

Award No. 4338
Docket No. 3989
2-C&O-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. — C. I. O. (Carmen)**

THE CHESAPEAKE & OHIO RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES: (1) That under the current agreement, Carman Carl L. Baumgardner was unjustly dealt with when he was suspended from the service of the Carrier August 2, 3, 4, 5, and 8, 1960.

(2) That accordingly, the Carrier be ordered to compensate Carl L. Baumgardner eight (8) hours each day at the applicable freight carman rate of pay for the dates August 2, 3, 4, 5, and 8, 1960.

EMPLOYEES' STATEMENT OF FACTS: Carman Carl L. Baumgardner, hereinafter referred to as the claimant, was employed as a carman in the Russell Car Shop by the Chesapeake and Ohio Railway Company, hereinafter referred to as the carrier.

Pursuant to carrier's notice to claimant citing him for investigation on charges of "being off your job and in the Erecting Shop toilet selling tips from tip book at about 2:30 P. M., June 15, 1960", investigation was held on July 6, 1960 and as a result thereof, discipline was administered to the extent of claimant's actual suspension from the service for five days—August 2, 3, 4, 5, and 8, 1960.

This dispute has been handled up to and including the highest officer designated by the carrier to handle such matters without any satisfactory settlement having been reached.

The Agreement effective July 1, 1921 as subsequently amended is controlling.

POSITION OF EMPLOYEES: It is respectfully submitted that an unbiased example of the hearing record will reveal nothing in the form of evidence to support carrier's findings of guilt in the charges placed against the claimant in this case.

It will be noted that claimant is charged with two offenses, namely, being

"Mr. Baumgardner: A. I figured that made it sore because I wasn't expecting nobody to take hold of it. He didn't aim to.

"Mr. Bradley: Q. Did Mr. Simpson hurt you at the time?

"Mr. Baumgardner: A. Yes, he did.

"Mr. Bradley: Q. Did you tell Mr. Simpson he hurt your arm?

"Mr. Baumgardner: A. I never told him nothing—I wasn't aiming to say much about it."

The employes' representative alleged at the investigation that such investigation had not been a fair and impartial one. Their objection was certainly not valid and effort was made to clear up any grounds for objections on the part of the Employes; however, such efforts by the officer conducting the investigation only resulted in further attempts by the Local Chairman to confuse the issue and to intimidate, slander and abuse those in authority.

Baumgardner was given a fair and impartial investigation in accordance with agreement rules.

As has been stated in carrier's statement of facts, the investigation resulted in Carmen Linkous, McKee and Cazad each being found guilty of charges against them and they were disciplined by being given five days overhead suspension. Grievance to the effect that the discipline rendered by carrier in their cases was not justified, was also handled by the employes on the property and was declined by the highest officer of the carrier designated to handle such matters under the Railway Labor Act. The employes did not submit their case to your Board and are now barred from doing so under the Time Limit Rule. While the employes will no doubt deny it, the indications are that they feel the discipline rendered in their case was justified.

In the case of Baumgardner the discipline was a little more severe than in the case of the others, Baumgardner being given actual suspension and the others being given overhead suspension. There can be no question as to his guilt which is clearly shown by the evidence. There was no denial by the Employes of the existence of the tip book and no reason for its presence given. The entire defense of the employes has been based on technical objections, inferences and innuendos.

The discipline meted out to Baumgardner was certainly not unreasonable or unjust and your Board would be exceeding its authority in endeavoring to substitute its judgment for that of the carrier if it should sustain the claim of the employes.

It has been clearly shown that Baumgardner was given a fair and impartial investigation in accordance with Agreement rules, that Baumgardner was guilty of the charges, that discipline rendered was fully justified by the evidence adduced, and that carrier had not been arbitrary, capricious or unjust in the degree of discipline administered. Carrier, therefore, asks that the claim of the employes be denied in its entirety.

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 dis-

pute 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 C. L. Baumgardner was employed as a carman at the Carrier's Russell Car Shop. Under date of June 16, 1960, he was charged by the Carrier as follows:

"You are charged with being off your job and in the Erecting Shop toilet selling tips from tip book, at about 2:30 P. M., June 15, 1960, which was on Company time."

After investigation hearing, he received a notice from the Carrier which reads, as far as pertinent, as follows:

"You have been found at fault for neglecting your duties to sell tips from tip book, about 2:30 P. M., June 15, 1960.

"The discipline administered is 5 days actual suspension, August 2, 3, 4, 5, 8, 1960 . . ."

The Claimant filed the instant grievance in which he contended that he was unjustly suspended. He requested compensation in the amount of eight hours at the pro rata rate for each day of his suspension. The Carrier denied the grievance.

1. At the Referee hearing the Carrier stated that the Claimant had died in 1962. This fact does not affect our jurisdiction because the Claimant died after initiating the instant claim. The law is well established that the purpose of the Railway Labor Act is fulfilled if the claim itself arises out of the employment relationship which Congress regulated. See: Award 4312 of the Second Division.

2. The Claimant was charged with two offenses: (i) with being off his job on the day in question, and (ii) with selling tips from the tip book on Company time. He was found "at fault for neglecting (his) duties to sell tips from tip book." Thus, he was merely found guilty of and disciplined for the second but not the first offense. Accordingly, the only issue before us is whether he was, in fact, guilty of the second offense, and, if so, whether the five-day suspension was a reasonable exercise of the Carrier's managerial discretion.

3. The law of labor relations is firmly settled that the burden of proof squarely rests upon the employer convincingly to demonstrate that an employe committed the offense upon which his disciplinary penalty is based. In meeting such burden, the employer is free to rely on circumstantial evidence which may often be more certain, satisfying, and persuasive than direct evidence. However, irrespective of whether the employer relies on circumstantial or direct evidence or both types of evidence, he is not relieved from proving beyond a reasonable doubt that the employe is guilty of the offense with which he is charged. Mere suspicious circumstances are insufficient to take the place of such proof. See: Award 3869 and 4046 of the Second Division and cases cited therein.

Applying the above principles to this case, we have reached the following conclusions:

The record shows that the Claimant had a tip book in his hand when he was approached by Foreman Simpson in the toilet. This fact, standing alone, did not constitute a neglect of the Claimant's duty. He has denied that he sold any tickets or tips from the tip book at that time. The evidence on the record considered as a whole is inconclusive convincingly to refute his denial. None of the witnesses, including specifically foreman Simpson, testified that the Claimant offered to sell or actually sold tips from the tip book in the toilet. On the contrary, W. O. Stephens, a disinterested witness who was in the toilet at the time under consideration, testified that he "didn't see anybody selling tips" (see: Carrier's Exhibit "B", p. 12). There is nothing in the record which would in any way contradict his testimony. The most that can be said in favor of the Carrier's position is that there exists a suspicion that the Claimant might have intended to sell tips from the tip book. (But mere suspicious circumstances are insufficient to prove beyond a reasonable doubt that the Claimant is guilty of the offense for which he was disciplined.)

In summary, we hold that the Carrier has failed to meet its burden of proof. Hence, the instant claim is justified in accordance with Rule 37 of the applicable labor agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 6th day of November, 1963.