Award No. 6245
Docket No. 6075
2-MP-CM-'72

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That Carman J. E. Solomon, Dupo, Illinois was unjustly dealt with when he was dismissed from the service of the Missouri Pacific Railroad Company effective September 22, 1969.

2. That accordingly, the Missouri Pacific Railroad Company be ordered to reinstate Carman Solomon to service with all seniority rights unimpaired, pay him for all time lost in the amount of eight (8) hours per day, five (5) days per week, until returned to service and that he be afforded all benefits that normally flow to an employe in active service.

EMPLOYES' STATEMENT OF FACTS: Mr. J. E. Solomon, hereinafter referred to as the claimant, was employed by the Missouri Pacific Railroad Company, hereinafter referred to as the carrier, at Dupo, Illinois, work week Saturday through Wednesday, rest days Thursday and Friday, hours 3:00 P. M. to 11:00 P. M.

Claimant was cited by the carrier for investigation to be held at 10:00 A. M., Tuesday, August 5, 1969, to determine facts and place responsibility in connection with his alleged attempt to remove Nutone 36-inch Mercury Hood Fan from company property at location between East Main Line, Columbia Road, and company private road south end Yard A 11:00 P. M., July 27, 1969, without authority. However, it was necessary to postpone the investigation which was finally held at 10:00 A. M., September 11, 1969.

Although it was never proved conclusively during the investigation that the claimant was guilty as charged, he was dismissed from the service of the carrier on September 22, 1969, Form 15059, signed by Superintendent, Mr. W. Crimm, reading:

of the charge was established. We repeat that Award 4744 is a claim on this carrier involving an employe represented by the same System Federation and consistency requires that the dismissal from service in this case be upheld just as dismissal from service was upheld in Award 4744.

Award 4407, involving the Southern Pacific Railroad, denied a claim where the employe was found guilty of theft of a foreign shipment in the custody of the carrier. In that case your Board held:

> "The record in this case does not disclose or give to us any indication that the Carrier was discriminatory in its action against Claimant Radich or that he was treated in an arbitrary or capricious manner. In the absence of discrimination, capriciousness or arbitrary action, this division has no power to substitute its judgment for that of the Carrier, nor can we re-weigh the facts to develop equities upon which to have a rescissory award.
>
> For the reasons given above the claimant's request for reinstatement and compensation must be denied."

The foregoing principles apply to this case, and a similar decision denying the claim should follow.

Other awards of this Division involving theft are Awards 4747, 4925, 5043 and 5610, all of which denied the claim for reinstatement with pay for time lost. The principle is settled that theft justifies discipline as severe as dismissal from service. There is no basis for overturning the action of the carrier's officers responsible for the operation of the railroad. It follows that the claim should 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.

This is a discipline case. Claimant was cited for investigation in connection with his alleged attempt to remove two NuTone Mercury Fans from Company property. Carrier originally scheduled the investigation for August 5, 1969, but ultimately postponed it until September 11, 1969. During the interim period, charges were filed against the Claimant for theft from an interstate shipment in the United States Court for the Eastern District of Illinois.

Claimant was dismissed from the service of the Carrier on September 22, 1969. Claimant was notified by Carrier Form 15059, signed by Superintendent W. Crimm, reading, in part:

"Form 15059

"MISSOURI PACIFIC RAILROAD COMPANY
THE TEXAS AND PACIFIC RAILWAY COMPANY
Office of Superintendent
CERTIFIED MAIL – RETURN RECEIPT REQUESTED

St. Louis Terminal Division
St. Louis, Missouri
September 22, 1969
Number 95

To Mr. Joseph E. Solomon
(Occupation) Carman
Address: 716 S. 4th St., DeSoto, Missouri

Dear Sir:

You are hereby advised that **you are DISMISSED from the service of this Company for removing merchandise (NuTone 36-inch Mercury hood fan) from Company Property without proper authority at the South End of Yard A, Dupo, Illinois at 11:00 P. M., July 27, 1969.** Your record now stands DISMISSED.

W. Crimm, Supt."

The claimant was subsequently tried before a jury on the charge of theft from an interstate shipment in the United States Court for the Eastern District of Illinois. The trial resulted in a not guilty verdict.

Claimant was employed at Dupo, Illinois, work week Saturday through Wednesday, rest days Thursday and Friday, hours 3:00 P. M. to 11:00 P. M. On July 27, 1969, Claimant and a fellow employe were apprehended by two Carrier Special Officers while placing cartons in their respective automobiles.

Upon questioning by the Special Officers, it was ascertained that the cartons contained NuTone Mercury Hood Fans. The Claimant contends that the cartons were discovered and pointed out to him by his fellow worker. He stated that they carried the cartons to the edge of the tracks and left them there.

The Employes contend that the Claimant had not had an opportunity to report the discovery of the cartons to a person in authority, and that he and his fellow worker were in the process of taking the cartons to the depot when apprehended. The Employes take exception to the wording of the dismissal notice since Claimant did not remove merchandise from Company property.

Third Division NRAB Award 15186 (Ives) states, in part:

"* * * Although the Carrier is not bound by the requirements of proof neccssary for conviction of a charge of larceny in a court of

law in order to invoke disciplinary action, probative evidence supporting the charge of attempting pilferage by Claimant must be offered to sustain such action by the Carrier. * * *

In fact, there is no competent evidence before us in support of the charge that Claimant was guilty of attempted pilferage as opposed to conduct unbecoming an employe. * * * "

Second Division NRAB Award 5745 (Dorsey) states:

"Carrier failed to prove that it was Claimant's intention to remove the two aluminum cross bars, which he had altered and damaged, from Carrier's property without consent. In this, the Carrier engaged in speculation. Speculation is without probative value."

