Award No. 3869

Docket No. 3728

2-UP-MA-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 105, RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L. - C. I. O. (Machinists)

UNION PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

That under the current agreement Machinist Helper Richard Hollinger was unjustly deprived of his service rights beginning on April 14, 1959, and that accordingly the Carrier be ordered to compensate this employe for all time lost.

EMPLOYES' STATEMENT OF FACTS: Mr. Richard Hollinger, herein referred to as the claimant, was employed by the carrier as a machinist helper at Council Bluffs, Iowa, and his seniority as such is April 9, 1943, with regularly assigned hours from 12:00 Midnight to 8:00 A. M.

The carrier advised this claimant to appear at 10:00 A. M. April 7, 1959, for investigation and hearing in connection with the No. 3 traction motor gears on GTE 2-B running hot caused by lack of gear grease.

The claimant was dismissed from service on April 14, 1959, and in conference on August 21, 1959, the carrier offered to reinstate him but without pay for time lost, which basis of settlement was not accepted.

The agreement effective May 1, 1948, as subsequently amended, is controlling.

POSITION OF EMPLOYES: It is submitted that the hearing record of the claimant definitely discloses that this claimant employe was dismissed from service on purely as well as even far-fetched circumstantial imagination as the carrier adduced no competent evidence whatever in the hearing record which remotely convicts the claimant of having in any way improperly performed his duties on Diesel Unit GTE 2-B the morning of April 6, 1959. Thus it is regarded pertinent to herein set forth certain significant questions and answers appearing in the hearing transcript. Questions advanced by the carrier's master mechanic and the answers thereto follow:

"Q. Did you work Turbine 2-2B, morning of April 6, 1959?

A. Yes.

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 were given due notice of hearing thereon.

This case arises out of the disciplinary penalty imposed upon the Claimant by the Carrier on the ground that he failed to grease the right No. 3 traction motor gears on the GTE Locomotive 2-B at Council Bluffs, Iowa, on April 6, 1959.

The Claimant has denied the charge and contended that he put the normal amount of 5 to 6 lbs. of grease in said gears. Two witnesses who worked with him at the time in question (H. C. Hires and L. R. Staniford) have, without reservation, corroborated the Claimant's contention.

In an effort to disprove the Claimant's statement as well as the direct testimony of the two witnesses, the Carrier has called our attention to certain inferred facts intended to show that no other circumstance than the Claimant's failure properly to grease the gears could have logically caused them to run hot.

The law is well settled that "circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." See: Michalic v. Cleveland Tankers, Inc., 364 U. S. 325, 330; 81 S. Ct. 6, 11 (1960). However, it is also a firmly established rule of law that, in discipline cases, circumstantial evidence does not relieve the employer from the burden convincingly to prove that the employe disciplined is guilty of the wrongdoing with which he is charged. Mere suspicious circumstances are insufficient to take the place of such proof. See: 2nd Division Awards 1178, 1197, 1969 and 2583. See also: Frank Elkouri and Edna A. Elkouri: "How Arbitration Works," Washington, D. C., BNA Incorporated, 1960, pp. 192-3 and cases cited therein.

In applying the above principles to the facts underlying this case, we have reached the following conclusions:

When the Carrier's mechanical forces inspected the gears in question at Schuyler, Nebraska, they assumed that they were running hot because of the Claimant's failure to grease them. But the record does not show that their inspection was so thorough as to exclude any other cause, such as foreign metal, dirt, carbon, etc. Moreover, after the gears were properly greased at Schuyler, they again needed (additional) greasing some 80 miles further at Grand Island, Nebraska. Hence, the chain of events pointing to the Claimant's guilt is inconclusive and the possibility that the gears ran hot for reasons other than the Claimant's failure to grease them at Council Bluffs, Iowa, cannot logically be excluded.

Furthermore, the record is devoid of any facts which would adversely reflect on the credibility of the two witnesses. We are also impressed by the fact that the Claimant has been in the Carrier's service since 1943

without having ever given cause for any disciplinary action prior to the incident here in dispute.

Finally, we place no significance upon the Claimant's admitted failure to put some car oil into the gear case because the addition of car oil was not for greasing purposes and, incidentally, is no longer used.

In summary, the evidence on the record considered as a whole does not permit a finding to the effect that the Claimant's own statement as well as the testimony of the two witnesses, namely, that the former properly greased the gears in question, are incorrect. The best that can be said in favor of the Carrier's charge is that there exists a suspicion that the Claimant may have overlooked greasing the gears. But mere suspicion is not sufficient to prove his guilt.

Accordingly, the Claimant is entitled to recover the loss in his pro rata rate resulting from the disciplinary penalty imposed upon him. He was dismissed from service on April 15, 1959, but, on August 21, 1959, was offered re-instatement on a leniency basis without pay for time lost. The available evidence does not reveal that said offer was conditioned upon a waiver of his right to process his monetary claim through ordinary channels. Thus, he is entitled to compensation only for the period from April 15, 1959, through August 21, 1959.

For the above stated reasons, it becomes unnecessary to rule on the Claimant's procedural objections and we express no opinion on the validity thereof.

AWARD

Claim sustained in accordance with the above Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 9th day of November 1961.