Award No. 4323
Docket No. 4102
2-SAL-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Joseph M. McDonald when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 39, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.—C. I. O. (Carmen)

SEABOARD AIR LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current applicable agreement Carmen A. W. Levins, Jr. and W. H. Wilkinson, Jr. were both unjustly given an investigation, conducted in the Master Mechanic's office, Tampa, Shops, Tampa, Florida, March 6, 1961, and discharged from the service on March 13, 1961.

2. That accordingly the Carrier be ordered to reinstate Carmen A. W. Levins, Jr. and W. H. Wilkinson, Jr. with seniority rights unimpaired and compensated for all wages lost as the result of said unjust charges.

EMPLOYES' STATEMENT OF FACTS: A. W. Levins, Jr. hereinafter referred to as the claimant (A) has been employed by the Seaboard Air Line Railroad Company, hereinafter referred to as the carrier, for approximately 16 years, and been a carman since May 5, 1953, Tampa Shops, Tampa, Florida. His regular assigned hours were first shift, 7:30 A. M. to 4:00 P. M., Monday through Friday, with Saturday and Sunday as rest days.

W. H. Wilkinson, Jr. hereinafter referred to as claimant "B" has been employed by the Seaboard Air Line Railroad Company, hereinafter referred to as the carrier, approximately 14 years and has been a carman since April 20, 1953, Mulberry, Florida. His regular assigned hours first shift, 7:30 A. M. to 4:00 P. M., Monday through Friday, with Saturday and Sunday as rest days. They were notified jointly by letter underdate April 4, 1960 from Mr. F. B. Clark, Master Mechanic, to appear for formal investigation to be held in his office at 10:00 A. M., April 9, 1960, charging them with the following:

"You are charged with disloyalty to your employer and conduct unbecoming a Seaboard employe in that you participated in a scheme that was inimical to the interest of the Seaboard when Claim Agent McCown was lured under false pretenses to, and guilefully entrapped

as being the proper functions of a Local Chairman. Nor can the fact that the Wilkinson suit was dismissed by Fulton Superior Court in Atlanta in October 1961 at request of Hewlett, Hewlett and Wall cause claimants' actions to be excused.

The evidence is conclusive that Carmen Wilkinson and Levins were guilty as charged, fully sustains the carrier's action in dismissing them from the service and that the seriousness of their conduct and improper actions cannot be overemphasized. The claim should, therefore, be denied.

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.

Claimants Wilkinson and Levins were discharged from the service of the Carrier after a hearing which found that they had participated in a scheme that was inimical to the interests of the Carrier.

We have examined the record herein, and the transcript of the hearing which led to the dismissal of the Claimants.

Aside from the merits of this dispute, there are several other matters to be disposed of.

The first we shall consider is whether Claimant Levins had a "prompt" hearing within Rule 33.

Rule 33 reads as follows:

"RULE 33 — Discipline — (Revised effective September 1, 1943)

> No employe shall be disciplined without a fair hearing by designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employe and his duly authorized representative will be apprised of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the net wage loss, if any, resulting from said suspension or dismissal."

The record indicates that there was no suspension of Levins pending the hearing involved in this Docket, and even so, the record does not support Levins' contention, since as late as September of 1960, Levins asked for furthe postponement of the hearing. Hearing was finally held on March 6, 1961, on the charge originally scheduled for April 9, 1960. We cannot hold the Carier responsible for the delay, and find that Carrier did not violate the Rule.

Carrier has objected to our consideration of certain materials which are contained in the Rebuttal statement of the Claimants, which items Carrier states are violative of Circular 1 of the National Railroad Adjustment Board and Circular "A" of our Division of the Board.

We find that Exhibits 1 and 2 attached to the Employes' Rebuttal, together with the Exhibits A and B attached to each are violative of the Rules and we are disregarding them in the consideration and disposition of this dispute. Exhibit 3, being a Public Law of the United States, we can consider or not as it adds or does not add to our understanding and disposition of this matter.

