Award No. 1694

Docket No. 1600

2-CMStP&P-F&O-'53

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 76, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Firemen & Oilers)

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current agreement Earl Carson was unjustly discharged on April 9, 1952.

2. That accordingly the Carrier be ordered to restore Earl Carson to service with seniority rights unimpaired and paid for all time lost since April 9, 1952.

EMPLOYES' STATEMENT OF FACTS: Mr. Earl Carson, hereinafter referred to as the claimant, was employed at the carrier's laundry on the 7:00 A. M. to 3:00 P. M. shift on March 29, 1952.

Under date of April 1, 1952, carrier's Superintendent M. P. Ayars directed a letter to the claimant citing him for investigation in connection with certain charges set forth in the aforementioned letter to be held in Mr. Ayars' office at 2:00 P. M., Thursday, April 3, 1952, a copy of which is submitted herewith and identified as Exhibit A.

The investigation was postponed and set for 10:00 A. M., April 4, 1952. The investigation was held as scheduled and submitted herewith and identified as Exhibit B is a copy of the hearing transcript.

Under date of April 9, 1952, Superintendent Ayars directed a letter to the claimant advising him that he was dismissed from the service of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a copy of which is submitted herewith and identified as Exhibit C.

The carrier has refused to adjust this matter in a satisfactory manner by the employes.

The agreement effective September 1, 1949, is controlling.

except for the period of time it was removed for display during the hearing on April 4, 1952, and the articles contained in that package were not removed therefrom at any time from March 29, 1952, until Mr. Fallon made his examination on April 15, 1952, except for a period of about 30 minutes during the hearing on April 4, 1952. Statements of Messrs. M. P. Ayars, A. J. Johnson, W. R. Jones and E. J. Dummer, coppies of which are submitted herewith and identified as Carrier's Exhibits M, N, O and P respectively, clearly show that Mr. Carson did not touch the can of peaches during the hearing. These facts are positive proof that Mr. Carson had the can of peaches in his hand prior to the time the package was taken from him on March 29, 1952 and this proves beyond any possibility of doubt that Claimant Carson had in his possession on March 29, 1952, without authority, commissary supplies which belonged to the carrier and that he attempted to remove those supplies from company premises without authority.

As a matter of information to your Honorable Board, Messrs. Carson and Brooks elected to call upon Mr. L. J. Benson, who is assistant to president, and has charge of company police officers, on or about April 28, 1952 in regard to Mr. Carson's dismissal and it is interesting to note, as indicated by Mr. Benson's letter of September 12, 1952, copy of which is submitted herewith and identified as Carrier's Exhibit Q, that in attempting to insure Messrs. Carson and Brooks that the carrier was willing to give Mr. Carson every possible consideration, Mr. Benson offered to arrange, at Mr. Carson's convenience, a lie detector test for Mr. Carson. Mr. Benson even went so far as to offer to reinstate Mr. Carson if the lie detector test was favorable to his contention. Under these circumstances it is a virtual certainty that Mr. Carson had reason to avoid a test as he made no attempt to take advantage of this offer of Mr. Benson.

The carrier has proved beyond any question of doubt that Claimant Carson was guilty as charged of having company supplies in his possession and attempting to remove those supplies from company premises without authority. The treatment which the company has afforded Mr. Carson has been entirely fair and impartial, even to the extent of permitting him to be represented by Mr. Brooks who is a dining car waiter and not a duly accredited representative of the "Firemen & Oilers Organization."

The carrier's actions have not been arbitrary and have been entirely free from discrimination. With these facts in mind, the carrier cannot be expected to retain in its service an employe who wilfully appropriated company supplies without authority. Therefore, we respectfully request that the carrier's action be not disturbed.

FINDINGS: The Second 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.

The parties to said dispute were given due notice of hearing thereon.

This appeal to this Division was taken by the Firemen and Oilers of System Federation No. 76 in behalf Laundry-Trucker Earl Carson. It is contended Carson was unjustly discharged by carrier and, because thereof, that he should be restored to carrier's services with seniority rights unimpaired and paid for all time lost since April 9, 1952.

On March 29, 1952, Carson was working as a trucker-linen checker in carrier's laundry at Western Avenue in Chicago, Illinois. His hours of service

were from 6:00 A. M. to 3:00 P. M. On April 1, 1952, carrier by a letter signed by M. P. Ayars, Superintendent, charged Carson with the following:

> "For having in your possession on March 29, 1952, without authority, Commissary supplies belonging to . . . (carrier)" and,
>
> "For attempt on March 29, 1952, without authority to remove from Company premises and property Commissary supplies belonging to . . . (carrier)."

A hearing was held on these charges on April 4, 1952.

On April 9, 1952, carrier notified Carson that, based on the facts brought out at the hearing, he was dismissed from its service.

Considerable discussion was engaged in by the parties in regard to certain facts brought into the record after the hearing had been completed. In this regard a question was raised as to whether or not such facts should be considered by us in determining claimant's guilt or innocence. Generally carrier and this Division are limited to the facts brought out by both parties at the hearing in determining whether or not the employe carrier has charged is guilty or innocent of the charge or charges which it has made against him. In this respect carrier should not close the hearing until it has adduced all of the evidence it intends to use. On the other hand if the organization, at any time during the hearing, feels it needs additional time to get certain evidence it should ask carrier to continue the hearing for that purpose. If carrier refuses to do so then it is always a matter for this Division to consider in determining whether or not carrier was arbitrary and unreasonable in doing so. Of course, if the hearing is continued, both sides can introduce additional evidence when it is reconvened. In the absence of any such continuance the record, once the hearing is closed, is complete and the evidence adduced thereat is the only evidence properly before us in considering the correctness of carrier's decision based thereon. See Awards 1111and 1551 of this Division.

We come then to the evidence adduced at the hearing and the question of whether or not it is sufficient to support carrier's finding of claimant's guilt. Carrier's Police Officer George Lady's testimony shows that about 4:20 P. M. on March 29, 1952, he apprehended claimant in carrier's Western Avenue Yards in Chicago, Illinois. At the time he was apprehended Lady testifies claimant had in his possession a package containing six different items of food. The evidence shows these items of food came from carrier's commissary, but that claimant had no authority to take them therefrom. The evidence also shows that at the time he was apprehended claimant was traveling away from the commissary and had traveled considerable distance therefrom.

The organization suggests it is a case of mistaken identification on the part of Officer Lady. It is true that Lady said claimant was wearing a tan or brown gabardine top coat at the time he was apprehended whereas claimant stated he never owned, nor was he wearing, such a coat. The fact remains Officer Lady stated he had previously known claimant; that at the time he apprehended him he saw his face from only a very short distance; that it was 4:20 P. M. and daylight; and at the hearing he identified claimant as the man he had apprehended and taken the package from. We think this evidence fully justified carrier in finding that it was claimant whom Officer Lady apprehended with the package of foodstuffs while he was in the act of taking it from carrier's property without any authority to do so.

We come to the conclusion that claimant had a fair hearing, that the evidence adduced thereat fully supports carrier's finding that he was guilty of the charges it had made against him and that dismissal was reasonable, in view of the nature of his act..

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 6th day of August, 1953.