

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 12971
Docket No. 12872
95-2-94-2-12

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

PARTIES TO DISPUTE: (International Brotherhood of Electrical
(Workers
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(Chicago and North Western Transportation
(Company

STATEMENT OF CLAIM:

- "1. That the Chicago and North Western Transportation Company violated the current Agreement, effective December 1, 1985, in particular Rule 26 (h) when they wrongfully dismissed Traveling Mechanic Electrician Rudy(sic) (Rudi) Milosaljevic on January 25, 1993, after an investigation held January 13, 1993.
2. That the Chicago and North Western Transportation Company promptly reinstate Mr. Milosaljevic to service with all seniority rights unimpaired and make him whole for all lost wages, without any reductions for any outside earnings and for benefits lost, including but not limited to vacation, insurance, hospitalization, railroad retirement rights and benefits lost, as well as interest on all monies lost at ten percent (10%) APR, account of the Carrier's most unjust action beginning November 3, 1993 and continuing until Mr. R. Milosaljevic is reinstated."

FINDINGS:

The Second 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.

Claimant was employed by Carrier as an electrician on its Suburban Division in the Chicago area. This position required Claimant to pick up electrical supplies from time to time with a Carrier purchase order from one of Carrier's suppliers in the area. The supplier commenced to notice inventory and invoice discrepancies and, upon investigation, determined that Claimant and one of supplier's employees were in collusion to deprive both carrier and supplier of material and money by deception.

Supplier's findings led to the establishment of a joint investigation over a period of time by a private investigator hired by the supplier and Carrier's Police Department which culminated on November 3, 1992, when Claimant was found in possession of items from supplier without proper invoices.

On November 5, 1992, Carrier issued Notice of Investigation to Claimant reading:

"You are hereby directed to appear for formal investigation as indicated below:

PLACE: Office of the AVP-Commuter Operations
500 West Madison - Atrium Basement
Chicago, Illinois 60661

Time: 10:00 AM

Date: Wednesday, November 11, 1992

Charge: 'Your responsibility for: 1) misuse and misappropriation of Company funds, credit and property, and 2) theft of property from a Company supplier which has resulted in loss of good will of C&NW, all of which resulted in your arrest on November 3, 1992.'

You may be accompanied by an employee and/or representative of your own choosing, subject to the provisions of the applicable rules in the applicable schedule, and you may, if you so desire, produce witnesses in your own behalf without expense to the Transportation Company."

The Investigation was postponed by mutual agreement on several occasions and finally rescheduled for January 13, 1993. Claimant was found guilty of the charges and dismissed from service effective January 25, 1993. A copy of the transcript of Investigation was furnished the Board.

Claimant's dismissal was appealed on the property in accordance with the terms of the Controlling Agreement. Failing to receive satisfactory resolution, the claim of wrongful dismissal was filed with this Board for adjudication.

Study of the voluminous record of handling filed with this Board convinces us that substantial evidence was adduced at the Investigation to sustain the finding that Claimant was guilty of the charges. Claimant's guilt was clearly established by direct testimony of the investigators assigned to make the joint investigation and by material found in Claimant's possession taken from the supplier without proper invoices.

It is not necessary in this case to discuss in detail all the testimony found in the Investigation transcript. Suffice it to say the evidence adduced more than met the substantial evidence rule as set forth by the United States Supreme Court. In Second Division Award 6419, the Board stated:

"The substantial evidence rule referred to was set forth by the Supreme Court of the United States as follows:

'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)."

See also Third Division Award 24989.

In its appeal on the property and to this Board, the Organization raised a number of procedural issues in an effort to reverse the discipline assessed. We will briefly comment on each.

This Board is not persuaded that the finding of guilt was based upon circumstantial evidence. We find it based upon substantial evidence produced by direct testimony of the investigators.

Even if it could successfully be argued that the finding of guilt was based upon circumstantial evidence, we note in Second Division Award 4046, the Board held:

"In meeting this burden of proof, an employer is free to rely on circumstantial evidence which may often be even more certain, satisfying and persuasive than direct evidence."

