that the statements were "simply self-serving" was taken at Carrier's peril. This Board cannot resolve conflicting testimony. It can only consider the testimony which exists in the record as developed on the property. Kelly and Connolly apparently had firsthand information relative to these charges. They should have been interrogated if for no other reason than to give the appearance of fairness.

The charge of an early departure from the work site is another matter. There is convincing evidence, including Claimant's own admissions, that he left the job site prior to the scheduled quitting time and that he took no action to correct his time card to reflect this "early quit." For that dereliction, Claimant deserved discipline.

This Board concludes, based upon the totality of evidence as found in this particular case record, and without hereby establishing any precedent which could possibly be used on this or

any other Carrier, that the interests of justice and fairness would be served in this instance by the assessment of a 15-day suspension. The discipline as originally assessed is hereby amended to reflect this conclusion.

A W A R D

Claim sustained of in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 20th day of September 1993.