Award No. 4046
Docket No. 3895
2-SOU-CM-'62

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. 21, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Carmen)

SOUTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current Agreement Carman G. J. Burks was unjustly suspended December 21, 1959, and dismissed from the Carrier's service December 23, 1959.

2. That accordingly the Carrier be ordered to compensate the aforenamed employe for all time lost from December 21, 1959 to May 29, 1960, for the aforesaid violation.

EMPLOYES' STATEMENT OF FACTS: Carman G. J. Burks, hereinafter referred to as the claimant, employed by the carrier at Columbia, South Carolina, was notified December 21, 1959 he was suspended from service and charged with dereliction of duty on December 20, 1959.

Formal investigation was held December 22, 1959. On December 23, 1959 the claimant was notified he was found guilty as charged and was dismissed from the carrier's service.

On December 29, 1959, Local Chairman Whittle furnished Mr. Gerson, Master Mechanic, for the record of claimant's dismissal, copies of statements from Yardmaster J. L. Gilmore and Engineer L. E. Dicke. May 26, 1960 the carrier advised that the discipline so far applied had served its purpose and claimant was being restored to service with all rights unimpaired, but without pay for time lost.

The claimant returned to the service of the carrier May 29, 1960, without prejudice to his position that he was entitled to compensation for wages lost, and with the distinct understanding the question of compensation would be further progressed in accordance with the controlling Agreement and the Railway Labor Act.

This dispute has been handled with the carrier's officers designated to handle such matters, in compliance with current agreement, all of whom have refused or declined to make satisfactory settlement.

and sufficient cause. His employment relationship was terminated. Having been reemployed by the carrier at is election on a leniency basis, he does not have a contract right to the compensation here demanded on his behalf. In these circumstances, the Board cannot do other than make a denial award.

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.

The claimant, Carman G. J. Burks, Jr., was employed by the Carrier at Columbia, South Carolina. On December 20, 1959, he was assigned, together with Carman D. W. Gabriel, to inspect the cars in passenger train No. 32. After the train had left Columbia, the five rear cars became cold. An inspection was made at Winnsboro, South Carolina. It was found that the steam valve on the rear end of Pullman Car Ocmulgee River was defective and closed. A supervisory employe opened the steam valve and the train departed. Since the three rear cars were still not heating adequately, another inspection was made at Chester, South Carolina. It was found that the steam valve on the rear end of the fourth car from the rear was closed. The valve was opened and no further difficulties developed.

The Claimant and Gabriel were promptly suspended from service on the ground of having been negligent in the performance of their assigned duties. Following an investigation hearing, Gabriel was found innocent but the Claimant was discharged. He was restored to active service with all rights unimpaired but without back pay on May 29, 1960. He now claims compensation for his loss in wages during the period from December 21, 1959, to May 29, 1960.

This case turns on the question of whether the Claimant was discharged for just and sufficient cause as contemplated in Rule 34 of the applicable labor agreement. For the reasons hereinafter stated, we are of the opinion that the answer is in the negative.

It is firmly established in the law of labor relations that the burden of proof squarely rests upon the employer convincingly to prove that an employe committed the offense upon which his discharge is based. See: Award 2583 of the Second Division; Arbitration Awards in re National Carbide Co., 24 LA 804, 806 (1955); Southern Bell Telephone & Telegraph Co., 25 LA 270, 274 (1955); Phillips Petroleum Co., 61-3 Labor Arbitration Awards (ARB; Commerce Clearing House, Inc.) No. 8790, pp. 6602, 6606-6607 and references cited therein. In meeting this burden of proof, an employer is free to rely on circumstantial evidence which may often be even more certain, satisfying and persuasive than direct evidence. However, irrespective of whether circumstantial or direct evidence or both types of evidence, is relied upon, the employer still has the burden to prove convincingly that the employe involved is guilty of the wrongdoing with which he is charged. Mere suspicious circumstances are insufficient to take the place of such proof. See: Award 3869 of the Second

Division and causes cited therein; Arbitration Award in re Cutler-Magner Co., 62-1 ARB No. 8070, pp. 3262, 3265.

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

In an effort to prove the Claimant's alleged negligence the Carrier asserts that no circumstances other than the Claimant's failure properly to inspect and service train No. 32 could have conceivably caused the lack of adequate heating. A careful review of the evidence on the record considered as a whole has convinced us that the Carrier's charge is inadequately supported thereby.

First, the record reveals that, shortly before train No. 32 left Columbia, Gabriel opened the steam valve on the rear end of the last car and held it open until dry steam started blowing (Carrier's Exhibit "A", pp. 9, 10). We fail to comprehend how this could have happened if the two steam valves in question had been closed.

Second, Trainmaster King testified at the investigation hearing that, prior to the train's arrival at Winnsboro, he walked through three coaches running behind Pullman Car Ocmulgee River and found them "fairly comfortable" (Carrier's Exhibit "A", p. 19). It is difficult to conceive how the coaches could have been heated comfortably if the steam valve on the rear end of the Pullman Car had been closed.

Third, the Claimant's direct testimony that he made certain repairs and opened the steam valve before the train left Columbia is corroborated by an affidavit of Yardmaster Gilmore. There is nothing in the record which would contradict Gilmore's statement. The Carrier has objected to the introduction of the affidavit on the ground that it was not submitted at the investigation hearing but was first submitted to Master Mechanic Gerson, Jr., together with the Organization's letter appealing the Claimant's discharge. Carrier Exhibit "C" shows that Gerson did not object to the submission of the affidavit. Assuming without deciding that it should have been introduced at the investigation hearing, Gerson's failure to raise a procedural objection barred the Carrier from objecting to the affidavit's introduction thereafter. See: Award 1834 of the Second Division.

Fourth, as far as the steam end valve on the fourth car from the rear is concerned, Gabriel testified that he inspected the last five cars of train No. 32 immediately prior to departure from Columbia and found nothing amiss (Carrier's Exhibit "A", p. 14). Since Gabriel was found innocent, we must assume that the Carrier accepted his testimony as a true statement of the facts. As a result, we fail to see any negligence on the part of the Claimant regarding the inspecting and servicing of this valve.

In summary, we are of the opinion that the chain of events pointing to the Claimant's alleged guilt is inconclusive. The best that can be said in favor of the Carrier is that there exists a suspicion that the Claimant may have been negligent. Mere suspicion is not sufficient to prove that he committed the offense for which he was discharged. See: Awards 1325 and 1969 of the Second Division. Hence, his discharge was not for just and sufficient cause.

Accordingly, we hold that the Claimant is entitled to recover the loss in his pro rata rate for the period from December 21, 1959, through May 28, 1960 (both dates inclusive), less any compensation which he may have earned in other gainful employment during said period.

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 3rd day of August, 1962.