Award No. 5837
Docket No. 5721
2-T&P-EW- '69

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee John J. McGovern when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 121, RAILWAY EMPLOYES' DEPARTMENT, AFL — CIO (Electrical Workers)

THE TEXAS AND PACIFIC RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That Electrician, R. L. Hobbs (hereinafter referred to as claimant), Employe of the Texas and Pacific Railway Company, was unjustly removed from service on May 27, 1967. That the Claimant be compensated for all wages lost starting with and including May 27, 1967.

EMPLOYES' STATEMENT OF FACTS: Electrician R. L. Hobbs was regularly employed by the Texas and Pacific Railroad Company (hereinafter referred to as carrier) and has rendered service to this company for some nineteen (19) years, without ever have previous controversies. On or about May 16, 1967 the carrier served notice of an investigation which was to be held in claimants' behalf on May 19, 1967, at 9:00 A.M. The carrier failed to comply with rule 22, grievance, under the current controlling agreement between the Texas and Pacific Railway Company and System Federation No. 121, Railway Employes' Department Mechanical Section thereof, when they fail to cite in their letter of charges against the claimant, the precise charge. You will note through the entire investigation nowhere in this transcript of the investigation is the carrier able to prove that the piece of metal allegedly to have been taken, could be identified as that belonging to the carrier. The carrier searched the claimants' house and garage. This was done without protest of claimant. Nothing here was found that would indicate that any property which claimant had, belonged to the carrier. In short, the carrier was unable to prove that claimant had removed any company owned material. It is true that a compressor type gauge was found in the tool box of claimant, which belong to the carrier, however it was brought out in the investigation, that claimant borrowed this gauge from one of the machinists in the shops and there was no intention on the claimants' part to steal this gauge. The facts here should show that the claimant had nothing to hide from the carrier and willingly permitted the carrier to make a search of his automobile, home and garage. The only real issue here is over a piece of metal one (1) inch thick, six (6) inches wide and sixteen (16) inches long. This piece of metal had no markings on it which could be identified as that belonging to the carrier. Claimant had a receipt for this piece of metal.

"Award 4282 and many others, state that this Division is without power to substitute its judgment for that of the carrier unless the action taken was arbitrary, or unreasonable or not supported by the record. Such conditions do not exist here therefore the claim should be denied."

In Award 3834, a machinist was charged with selling a quantity of copper and brass scrap to a scrap iron and metal company. Your board considered the weight of the evidence including claimant's explanation of his selling the scrap to the scrap dealer but came to the conclusion that the evidence was legally sufficient and denied the claim. In that case, your board stated the principle that, "It is, of course, axiomatic that in this type of proceeding proof beyond a reasonable doubt is not essential." Although that is sound principle, the facts in this case are sufficiently clear that claimant was guilty as charged beyond a reasonable doubt.

Following the principles enunciated by your board in the above awards as well as in many other awards, we believe your board will come to the conclusion that claimant was afforded a fair and impartial investigation. We further believe that the proof in this case consisting of the eye witness testimony of the special agent and the claimant's admission of his wrongful conduct as described in the master mechanic's testimony is proof beyond a reasonable doubt that claimant is guilty of taking company material from T&P property without permission. Dismissal from service under these circumstances is not arbitrary, harsh or unreasonable discipline. Accordingly, we believe the discipline assessed by the carrier should not be set aside but that your Board should deny the claim for all wages lost from the time claimant was dismissed from service.

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 waived right of appearance at hearing thereon.

This is a disciplinary case wherein Claimant, after due and proper notice of the charge and hearing, was found guilty and dismissed from service.

The first question with which we are confronted is whether or not the evidence adduced at the investigation was sufficiently substantial to warrant the finding of guilty Although admittedly there is a conflict of evidence from witnesses on opposing sides of this matter, there is, in our judgment sufficient evidence to justify the finding of the Carrier. The hearing officer conducted the investigation in a fair and impartial manner and was afforded the opportunity to observe the conduct and demeanor of all witnesses testifying. The fact that he attached more credibility to some witnesses more-so than others is a matter with which we, as an appellate body, will not interfere, for the simple reason that we were unable to observe them for ourselves. If the evidence upon which a decision is rendered is substantial, we cannot interject and over-throw that decision. We find that the evidence in this case justified the finding of guilty.

