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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6368
Docket No. 6204
2-SOU-CM-'72

The Second Division consisted of the regular members and in addition Referee Irving R. Shapiro when award was rendered.

Parties to Dispute: System Federation No. 21, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)

Southern Railway Company

Dispute: Claim of Employes:

1. That under the current Agreement, Carmen W. H. Freeman and R. H. Bohannon, Atlanta, Georgia, were improperly suspended from service August 10, 1970 and discharged from service September 26, 1970.

2. That accordingly, Carrier be ordered to restore Carmen W. H. Freeman and R. H. Bohannon, Atlanta, Georgia, to service and paid for all time lost, regular time, overtime, holidays and vacation, plus six per cent (6%) annually.

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.

The Claimants were dismissed for allegedly committing a theft of property being transported by the Carrier in behalf of a shipper. In essence, the record below and the hearing established that the basis of the Carrier's charges is that Claimants, while on duty at 1:45 a.m., August 10, 1970, did break into and enter a freight car, remove two cases of beer therefrom and secret them at a point where they could, at the completion of their tour of duty, recover same and appropriate them for their own purposes. The claimants were apprehended by Security Officers employed by the Carrier who had been keeping the box car loaded with cases of beer under surveillance, due to recurring incidents of pilferage of such product at the Carrier's Inman Yard, Atlanta, Georgia. The Claimants were arrested, tried by a jury and found not guilty of the criminal charge.

Rule 34 of the Controlling Agreement reads in part as follows:

> "34. Procedure in Dealing With Grievances:
> An employee will not be dismissed without just and sufficient cause or before a preliminary investigation..."

The Claimants and the Petitioner contested the charges made and action taken by the Carrier. The claims were duly processed and appealed in accordance with contractually provided procedure and the Rules of this Board.

It must be reiterated here that this Board is not a tribunal of original jurisdiction. Our function, particularly in discipline cases as established by the Railway Labor Act, as amended, is to review the record, ascertain whether the Controlling Agreement had been complied with; the Claimants were afforded due process; there was substantial evidence to sustain a finding of just and sufficient cause for the discipline imposed; and that the action taken by the Carrier was not arbitrary, capricious or unreasonable.

The Petitioner does not contend that the Claimants were not afforded a fair hearing. The transcript, submitted with the record, reveals that full opportunity was given for the examination of witnesses by representatives of the employes' Organization as well as the hearing officer. The Carrier met the requirement of going forward with its proofs.

Petitioner claims that the Carrier failed to support its charge against the Claimants by a preponderance of evidence and that this was clearly established when the same evidence placed before a jury failed to result in a conviction for theft.

Several Awards have enunciated the principals and concepts which lay the foundation for our consideration of appeals. In the absence of special circumstances or novel argument and approaches we are, under the established procedures required to stay within those guidelines.

In First Division Award 16785 (Loring) it was stated:

> "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."

The substantial evidence rule referred to was set forth by the Supreme Court of the United States as follows:

> "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. vs. Labor Board 305 U. S. 197, 229")

In Third Division Award 12491 (Ives) we find the following:

> "The mere fact that the evidence is circumstantial, makes it no less convincing and the board cannot say as a matter of law that the carrier was not justified in reaching its conclusion following the trial."

and in Third Division Award 13116 (Hamilton) the following:

> "It is basic that the evidence which is admissible and the degree of proof which is necessary for a conviction, varies greatly between a criminal case, in a court of record and that to be found in a discipline case on the property. We have held an acquittal by the court is not a bar to disciplinary action by the Carrier."

Awards of this Division 5681, 4098 and 6155 and the Third Division 12322, 13127 and 15456, among others, reiterated and emphasized these guiding principles.

We examined the record before us with the above in mind. The salient facet was the testimony found in the transcript of hearing of the Security Officer that on several occasions prior to 1:45 a.m. on the day in question, he checked the freight car containing the beer, and found the doors securely locked and properly sealed. The last time was twenty minutes prior to that time. He and a fellow officer kept close watch and no one but the Claimants approached the car during the ensuing period. Claimants allege that one of the doors was open and could not be closed because two cases of beer were blocking it. They removed the cases in order to be able to shut and lock the car, placed them away from the track, intending to later alert their foreman with reference to the removal of the merchandise.

This brings into play two further concepts dealt with at length in our Awards as follows:

Award 13129 (Kornblum)states:

> "...The Board has consistently refused to determine the credibility of witnesses. See e.g. Award 11105 (MeGrath), 10876, 10505 (Hall), 10791 (Ray) and 10642 (LaBelle). So, too, the Board has left to the trier of the facts the matter of weighing or resolving conflicts in the evidence. See e.g. Award 11105 (McGrath), 10899 (Boyd), 10791 (Ray), 10717 (Harwood) and 10596 (Hall..."

and Award 13179 deals with the allegation of intent as follows:

> "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".

We must, in view of the foregoing, find that the carrier fulfilled our requirements for sustaining the dismissals.

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A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 26th day of September, 1972.