As to the merits of this matter, without reciting the details of what is contained in the hearing transcript, there is not much variance in the account of what occurred on the day in question, although there is complete variance between Carrier and Claimants as to what those facts established.

Wilkinson had a lawsuit pending against the Carrier, which in itself is not any breach of the duty of loyalty owed his employer. However, when he took advantage of his employment relationship to induce the Claim Agent McCown to come to his home for the purpose of permitting his attorney to eavesdrop, (whether mechanically or otherwise), this was an improper advantage of the employment relationship, and we must agree that as to Wilkinson, the Carrier's action cannot be disturbed.

As to the Claimant Levins, the case is circumstantial. Such evidence, however, when properly considered is sufficient, and is often more conclusive and satisfying than real evidence. But, suspicious circumstances or guilt by association cannot take the place of proof. The circumstances must be such that they exclude every reasonable hypothesis, except that of guilt.

The record here shows that Claimant Levins was the Local Chairman of Wilkinson's organization, and responding to Wilkinson's request, drove Wilkinson's attorney to Wilkinson's home on the evening in question. He denies knowledge of the fact that McCown was to be there; he denies that he knew of a tape recorder; he denies any knowledge of Wilkinson's plan to attempt to entrap McCown.

We fail to see how the record herein points to the guilt of Levins so clearly as to brand him disloyal and call for his discharge.

AWARD

Claim denied as to Claimant Wilkinson.

Claim sustained as to Claimant Levins. Ordered that Claimant Levins be reinstated with seniority rights unimpaired, and that he be compensated for the net wage loss resulting from his discharge.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 18th day of October 1963.

DISSENT OF CARRIER MEMBERS TO AWARD 4323

The majority clearly erred in defining the actions of claimant Levins as being merely "suspicious" in implying that dismissal was ordered on the grounds of "guilt by association," and by ordering reinstatement to service with pay for net wage loss because they "fail to see how the record herein points to the guilt of Levins so clearly as to brand him disloyal and call for his discharge."

Circumstantial evidence has been defined as the positive proof of circumstances which necessarily or usually attend the ultimate fact, giving rise to the logical inference that such fact does exist. The majority finds the evidence against Levins to be circumstantial in this case. Then, after correctly holding that circumstantial evidence "is sufficient and is often more conclusive and satisfying than real evidence," the majority completely disregarded all of the evidence of record.

After reviewing the evidence that a trap was placed in motion early in the day, the majority finds that co-claimant Wilkinson improperly entrapped the Carrier's agent, McCown. The springing of that trap required Levins' assistance; and the direct evidence, not circumstantial, is that Levins gave it, either innocently or with knowledge. It becomes important, therefore, to decide whether Levins knew of the trap. In this connection, and in finding that the circumstantial evidence was inadequate, the majority Opinion erroneously reports that the record shows Levins "drove Wilkinson's attorney to Wilkinson's home on the evening in question." The only mention made in the record about their time of arrival at Wilkinson's home was Levins' statement in the formal hearing, as shown by the transcript, that "it was early in the afternoon." The improperly submitted Exhibits 1 and 2 attached to Employes' Rebuttal mentioned arrival "in the evening" but the Referee stated they were being disregarded in deciding the case. The error is important because Levin's presence in a small house from early afternoon to late evening with only two other persons, both of whom were engaged in the entrapment, adds substantially to the showing that Levins' assistance to the plot was given with knowledge.

After committing this error the Referee then cites Levins' denial of knowledge of the fact that McCown was to be there, denial that he knew of a tape recorder, and denial of any knowledge of Wilkinson's plan to attempt to entrap McCown. The Referee appears to hold Levins' denials to be factual, in spite of the fact that the direct evidence (not circumstantial) shows that for a lengthy period during McCown's visit Levins hid out, quietly, in a dark part of the house, not on the back porch, as he said, for there is no back porch on that house. In doing so the majority seems to conclude that a person cannot be found guilty of a charge so long as he denies his guilt. Such a conclusion, of course, disregards completely the doctrine of circumstantial evidence, the principle established by the National Railroad Adjustment Board that it will not pass upon the creditability of those testifying at a hearing or investigation, and the holding of Second Division Award 1831 that the Carrier is not obliged to believe the claimant and the decision must result from a consideration of all the evidence, including the circumstances surrounding the incident. If convictions depended upon admissions of guilt by the accused there would be very few convictions.

