

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 13082
Docket No. 12938
96-2-94-2-89

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

PARTIES TO DISPUTE: (System Council No. 9 - (International
(Brotherhood of Electrical Workers
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(CSX Transportation Company, Inc. (former
(Seaboard Coastline Railroad Company

STATEMENT OF CLAIM:

- "(1) That at Waycross, Georgia on May 11, 1993, CSX Transportation Company violated the controlling agreement, particularly Rule 32, when Electrician Jesse Sparrow, ID 165183, was unjustly removed from service and was directed to attend formal investigation for alleged participation in a fraudulent insurance scheme in connection with conduct unbecoming an employee in that he was indicated (sic) April 6, 1993 by Federal Grand Jury in the United States District Court, Southern District of Georgia. CSXT neglected to apprise Mr. Sparrow of the precise charge citing no specific Company rule and/or labor agreement violation further conducting formal investigation on June 15, 1993 of which adduced no conclusive evidence that Mr. Sparrow was involved in a scheme to defraud any insurance company and CSXT, on July 3, 1993, subsequent dismissal of Mr. Sparrow from service.
- (2) That Electrician Jesse Sparrow be compensated for eight (8) hours at the pro rata rate commencing May 11, 1993 by reason of CSXT unjust removal and subsequent dismissal from service on July 3, 1993, and compensation for all lost wages until such time Mr. Sparrow is returned to service with seniority rights unimpaired, be made whole for all vacation rights, for all health and welfare and insurance, for pension benefits, including railroad retirement and unemployment insurance, and for any other benefits that he would have earned as said benefits are part of the wages lost while being unjustly removed and dismissed from 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 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 were given due notice of hearing thereon.

On April 6, 1993, the federal grand jury sitting in the United States District Court, Southern District of Georgia, indicted the Claimant on 11 counts of mail fraud. The grand jury indictment stemmed from an allegation that Claimant, along with other CSX employees, filed fraudulent claims, in conspiracy with a local chiropractor, seeking payment from Traveler's Insurance Company for treatments that never occurred.

The Traveler's Insurance Company policies are provided as an employment benefit for employees of the nation's carriers through Agreements negotiated with the employees' organizations.

Once the indictments became unsealed, the Carrier charged the Claimant on May 11 and noticed an Investigation for May 20, 1993 to determine the Claimant's responsibility, if any, in connection with "... conduct unbecoming an employee in that you were indicted on April 6, 1993 by the federal grand jury in the United States District Court, Southern District of Georgia, for your alleged participation in a fraudulent scheme." Claimant was immediately removed from service.

The Investigation finally commenced on June 15, 1993. At the Investigation, Carrier's Police Lieutenant introduced evidence of the entire indictment and Carrier determined that Claimant was the Jesse Sparrow named in the indictment. The Carrier also introduced a newspaper article indicating that Claimant had been indicted, along with others, for participating in the fraudulent insurance scheme.

As a result of the Investigation, Claimant was removed from Carrier's service on July 3, 1993.

On July 28, 1993, Claimant was convicted on 11 counts of mail fraud as alleged in the April 6, 1993 indictment.

On October 20, 1993, the Claimant was sentenced to serve 16 months in prison, to make restitution of over \$17,000, and was sentenced to three years supervision after release from prison.

The Organization appealed the Claimant's dismissal by alleging that the Claimant was improperly charged because the Carrier failed to cite a Rule violation in its May 11, 1993 Notice of Investigation. According to the Organization, conduct unbecoming an employee is insufficient to properly apprise the Claimant of the nature of the offense causing him to be dismissed from service.

The Organization also argues that the Claimant was improperly removed from service per Rule 32. According to the Organization, the Claimant posed no threat to continued service of the Carrier and he could not, therefore, be withheld from service prior to the June 15, 1993 Hearing as required by Rule 32.

The Organization also argues that the Carrier failed its burden of proving that Claimant participated in the fraudulent insurance scheme which caused him to be indicted on April 6, 1993.

Therefore, the Organization urges the Board to reinstate the Claimant with backpay and appropriate benefits.

The Carrier first argues that the Claimant was properly withheld from service pursuant to Rule 32, because the Claimant was guilty of a felonious fraud. The Carrier cites Second Division Award 9928 which suggests that in certain situations, a Carrier may summarily remove an employee prior to a Hearing. The Carrier argues that certainly an employee charged with insurance fraud against the railroad's own insurance carrier qualifies as a legitimate reason to remove an employee from service prior to conducting a Hearing. The Carrier also notes that the Claimant's co-conspirators' summary removal from service and dismissal had been upheld in Second Division Award 12625 and in Public Law Board No. 5310, Awards 1, and 2.

Next, the Carrier argues that it sustained its burden of proof at the Investigation by introducing substantial evidence that the Claimant was guilty of insurance fraud. The Carrier correctly asserts that the burden it bears during the Investigation is to produce substantial evidence upon the record and that it is not required to meet the criminal burden of proof of beyond a reasonable doubt.

Finally, the Carrier argues that the discipline of dismissal is justified in this matter despite the fact that it reached its decision to dismiss the Claimant prior to his ultimate conviction for mail fraud. The Carrier argues that it has a right to expect honesty in its employees and that it has no obligation to retain dishonest employees in its service. Therefore, the Carrier argues in favor of upholding its decision to dismiss the Claimant.

We reviewed the record as presented by the parties and the above-mentioned Awards upholding the dismissal of the Claimant's co-conspirators scheme and find that we must uphold the Claimant's dismissal.

We find that the Carrier correctly argued that a Notice of Investigation does not need to contain a charge alleging a specific Rule violation but rather, must contain sufficient information to reasonably apprise an employee so that he or she may mount a defense. In this situation, Claimant could not have been surprised that the Carrier charged him with conduct unbecoming an employee based upon his April 6, 1993 indictment.

Furthermore, the Carrier correctly states the evidentiary rule, that it merely must produce substantial evidence at the Investigation in support of its charges against an erring employee. Here, the Carrier produced substantial evidence in the form of Claimant's indictment and his admission that he was, in fact, the Jesse Sparrow mentioned in the April 6, 1993 indictment alleging mail fraud.

The Carrier has no obligation to keep in its service dishonest employees. Furthermore, it had no obligation to insure that Civil and/or criminal charges against the employee were, in fact, proven. This argument is moot in any event because the Claimant was, in fact, found guilty of 11 counts of mail fraud as alleged in the indictment subsequent to the Hearing.

Therefore, we find that the Claimant was not treated in an unfair manner and that the Carrier based its decision of dismissal on substantial evidence developed at the June 15, 1993 Investigation. Finally, we find the discipline of dismissal to be just in this matter because the Claimant did, in fact, participate in the mail fraud against the railroad's insurance carrier, namely, Traveler's.

Therefore, we must deny this claim.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 9th day of December 1996.