The Organization's assertion that Claimant was not granted a fair and impartial Investigation is without foundation. We have studied the transcript and find that Claimant was granted all contractual rights to a fair and impartial Investigation. Claimant was issued precise charges with notice of hearing and reasonable time to prepare a defense. He was present at the Investigation with representative of his choice and given the right to produce evidence and witnesses in his behalf, and cross-examine witnesses testifying against him.

The Organization argues that supplier employees alleged to have made written statements were not present at the Investigation as witnesses for cross-examination and Carrier refused to produce them. We find this argument is not sufficient to reverse the discipline assessed. Carrier has no power to require employees of the supplier to appear as witnesses. Study of Rule 26 - Discipline - does not reveal any prohibition against the use of written statements or any requirement to produce the author of the written statements for cross-examination. In Third Division Award 16308, the Board held:

"Numerous awards of this Board have held that written statements of witnesses not present at an investigation are admissible in the absence of contractual prohibition. Awards 10596, 9624, 9311, 8504, and others."

In reaching a decision that failure to produce as witnesses the alleged authors of the written statements presented is not sufficient to justify reversal of the discipline assessed, we are not unmindful of the numerous Awards cited by the Organization in support of its argument. We have reviewed the Awards and find they involved employees under control of the Carrier, which is not the case before this Board.

We also note that Rule 26(c) - Discipline - provides that the charged employee is responsible for securing the presence of witnesses he believes favorable to his defense of the charges. In the record before us, we note at the beginning of the Investigation Claimant was asked if he had any witnesses he wished to testify on his behalf to which he responded, no. Moreover, the record does not reveal that during the course of the Investigation, the Claimant or his representative asked for a recess to arrange for the presence of supplier employees alleged to have authored written statements introduced at the Investigation. For the reasons stated, we are not persuaded that failure to produce supplier employees who allegedly authored written statements as witnesses prejudiced Claimant's right to a fair and impartial Investigation.

This Board is not impressed with the argument advanced by the Organization concerning statement of December 30, 1992, by supplier's employee directly involved with Claimant, rescinding his statement given to investigating officers on November 3, 1992. On the basis of the record before us, we choose to accept the statement of November 3, 1992, as being truthful. Supplier's employee wrote the statement of November 3, 1992, of his own free will. He was under no duress of any type.

The Organization also argues that Carrier's refusal to honor its request for a list of witnesses Carrier intended to call and a copy of all documents it intended to use at the Investigation reveals Carrier had no intent to afford Claimant a fair and impartial Investigation.

The Controlling Agreement provision is Rule 26 - Discipline. We have reviewed it and fail to find any discovery procedures contained therein. Neither have we been furnished with any precedent to support the Organization's request for a list of witnesses and documents Carrier expected to use at the Investigation. Precedent does exist that absent agreement provisions requiring discovery procedures, failure or refusal to furnish a list of witnesses and documents to be used at the Investigation, prior thereto, does not contravene Claimant's agreement rights. In Third Division Award 16308, the Board held:

"The notice of investigation set forth the exact Nature of the Charges and the 'written' evidence introduced at the investigation was offered in accordance with Rule 18 of the Agreement. No discovery procedure is provided by the terms of the controlling Agreement, and Claimant was not deprived of any contractual right to receive advance copies of written evidence introduced by Carrier at the investigation. Awards 14187, 13670 and others."

See also Second Division Award 11124.

The record before us reveals that Claimant was granted a fair and impartial Investigation and no provision of Rule 26 was violated by Carrier.

Claimant clearly engaged in wrong-doing, theft of property and misappropriation of funds. Theft by any means is serious misconduct and cannot be tolerated in the industrial work place. It is a dismissible offense and we find no justification for this Board to interfere with Carrier's decision of dismissal. The Claim will be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 1st day of November 1995.