Award No. 5790
Docket No. 5620
2-SOU-CM '69

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee William H. Coburn when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 21, RAILWAY EMPLOYES' DEPARTMENT, AFL — CIO
(Carmen)

SOUTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current Agreement, Carman R. H. Bedwell, Knoxville, Tennessee, was improperly suspended from service October 31, 1966 through January 3, 1967.

2. That accordingly, the Carrier be ordered to compensate the aforenamed employe for all time lost beginning October 31, 1966 through January 3, 1967.

EMPLOYES' STATEMENT OF FACTS: Carman R. H. Bedwell, Knoxville, Tennessee, hereinafter referred to as the claimant, was regularly employed by Southern Railway Company, hereinafter referred to as the carrier, at John Sevier Yard, Knoxville, Tennessee, and was removed from service October 31, 1966 through January 3, 1967, charged with failing to close slide doors on covered hopper cars.

Formal investigation was held 9:35 A.M. on November 3, 1966.

In a letter dated November 7, 1966, the claimant was advised by Mr. F. E. Kimball, master mechanic, that he was dismissed from service.

On November 21, 1966, claimant wrote to the master mechanic pointing out that the transcript of the investigation failed to prove him guilty. On November 22, 1966, the master mechanic replied to claimant's letter of November 21, 1966, declining the claim.

On December 13, 1966, the claim of claimant was appealed to the superintendent motive power (Western Lines), Southern Railway Company. On February 11, 1967, the superintendent motive power replied to the letter of December 13, 1966 stating that claimant was allowed to return to service on January 4, 1967 with all service rights restored but without pay for time lost.

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

erly and with authority when the punishment was imposed and that, within our limitations, we are without authority to disturb its decision."

Award No. 1137, Referee O'Gallagher:

"This is a discipline case in which there is evidence of a substantial character present in the record to show clearly that Claimant had a fair and impartial hearing. The record further shows that the decision of the Carrier to dismiss the Claimant from its service was not arrived at arbitrarily, capriciously or from motives of prejudice. Therefore, the Carrier having exercised its discretionary power to discharge the Claimant, this Board has no power or right to substitute its judgment for that of the Carrier, not to determine what we might or might not have done had the matter come to us initially."

Award No. 1275, Referee Sembower:

". . . we cannot interfere where no material error appears in the transcript of the proceedings and there is such basis for the discipline that it cannot be said to have been arbitrary, unreasonable, or in bad faith. . . ."

Also see the following additional awards of the Fourth Division:

257	401	677	844	978	1102	1218
264	574	755	899	1008	1124	1241
337	622	796	901	1048	1152	1268
375	671	804	912	1081	1201	1270

In the absence of any showing that the discipline imposed in dismissing Carman Bedwell for dereliction of duty was arbitrary or capricious or in bad faith, the Board should follow the principle of the above referred to awards.

CONCLUSION

Carrier has proven that:

(a) Under the current agreement Carman Bedwell was properly dismissed during the period October 31, 1966 through January 3, 1967.

(b) The charge against Carman Bedwell was proven at a fairly and impartially conducted investigation in which he was duly represented and testified. The evidence of record adduced at that investigation clearly reveals the indisputable fact that he was guilty as charged and was therefore dismissed for just and sufficient cause.

(c) There can be no showing that the discipline imposed was arbitrary or capricious or in bad faith. Carrier's action in dismissing Carman Bedwell is fully supported by the principles of awards of all four divisions of the Board.

(d) The Board is without authority to substitute its judgment for that of the carrier. As evidenced herein, it has so held on many occasions.

On the basis of the evidence of record, the claim presented by the brotherhood should be denied. Carrier therefore requests that the Board 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.

Claimant was dismissed from service as of October 31, 1966, after having been charged with and found guilty of failure to perform his assigned duties. a car inspector and repairer when, on that date, he did not close slide hopper doors on three covered hopper cars prior to the train's departure from Knoxville. He was reinstated on January 4, 1967, on a leniency basis with all contractual and service rights restored but without pay for time lost; hence this claim.

In view of the allegation and statements made by the representatives of the parties during the course of the Referee hearing held June 5, 1969, it appears necessary to reiterate what often has been said in these discipline cases: i.e., the Board's scope of review is limited to a consideration of the record made on the property to determine (1) whether or not the accused employe's procedural rights under the contract were fully observed; (2) whether or not he was accorded the fundamental rights of due process; (3) whether or not the finding of guilt by the Carrier was supported by substantial evidence; (4) whether or not the discipline assessed and imposed was so execessive or unreasonably harsh that the Carrier's action would be held arbitrary or capricious.

Confining our review of the record here to the foregoing, we find:

1. The charge against claimant at the preliminary investigation, i.e. "failing to close slide doors on covered hopper cars" was sufficiently precise to place Claimant on notice of the substance of his alleged offense for which later he would be tried in the formal investigation. The wording of the charge in that proceeding did not constitute a change or alteration in substance; it simply was more specific.

2. The investigation was properly and fairly conducted. The hearing officer's refusal to testify cannot be held to have prejudiced the Claimant's case. On the contrary, a presiding officer who permits himself to be used as a witness may be subject to a charge of prejudicial conduct.

3. An objective reading of the dismissal letter of November 7, 1966, leads to the conclusion that the discipline was based upon the invesgitation and not, as alleged by the Employes, upon the Claimant's personal record. It is too well established to require citation of authority that a Carrier may consider an employee's record in order properly to assess the amount or degree of discipline to be imposed.

4. The eye witness testimony of General Foreman Allen and Foreman McCay that they observed the slide doors open on the three hopper cars here involved and the appearance on those cars of claimant's pool mark was attacked but not controverted by Claimant and his representatives. Claimant's own testimony and the Richardson affidavit do not constitute evidence of any probative value because the first is self-serving and the second hearsay. The latter also can be said of Mr. Smalley's testimony regarding the closing of the car doors at Oakdale, and the Board has so treated that testimony.

The crucial point here is, however, that the testimony developed at the investigation constitutes sufficient evidence to establish that when the hopper cars left Sevier Yard (Knoxville) the slide doors were open and the Claimant's identifying pool mark appeared thereon. Those facts, in turn, raise the reasonable presumption that Claimant did not complete the job of closing the doors on the cars involved. Since that presumption has not been rebutted by evidence of probative value, it must stand. Accordingly, we find there is substantial evidence to support the Carrier's finding of guilty as charged in this case.

5. In view of the reinstatement of Claimant on January 4, 1967, with all his rights restored but without back pay, there is no basis for a finding that the discipline imposed was excessive or unreasonably harsh.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 7th day of November, 1969.

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