



**Award No. 6193
Docket No. 6048
2-CSS&SB-CM-'71**

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Paul C. Dugan when award was rendered.

PARTIES TO DISPUTE:

**RAILWAY EMPLOYEES' DEPARTMENT, AFL-CIO (Carmen)
CHICAGO SOUTH SHORE AND SOUTH BEND RAILROAD**

DISPUTE: CLAIM OF EMPLOYEES:

1. Coach Cleaner Carl Graham was unjustly suspended from service for five (5) work days, March 7, 1969 through March 11, 1969.
2. Coach Cleaner Carl Graham to be compensated eight (8) hours pro rata rate of pay for each of the five (5) days he was suspended from service.

EMPLOYEES' STATEMENT OF FACTS: On February 25, 1969, Coach Cleaner Carl Graham received notice to attend hearing to be held 10:00 A. M., Friday, February 28, 1969 in the office of Superintendent-Mechanical Department.

Hearing was held at 1:30 P. M., Friday, February 28, 1969 in the office of Superintendent-Mechanical Department. Transcript was taken by Steno and tape recorder.

Coach Cleaner Carl Graham received notice dated March 5, 1969, advising that he was suspended from service for five (5) working days.

The agreement effective January 16, 1943, as subsequently amended, is controlling.

POSITION OF EMPLOYEES: Coach Cleaner Carl Graham received notice dated February 25, 1969, advising him of hearing to be held 10:00 A. M., February 28, 1969, to the truth and accuracy of the following charges against him:

1. That at or about 4:00 A. M., Sunday, February 23, 1969, he left his job without authority.

AWARD 1979

"Such hearing is not analogous to a criminal proceeding, requiring 'irrefragible evidence' of guilt, as urged by employes. We properly determine only whether there appears to be decision without prejudice and penalty without caprice."

AWARD 2683

"The claimant denied the charge. The resolution of such conflicting evidence is a function of the officer conducting the investigation initially. Since evidence was adduced to support his findings and there is no evidence that the carrier acted arbitrarily or capriciously, the claim must be denied."

AWARD 3266

"Awards of this and other Divisions of this Board are definite and uniform as to the prerogative of the carrier and degree of proof required to support a finding against an employe who has been charged with an infraction of rules of the company or of a controlling agreement.

Typical of these awards is No. 2207, Referee Carter sitting with the Second Division:

'It is not the function of this Board to weigh the evidence as in an original hearing.

If the evidence is sufficient, if believed, to sustain the carrier's findings, the carrier's action must be sustained.'

It is within the province of the representative of the carrier who presides at the hearing to determine the credibility of those who testify and to weigh and evaluate their testimony. If upon so doing, it is probable that the charge is proven and the representative so finds, this Board may not disturb that finding unless it is manifestly unsupported by the evidence.

Proof beyond a reasonable doubt, as required to convict in criminal prosecutions in Courts of Law, does not apply."

CONCLUSION

Claimant had a fair and impartial investigation. The transcript of that investigation sustains responsibility. Carrier respectfully submits that the discipline imposed in this case should not be disturbed by your Honorable Board.

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.

Parties to said dispute waived right of appearance at hearing thereon.

Carrier charged claimant as follows:

1. That at or about 4:00 A. M., Sunday, February 23, 1969, you left your job without authority.
2. That you turned in a fraudulent time slip claiming pay for the above time (11:40 P. M. to 7:40 A. M.).
3. That you have been regularly leaving the job before the end of your shift at 7:40 A. M.
4. That on Monday, February 24, 1969, trains 8 and 200 each left with a cold car due to the stoves not being properly fired.

After hearing was held, Carrier's Superintendent Doyle made the following findings in regard to the charges against claimant:

- “1. I find that you did leave the job at or about 4:00 A. M.
2. No finding is made on this, as there is considerable conflict in the testimony.
3. That you have been leaving the job early.
4. That cars 204 and 208 were dispatched without a proper fire.”

As a result of the aforesaid findings, Carrier assessed a five workday temporary suspension penalty against claimant.

The Organization's position is that: (a) charge No. 3 should not have been considered, inasmuch as it was not proven in the transcript of the hearing; (b) in regard to charge No. 4, Carrier failed to prove that the coaches that were deemed to be cold were in fact the responsibility of the claimant or the other cleaner on duty, T. Gambill, and Carrier failed to prove said charge; (c) in regard to charge No. 1, the facts failed to substantiate that claimant actually left his job without authority.

In regard to the first charge against claimant of leaving the job without authority, although it is true none of the witnesses involved actually saw claimant leave Carrier's property, nevertheless, witness T. Gambill testified that she saw claimant get in his car and drive away. Also, Carman R. Killingbeck testified that when he went to check the yard, claimant's car, that normally is parked between the washhouse and the skunk house, was gone. Claimant himself did testify that he moved his car from its normal parking place to a different one. No evidence was offered by claimant showing that this act was authorized by Carrier or that said act was a part of his job duties. Further, claimant wasn't charged with leaving Carrier's property. He was charged with leaving his job without authority. Thus, Carrier offered substantial evidence to prove said charge, and the Organization's contention in this regard must be denied.

Carrier, in support of the third charge against claimant of regularly leaving his job before the end of his shift at 7:40 A. M., offered the testimony of Carman R. Killingbeck, who stated that claimant had been regularly leaving the job before the end of the shift. In addition, witness T. Gambill testified that the other nights that she worked with claimant, he left early. The fact that other employes may at some time or other have left the job early does not excuse claimant for having done so himself as charged. Thus, Carrier met its burden of proving by substantial evidence claimant guilty of charge No. 3.

Concerning the 4th charge against claimant of dispatching cars 204 and 208 without a proper fire, Carrier's Assistant Terminal Supervisor, J. Laughrey, testified that he inspected the cars on train No. 200 with Carman Robert Killingbeck and found some cars that were poorly cleaned and that car 204 was cold and had a poor fire; that there was a whole lot of paper stuffed in the magazine of the stove, making it appear that the stove was full and properly fired. Carman R. Killingbeck testified that he checked the A car and found paper up in the magazine and they were cold. Mr. Killingbeck also testified that he found two other cars that weren't fired properly either. Claimant testified that he fired trains No. 8 and No. 200 and that there were about four or five paper towels in the chamber, which he had taken out of the bathroom, but didn't want to throw outside. Claimant further testified that if the cars were not properly fired on the date in question, they were not properly fired at any other time because he fires them the same way all the time. The fact that claimant may have fired the cars in the same manner on all occasions did not excuse or relieve him from his given duties of properly firing said cars. Thus, Carrier sustained its burden of proving by substantial evidence the fourth charge made against claimant.

Taking together the three proven charges made against claimant, we cannot say that the five (5) day temporary suspension assessed against him was so arbitrary or unreasonable so as to constitute an abuse of Carrier's discretion in imposing said penalty, and therefore we must deny the claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 5th day of November, 1971.