

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12856
Docket No. 12719
95-2-93-2-92

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

PARTIES TO DISPUTE: (International Brotherhood of Electrical
(Workers, AFL-CIO, System Council No. 2
(Union Pacific Railroad Company
((Texas & Pacific)

STATEMENT OF CLAIM:

- "1. That the Union Pacific Railroad Company (Texas & Pacific) violated the controlling agreement, particularly Rules 23 and 24, when they unjustly and arbitrarily withheld Electrician K. C. Jackson from service beginning April 8, 1992, following investigation held April 27, 1992, and was assessed a sixty (60) day suspension from Carrier's service May 7, 1992.
2. Accordingly, the Union Pacific Railroad Company (Texas & Pacific) be ordered to compensate Electrician Jackson as follows:
 - (a) Compensate him for all wages lost, April 8, 1992 through June 6, 1992 inclusively, at the prevailing rate of pay of electricians and all applicable overtime;
 - (b) Make him whole for all vacation rights;
 - (c) Make him whole for all health welfare and insurance benefits;
 - (d) Make him whole for all pension benefits including Railroad Retirement and Unemployment Insurance;
 - (e) Make him whole for any and all other benefits that he would have earned during the time withheld from service;
 - (f) Any record of this arbitrary and unjust disciplinary action be expunged from his personal record."

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 April 9, 1992, Claimant was notified by certified mail to attend a formal Investigation considering charges of alleged removal of company property. The Investigation was held on April 27, 1992. On May 7, 1992, the Carrier notified the Claimant that he had been found guilty of a substantial part of the charges and was assessed a 60 day suspension.

The Organization has raised several arguments on the property. It objects to the Claimant's removal from service which occurred prior to the Investigation. It argues that the Investigation was conducted in manner to elicit statements prejudicial to the Claimant and clearly in opposition to Agreement Rules providing for a fair hearing. The Organization argues that the Claimant was forced to face two Investigations (double jeopardy), with the second one conducted to "justify the first." The Organization also argues that the Investigating Officer coached witnesses and failed to produce the evidence from the first Investigation. On merits, there was no evidence to support the charges and the Claimant was not proven guilty.

The Carrier denied any procedural violation in the handling of the Investigation. As for the issue of two Investigations, the Carrier argues that the first was only the Special Agents preliminary Investigation which was handled with the full cooperation of the Claimant. That interrogation was in violation of no provision of the Agreement and certainly did not, in the Carrier's view, raise to the level of double jeopardy. As for the charges, the Carrier maintains throughout its on-property correspondence that the evidence sufficiently proves that the Claimant was guilty as charged.

As a preliminary point, information and argument found in Submissions and not a part of the on property record is inappropriate. This Board has ignored all such evidence and argument in its decision.

The Board has reviewed the procedural issues and finds no Rule violated herein. No provision of the Agreement permits the discovery requested. The Board finds no relevant basis to hold for alleged "double jeopardy" in that the Claimant was interviewed by Special Agents in the course of their investigations. The Investigation was handled in full compliance with the controlling Agreement.

The Board has turned its attention therefore to the merits of the case. The Carrier has the burden to prove its case with substantial probative evidence. In the instant record, this Board has labored over the transcript and the transcribed recording of the interview with the Claimant prior to the search of his house. We are forced to conclude that the evidence is insufficient.

The Claimant was charged with alleged misconduct in that he had engaged in the:

"Unauthorized removal of company tools, towels, Fanfare, as well as the following property recovered during search of your residence: One jet Lube 769 lubricant, one Zap Aerosolve, one pair of safety glasses."

The record has no probative evidence whatsoever that the Claimant had in his possession any company tools, towels or Fanfare. The Special Agents who went with the Claimant to his house for the search brought back items including glasses and a flashlight, which turned out not to be Carrier property. As for the two remaining items, the testimony of Carrier witnesses does not satisfy the burden of proving that the items were Carrier property. Both Special Agents testified that they were not knowledgeable about the items. Special Agent Plummer indicated that he took items that might belong to the Carrier and which were identified as Carrier items by J. T. Eason, who didn't testify. Special Agent Legate was asked if the two remaining items given to him were exclusively made by and used by the Carrier. He responded that he did not have "the faintest idea." The items were not a part of the record, only a picture of them. There is no evidence or testimony that these two items of Jet Lube 769 and Zap Aerosolve had or should have had Carrier markings. The Board has carefully reviewed the testimony of the Claimant by transcription, when interviewed by the Special Agents, as opposed to his testimony during the Investigation. We have contrasted that testimony with the testimony of the Special Agents. The Board finds that the overall burden of proof has not been met.

The Board concludes after a thorough consideration of all of the argument and testimony that there is a lack of substantial evidence for a finding of guilt. The Claimant is to be made whole for all lost wages less any outside earnings. His record is to be cleared. The Claimant is to be provided all benefits consistent with the Agreement (see Second Division Award 10334).

AWARD

Claim sustained in accordance with the Findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 24th day of February 1995.