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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6360
Docket No. 6151
2-GM&O-CM-'72

The Second Division consisted of the regular members and in addition Referee Irving T. Bergman when award was rendered.

Parties to Dispute: (System Federation No. 29, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(
(Gulf, Mobile and Ohio Railroad Company

Dispute: Claim of Employees:

1. That under the current agreement Carrier improperly dismissed Carman S. C. Creel from service on December 3, 1970.
2. That accordingly, Carrier be ordered to reinstate Carman Creel to his position as Carman with all rights unimpaired and with pay for time lost including payment of Hospital, Medical and Life Insurance premiums which are a condition of employment, plus 6% interest on lost wages annually, compounded annually.

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 employees 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.

On December 2, 1970, claimant complied with Rule 21 of the Agreement by giving notice by telephone that he would be detained from work on account of sickness. Later that morning, claimant telephoned his foreman to say that he had been arrested for driving while intoxicated and was being detained at the police station. On December 3, 1970, claimant was advised that he was out of service pending investigation, Carrier's Submission p.3. On December 7, 1970, claimant was convicted after trial in the Mobile, Alabama Municipal Court of driving while intoxicated on December 2nd. By letter dated December 7, 1970 the claimant was dismissed, "effective this date as a result of your actions on the morning of December 2nd," and was notified that an investigation would be held on December 11, 1970, Carrier's Exhibit B.

The Organization has argued that the Carrier failed to sustain the burden of proof of "just and sufficient cause" nor did it hold the investigation within 5 days after dismissal, both required by Rule 36. It is also argued that record of prior arrests submitted at the hearing was prejudicial. At the investigation, it was stated claimant, "was technically dismissed on the third." Employees' Exhibit B p.7.

The investigation is held to produce the facts as charged. From the record of the testimony, Employees' Submission Exhibit B, this was done. Evidence was also admitted of prior police arrest and conviction record of claimant which are not his actions on the morning of December 2nd, as charged. This is so also with regard to his past record with the company. The record does not contain any denial by claimant as to his actions on the morning of December 2, 1970.

It is reasonable to believe from all the facts that claimant was held out of service from December 3 to December 7 but was not actually dismissed until the 7th so that the investigation hearing was timely. There is no authority cited for suspension or investigation preliminary to the hearing. Claimant is entitled to his pay at the pro rata rate for his work days from December 3 through December 7, inclusive.

The cause for dismissal was the events of the morning of December 2nd, compounded by claimant's distortion of the truth. The Carrier has met the burden of proof in setting forth the events. In this case, it became necessary for the claimant to present facts as a defense against the facts submitted by the Carrier; in other words, the burden had shifted to the claimant. Claimant failed to meet the burden. On the issue of cause, only the testimony as to the events of the morning in question have been considered. The degree of the penalty is to be determined afterward.

Upon reviewing the record in his employment only, the claimant has been given every consideration for his prior offenses, including reinstatement after dismissal.

One may not find a record which is absolutely pure when the hearing is conducted by a layman, the claimant is a layman and the objections of his representatives are not decided as in a court of law. As in administrative hearings, however, it is all on the record for review. This record sets forth the relevant evidence of the claimant's actions of the morning of December 2, which was the cause for dismissal as set forth in the letter of December 7, 1970. This Board is capable of sifting the chaff from the wheat and confining its findings to the relevant testimony. The claimant had ample opportunity to develop facts in his defense.

The determination of the cause for dismissal and of the penalty to follow were not arbitrary or capricious or an abuse of the discretion resting with the Carrier. Second Division Award No. 6240 sums up the applicable reasoning, citing prior Awards.

A W A R D

Claim disposed of in accordance with findings.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killean
Executive Secretary

Dated at Chicago, Illinois, this 14th day of July, 1972.