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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6459
Docket No. 6304
2-IC-CM-'73

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. 90, Railway Employees'
 { Department, A. F. of L. - C. I. O.
 { (Carmen)
 {
 { The Illinois Central Railroad Company

Dispute: Claim of Employees:

1. That under the current agreement Car Oiler M. M. Tottleben was unjustly dismissed from the service of the Illinois Central Railroad on December 2, 1971.
2. That accordingly the Illinois Central Railroad be ordered to re-instate Car Oiler M. M. Tottleben to service with seniority unimpaired, paid for all time lost, and any other benefits he would be deprived of while being held out of service.

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.

The Organization's objections to the dismissal of claimant are: That claimant was framed; that he was prejudged; that carrier failed to produce witnesses listed by claimant as necessary for his defense; that there was no direct proof brought out at the hearing that he was asleep; that the transcript of the testimony at the hearing is not complete.

The Board's review is limited to the transcript in the record. There is testimony of claimant's foreman that he saw claimant lying asleep on a bench in a shanty. The foreman left to get a witness. He returned with a lieutenant of security forces. They both testified that they found claimant still lying on the bench asleep and observed him for thirteen minutes before he awoke. The transcript shows that claimant admitted that he was lying on a bench in the shanty but denies that he was sleeping. Claimant also testified that when he saw the foreman he got up and that the foreman accused him of sleeping. Claimant also testified that when he got up the lieutenant was with the foreman.

It cannot be ascertained from the transcript that claimant was framed or prejudged. The record does not disclose proof that the transcript is not complete. To the contrary, there is a certification by the stenographer that the transcript is a true transcript of the testimony taken at the hearing.

It is the duty of the carrier to produce all witnesses who can shed light on the facts of the alleged violation. The only witnesses at the time were the foreman and the lieutenant. The transcript shows that claimant's representative was asked if any of the witnesses were present at the time that the incident took place. There was no answer. (Reference is to claimant's witnesses).

The accusations made against the carrier by the Organization are serious ones but this Board is not an investigating agency. Ample time elapsed between the date of the alleged violation and the date of the hearing for claimant to produce witnesses but admittedly none of them were witnesses to the event; nor was additional time requested to produce evidence to exonerate claimant.

Claimant had three representatives present at the hearing. At the end of the hearing the claimant and his representatives were asked if there were complaints relative to the manner in which the investigation was conducted. Although objections were made regarding the carrier's failure to produce claimant's witnesses and to the testimony, no objection was made to the conduct of the hearing.

Accusations are not evidence. The transcript indicates that the hearing was conducted properly on appropriate and adequate notice of the charge. There is substantial evidence to support the hearing officer's finding.

The Organization objected to the inclusion in the notice of hearing that past performance and record will be reviewed. This objection was overcome by the statement of the hearing officer at the end of the hearing, before introducing the record, as follows: "-- at this time your personal record will be reviewed. You are not now being investigated for any offense which may appear on this record. It's review is for consideration of the measure of discipline, if any, which may be assessed to you in this case."

In less than two years of service, claimant had been suspended for thirty days when he admitted to being asleep while on duty. Later he was cited several times for reporting late to work.

In considering this case, we have reviewed prior Second Division Awards No's. 6281, 6327, 6372, and First Division Awards No's. 15505, 20816, 21058 and 21365.

Neglect of duty by sleeping on the job is a dismissable offense. Following a suspension for sleeping on the job prior to this occasion, for an employee with less than two years service, it cannot be said that the penalty is arbitrary or capricious.

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A W A R D

Claim Denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killen
Executive Secretary

Dated at Chicago, Illinois, this 27th day of February, 1973.