See also Second Division NRAB Award 5762 (Zumas).

We find the Employes' contention that the Claimant was discharged improperly to be well taken. The evidence is clear that the Claimant did not remove merchandise from Company property.

There is no competent evidence before the Board to show that it was the Claimant's intention to remove merchandise from Company property. Carrier has failed to prove intent on behalf of the Claimant. (See Second Division NRAB Award 5745, supra.)

Claimant shall be reinstated to service with all seniority and vacation rights unimpaired, and compensated for all time lost in the amount of eight hours per day, five days per week, until returned to service.

AWARD

Claim sustained as set forth in Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of February, 1972.

CARRIER MEMBERS' DISSENT TO AWARD 6245
(Docket No. 6075) (Referee Don J. Harr)

The "Findings" are grossly unrelated to the Carrier's transcript of evidence, and the Award is baseless for the following reasons:

(1) The notice of dismissal is not of evidentiary significance although the majority chose to quote it in full. In contrast, the notice of investigation which was not quoted by the majority, but duly served upon the claimant is of contractual significance. At the investigation, claimant acknowledged the notice to have been both "received" and "proper." It charged him with an

"alleged attempt" to remove the subject fans from the Carrier's property. That is precisely what he and his "fellow worker" had done. Their work tour was between 3:00 P.M. and 11:00 P.M. (Tr. p. 3.) They "found" the two fans, in cartons, between 6:00 and 7:00 P.M. (Tr. p. 5.) They took the time to hide the fans where the special officer testified he found them "in the weeds." (Tr. p. 12.) From the point where the fans were "found", claimant and fellow worker consumed time carrying them across twelve railroad tracks, necessitating passing through cuts of cars standing on three of the tracks, to seclude them in the "weeds." Taking them to the yardmaster's office would have been over an unobstructed route. (Tr. p. 14.) Claimant and fellow worker made no report to anyone of their possessing the fans, and at 11:00 P.M. their tour of duty ended. Shortly thereafter they were apprehended by special officers (who had previously found and marked the cartons) actively placing the cartons in their respective automobiles. Claimant explained that he was going to take the fans to the Carrier's depot. (Tr. p. 7.) But, when asked if the depot was a place for storage of company property or a receiving storeroom, he answered, "I don't know what they use it for." (Tr. p. 8.) The fellow worker resigned from the service after the incident in question and prior to the investigation.

(2) The trial of claimant before a jury on the charge of theft from an interstate shipment resulting in a not guilty verdict is irrelevant although brought into the "Findings" of this Award. The charge of theft from an interstate shipment, the judicial forum in which it was heard and the procedures therein were unrelated to the investigation conducted by the Carrier on the entirely different subject contained in the notice of investigation. Moreover, a jury verdict is not binding upon a Carrier or upon this Agency, and the principle is too well established for citation beyond the examples of this Division's **Award 4098** and First Division **Award 14568.**

(3) Citing of Third Division **Award 15186** treating a completely different fact framework lends neither force nor status to the majority finding here. The apparent reliance upon that citation commits the error of engrafting the conclusion in that case upon the different facts of this case. The majority also cited this Division's **Award 5745** involving what was found there to be "Carrier's loose practices relative to the disposition of scrap lumber." Again, the conclusion reached on those facts is improperly borrowed and wholly misapplied to the facts of this case. Furthermore, Second Division **Award 5762** cited by the majority treats a dispute involving compensation for birthday holiday, and only serves to compound the error in this case.

(4) Contrary to the majority "Finding" that "claimant did not remove merchandise from company property" is the fact that claimant, as charged, attempted to remove merchandise from company property. The fact drawn from substantial evidence adduced at the investigation reveals that claimant did constructively remove merchandise from company property through failure to report his possession of that property, his concealment of it for many hours, and placing the merchandise in his automobile after going off duty and while in the usual course of leaving company property.

(5) Contrary to the majority "Finding" that "Carrier has failed to prove intent on behalf of claimant", the Carrier has by substantial evidence and without arbitrariness or caprice, after a fair and impartial investigation, reached a reasonable, proper conclusion. While it is a general proposition that where any wrongful act is committed, the law will infer conclusively that it was

intentionally committed, "intent" is not an essential element subject to that degree of proof required in a criminal proceeding. The majority error on that point turns the Award away from the established rule of substantial evidence long recognized in industrial arbitration. A clear statement of this rule was enunciated in 1954 by Charles Loring, one-time Chief Justice of the Supreme Court of Minnesota, in **Award 16785** of the First Division, National Railroad Adjustment Board. The Justice said:

> "In these investigations as to whether a discharge was wrongful, the Carrier is not bound to prove justification beyond a reasonable doubt as in a criminal case **or even** by a preponderance of evidence as does the party having the burden of proof in a civil case. **The rule** is that there must be substantial evidence in support of the Carrier's action." (Emphasis ours.)

The substantial evidence rule is recognized by the judiciary. It has been defined and further distinguished from the rule in criminal proceedings and the preponderance rule in civil proceedings:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (Consol. Ed. Co. v. Labor Board, 305 U. S. 197, 229.

A proper application of this rule of evidence stands out in Third Division **Award 13179** (1964), wherein the majority stated:

> "The conclusion as to what is intent, unless admitted to, is subjective. Where a subjective finding as to intent must be made, an appellate forum will not reverse the judgment of the trier of the facts if the conclusion is one that, in the light of the evidence, could be arrived at by a reasonable man."

Award 6245 is baseless and requires this Dissent.

E. T. Horsley
Carrier Member

We concur:

H. F. M. Braidwood
R. E. Black
P. C. Carter
W. B. Jones

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