Circumstantial evidence is said to be particularly competent in those cases in which the witness giving evidence to the contrary is not deemed

wholly credible. Here, if the evidence of record had been properly considered, Levins' truthfulness would have been so clearly questioned that his denials could not have been accepted as factual and proving his innocence. The record shows, for example, that:

Levins testified that he was on the back porch of Wilkinson's home during the visit of McCown, whereas the floor plans and photographs of the house showed there was no back porch or any room resembling a back porch.

Claimant testified that he took no part in the discussions between Attorney Hewlett, who assisted in the entrapment, and Wilkinson, did not know who called on the telephone, was asked to leave the room and went to the back of the house where he concealed himself in the dark during the McCown visit, and did not know McCown was at the house until he saw him on the front porch. If that story were true he could not have simultaneously appeared with Attorney Hewlett at the front of the house to confront McCown as he was preparing to depart. Actually, if his story were true and he had nothing to do with the scheme as he alleged, it is only logical that he would not have made any appearance whatever with Hewlett.

Levins testified that while he was in the Wilkinson home his red and white Chevrolet was parked in front of the house opposite the driveway and was not hidden from view. In an effort to substantiate such allegation affidavits were submitted by Hewlett and Wilkinson in which they stated that McCown parked his car in front of Wilkinson's house directly in front of Levins' car which was parked adjacent to Wilkinson's driveway. Photographs of the Wilkinson home illustrate that it is impossible for the automobiles to be so parked. Claim Agent McCown testified that when he parked his car in front of the house there was no other car parked on the street in the vicinity of the house. Bearing in mind that McCown was lured to Wilkinson's house by his plea that his back was troubling him, that he was alone in the house and without transportation, the conspirators would not have jeopardized their scheme by having Levins' red and white automobile from Tampa parked directly in front of the house so as to cause McCown to doubt that Wilkinson was alone.

According to Levins, he was completely ignorant of everything connected with the entrapment, before, during and after McCown's visit, and never even knew there was a recording machine, his complicity being confined to that of chauffeur for Attorney Hewlett; that he was directed, without question, around the house, and even told to hide out in the dark part of the house without inquiry on his part. He could not explain how he suddenly and "accidentally" found himself alongside Attorney Hewlett on the front porch, confronting an officer of the Carrier with whom he was regularly employed and letting him know, in the presence of his, McCown's, wife that he had been the victim of an entrapment and "did just what we hoped you would do." It is Levins' story, in other words, that, in spite of all of the cloak-and-dagger activity going on about him in a small house, he never asked any questions about those activities, even when he found himself in the midst of them. Nor did he even ask why he had been "used" and unknowingly implicated in a devious scheme against an officer of his Company. He can only assert that all that was asked of him was done as part of his duty as a Local Chairman.

In the light of the clear evidence of record, rebutted only by assertions of a most questionable nature, it is most difficult to understand a conclusion which finds that the facts presented were nothing more than suspicious cir-

cumstances. In 20 American Jurisprudence 1043, with reference to weight of evidence, it is stated:

> "Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and cannot be presumed, and the circumstances proved must be consistent with each other and with the main fact sought to be proved. They must be not only consistent with the theory which is sought to be established, but absolutely inconsistent with any other rational theory. To establish a theory by circumstantial evidence, the known facts relied upon as a basis for the theory must be of such nature and so related to each other that the only reasonable conclusion to be drawn therefrom is the theory sought to be established."

The only "reasonable" conclusion that could be drawn from the record and evidence is that Levins was guilty as charged. The evidence excludes every other hypothesis but that of guilt.

For the reasons herein presented, we dissent.

P. R. Humphreys

F. P. Butler

H. K. Hagerman

W. B. Jones

C. H. Manoogian