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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6528
Docket No. 6287
2-CMStP&P-CM-'73

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

Parties to Dispute: (System Federation No. 76, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Chicago, Milwaukee, St. Paul & Pacific Railroad Company

Dispute: Claim of Employees:

1. That the Carrier violated the Current Agreement when it unjustly suspended Carmen Arthur Washington and Willie Smith from service from November 17th to and including December 6, 1970, a period of fourteen (14) days.
2. That accordingly the Carrier be ordered to compensate Carmen Arthur Washington and Willie Smith for all time lost, which consists of eight (8) hours per day for a period of fourteen (14) days starting November 17th up to and including December 6, 1970.

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 waived right of appearance at hearing thereon.

On November 17, 1970 Carrier served upon Claimants separate letters, the wording of which are exactly the same and the pertinent portions of which read:

"This is to notify you that you are suspended from service from your position as carman in the Bensenville Train Yard. This suspension is effective at 3 P.M. November 17, 1970 pending an investigation due to charges of theft.

Specifically, you are charged with possession of several bottles of Jim Beam liquor, taken from Milwaukee 3595, on track 2-C, around 10 PM of November 16, 1970.

An investigation will be held at 9:00 A.M.
Tuesday November 24, 1970, in my office, regarding
this matter."

An investigation hearing was held as scheduled at which Carrier's
District General Car Foreman presided. Claimants appeared and were duly
represented thereat.

On December 1, 1970, the District Car Foreman forwarded to Claimants
separate letters containing the same wording as follows:

"The transcript of investigation held with you on
November 24, 1970 in my office has been reviewed
and clearly indicates that you are guilty of
charges preferred against you.

Accordingly, discipline for this offense will
consist of 14 working days suspension from
service. Therefore you may report for duty on
your regular assignment as Car Inspector at 3 PM
on December 7, 1970."

Petitioner contends that the suspensions of claimants violated
Rule 34 (h) of the Controlling Agreement, which provided in part:

"If it is found that an employe has been unjustly
suspended ... from service, such employe shall be
reinstated with his seniority rights unimpaired and
shall be paid for all time lost resulting from such
suspension ... less any amount earned in other em-
ployment."

Petitioner avers that Carrier failed to sustain the charges with
valid proof and therefore the penalties imposed were unjust. Carrier urges that
this record fully satisfies the criteria which our many Awards dealing with dis-
cipline matters have enunciated and, therefore, its action should not be inter-
fered with.

In Second Division Award 6368, the extent and limitations of this
Board's jurisdiction and authority relative to discipline cases were summarized,
in part, as follows:

"Our function, ... is to review the record, ascertain
whether the Controlling Agreement had been complied with;
the Claimants were afforded due process; there was sub-
stantial evidence to sustain a finding of just and suf-
ficient cause for the discipline imposed; and that the
action taken by Carrier was not arbitrary, capricious
or unreasonable."

The Claimants were afforded the hearing called for in Rule 34 (g) of the Controlling Agreement. They were duly represented by spokesmen from their Organization. They testified in their own behalf and witnesses were subjected to cross-examination. Thus, the first two cited standards were fulfilled.

The third factor is guided by the following:

"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)"

Application of this doctrine was forthrightly stated in Third Division Award 13179 (Dorsey) to the effect that:

"We do not weigh the evidence 'de novo.' If there is material and relevant evidence, which if believed by the trier of the facts, supports the finding of guilt, we must affirm the finding."

The extent and nature of the evidence adduced at the hearing necessary to meet these requirements has been set forth in many Awards of this Board. (See Second Division Awards 4098, 5681, 6155 and Third Division Awards 12491, 13116, 13127, 13129, 15456 and others cited therein.)

In the instant case, there is no material dispute as to material facts. Claimants were apprehended by Carrier security officers picking up merchandise, validly believed to have been previously removed from a freight car by a person or persons unknown, from a place along the tracks located in Carrier's Bensenville, Illinois Train Yards. Essentially this was the basis for the charges initially referred to hereinabove and the conclusion of the Carrier that the claimants were guilty of said charges.

Hearing Officers on the property are not required or expected to be versed in the law. However, when the serious charge of "theft" is levelled against employes, it must be presumed that at least the elements of the word as provided by a dictionary was understood to be applicable. The Dictionary of the English Language (Random House, New York, 1966) provides the following definition:

"theft n. 1. the act of stealing; the wrongful taking away and carrying away of the personal goods or property of another; larceny ..."

The Hearing Officer was unquestionably impressed by the views of the Carrier's key witness, a Lieutenant in its Security forces, who stated at various times during the hearing:

"...They were acting very suspicious..." (Tr. pg. 4)

I assume whoever took the bottles from underneath the box car were the ones who broke into the box car."
(Tr. pg. 9) (Emphasis supplied.)

And then the following colloquy between the Hearing Officer, W. C. Mauer, and Lieutenant Sedlack:

"WCM ... Am I correct in believing that whoever broke into the car put the bottles on the track.

M.S. Yes." Tr. pg. 12 (Emphasis supplied.)

In a recent Award of this Division 6277 (McGovern), it was stated that a "record ... replete with assumption, conjecture, speculation, and suspicion," is not "sufficient to uphold Carrier's position ...". (See also Award 1198, 3869, 4046, 4338, and First Division Award 20471.)

The record of hearing, even as embellished in Carrier's submission, does not provide the necessary proofs to result in a finding that substantial evidence was adduced to support the charge upon which Claimants were disciplined.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:

E. A. Killen
Executive Secretary

Dated at Chicago, Illinois, this 20th day of June, 1973.