The second question to be resolved is whether or not the action of dismissal from the service, was commensurate with the offense with which he was charged and found guilty. It is our judgment that the material he was charged with stealing, a pipe, approximately value $1.50, places this case in the category of "de minimis". We do not over-look the seriousness of the matter, but to deprive a man of his livelihood for one mistake, particularly after having served this Company for nineteen years without incident, is too harsh a penalty to have inflicted upon him. One month's suspension without pay is sufficient considering the entire record, and he should accordingly be compensated for all wages lost subsequent to the one month's suspension up to and including the effective date of the order of this opinion. We will sustain the claim consonant with the opinion as expressed.

AWARD

Claim sustained consonant with opinion as expressed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 16th day of December, 1969.

CARRIER MEMBERS' DISSENT TO AWARD NO. 5837
DOCKET NO. 5721
REFEREE JOHN J. McGOVERN

No principle has probably been more firmly established by all Divisions of the National Railroad Adjustment Board than that in discipline cases, it is not the province of the Board to substitute its judgment for that of the Carrier, once it finds that the evidence supporting the Carrier's decision is substantial. This award openly infringes this principle.

The claimant's offense was stealing and the evidence "justified the finding of guilty". The Referee arbitrarily reduces the dismissal of claimant to one month's suspension, by discounting the value of the item taken and noting the claimant's many years of service with the Carrier.

The seriousness of the offense is not measured by the value of the item taken. Awards **4401** (Williams), **3834** (Doyle), **3590** (Carey), **2723** (Ferguson), **2484** (Schedler), **1913** (Stone), **1850** (Bailer), **1776** (Wenke). **Third Division Awards 17243** (Yagoda), **13674** (Weston), **13130** (Kornblum), **13116** (Hamilton), **12248** (Dorsey), **9422** (Bernstein), **8715** (Weston), **8574** (Sempliner), **2696** (Carter), **2646** (Shake). It is the nature of the act — dishonesty — that warrants dismissal; the conduct strikes at the heart of the employer-employee relationship. The Carrier may well take into account the years of service in assessing the penalty, but it is not the proper function of the Referee to declare that in such serious cases, the decision of dismissal for the proven offense is "too harsh".

We dissent.

/s/ W. R. HARRIS
W. R. Harris

/s/ H. F. M. BRAIDWOOD
H. F. M. Braidwood

/s/ P. R. HUMPHREYS
P. R. Humphreys

/s/ J. R. MATHIEU
J. R. Mathieu

/s/ H. S. TANSLEY
H. S. Tansley

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NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

(The Second Division consisted of the regular members and in addition Referee John J. McGovern when the Interpretation was rendered.)

INTERPRETATION NO. 1 TO AWARD NO. 5837

DOCKET NO. 5721

Name of Organization:

SYSTEM FEDERATION NO. 121, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Electricians)

Name of Carrier:

THE TEXAS & PACIFIC RAILWAY COMPANY

QUESTION FOR INTERPRETATION:

Does the language contained in the findings of Award No. 5837, reading in pertinent part:

> "x x x One month's suspension without pay is sufficient considering the entire record, and he should accordingly be compensated for all wages lost subsequent to the one month's suspension up to and including the effective date of the order of this opinion. We will sustain the claim consonant with the opinion as expressed."

and the Award reading:

> "Claim sustained consonant with opinion as expressed."

allow the Carrier to deduct from Claimant's wage loss, the following:

1. — Outside earnings.
2. — Vacation pay.
3. — Holiday pay, including Birthday Holiday.

This is a discipline case, in which basically the same issue is presented to us for interpretation or clarification, to wit, the deduction of earnings in other employment during the period Claimant was held out of service.

Practically the same language in the discipline rule is contained in the basic contract as was contained in the discipline rule in our interpretation to Award No. 5836. The language in 5836 specified "net wage loss if any", whereas the language in this case is "wage loss, if any."

We see no distinction between the discipline rule in this case and that involved in Award 5836. We re-affirm our reasoning in our interpretation to Award 5836 and re-assert Carrier's right to deduct earnings in other employment during the period Claimant was held out of service.

Referee John J. McGovern, who sat with the Division as a Member when Award No. 5837 was rendered, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 15th day of December, 1970.

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