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MAR 21 1978

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 7483
Docket No. 7225
2-SPT-MA-'78

B. K. TUCKER

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

Parties to Dispute: { International Association of Machinists
and Aerospace Workers
{
{ Southern Pacific Transportation Company

Dispute: Claim of Employees:

1. That under the current Agreement Machinist E. Dominguez (hereinafter) referred to as Claimant) was improperly dismissed from Carrier's service on April 4, 1975.
2. That, accordingly, the Carrier be ordered to restore Claimant to service with seniority and service rights unimpaired and with compensation for all wage loss from date of dismissal to date of restoration to service.
3. Carrier violated the provisions of Rule 39 of the current controlling Agreement in conducting a joint formal hearing which involved employees of three (3) Shop Crafts, eliminating the possibility of a fair and impartial hearing.

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.

Mr. E. Dominguez was employed by Carrier as a Machinist from January 19, 1971 until he was dismissed from service on April 4, 1975. The letter notifying him of his dismissal reads in pertinent part as follows:

"Evidence adduced in formal hearing conducted in El Paso, Texas, March 11 thru March 19, 1975 established your responsibility for participating in an unauthorized work stoppage of the Company's service at El Paso, Texas, February 10, 1975.

"Your actions in this instance were in violation of Rule 801, that part reading:

'Employees will not be retained in the service who are ..., indifferent to duty,... or who conduct themselves in a manner which would subject the railroad to criticism.',

Rule 804, that part reading:

'Any act of hostility, misconduct or wilful disregard or negligence affecting the interests of the Company will not be condoned...'

of the General Rules and Regulations of the Southern Pacific Transportation Company, Form S-2292, as posted.

For reasons stated you are hereby dismissed from the service of the Southern Pacific Transportation Company.

Please acknowledge receipt of this letter by affixing your signature to the attached copy and arrange to turn in any passes or Company owned equipment to the Plant Manager's Office, El Paso."

A voluminous hearing transcript is included in the record before us. That transcript memorializes a "joint hearing" involving multiple crafts and many employees which was convened March 11-19, 1975 to investigate a concerted "sick out" or unauthorized work stoppage on February 10, 1975. Claimant and his representatives objected to the format and conduct of the hearing on the first day and refused to participate further. That claim is based at least in part upon the alleged procedural insufficiencies of that hearing, specifically that a joint hearing is per se violative of Rule 39. We are not persuaded on this record that the hearing was per se defective under the Rule. Accordingly Claim 3 must be denied.

Claimant boycotted the investigative hearing at his peril but his dismissal cannot be upheld because no substantive evidence was adduced at the hearing to support the charges against him.

We have combed the record with extreme care and can find not a scintilla of solid evidence from which a reasonable mind could conclude that Mr. Dominguez participated in, let alone was a "principal leader" of, an unauthorized work stoppage on February 10, 1975. The record shows that he reported for work on time, was present and available for work all day and left the property only once (and then with permission from his Supervisor) to make a telephone call to his General Chairman. It is too well established to require citation that Carrier has the burden of persuasion by substantial record evidence that Claimant is culpable of the acts of misconduct with which

he is charged. Hearsay evidence is admissible in arbitration proceedings, but the absence of substantial evidence on the record before us requires that we sustain the Claims 1 and 2.

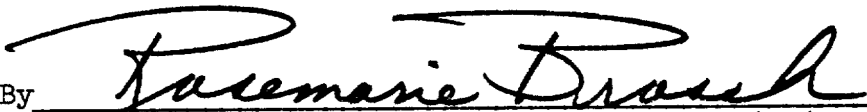
Claimant shall be restored to service with his seniority rights unimpaired and Carrier shall compensate him for the wage loss resulting from his wrongful dismissal. In computing the amount of wage loss payable under Rule 39, outside earnings shall be deducted.

A W A R D

Claims 1 and 2 are sustained and Claim 3 is denied, all consistent with the foregoing findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 21st day of March, 1978.