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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6395
Docket No. 6203
2-MP-CM-172

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. 2, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(
(Missouri Pacific Railroad Company

Dispute: Claim of Employees:

1. That Carman E. L. Bankston, North Little Rock, Arkansas, was unjustly dealt with when he was dismissed from the service of the Missouri Pacific Railroad Company effective November 25, 1970.
2. That accordingly, the Missouri Pacific Railroad Company compensate Carman Bankston at the pro rata rate for each work day beginning November 25, 1970 until he is reinstated to service and in addition he receive all benefits accruing to any other employe in active service, including vacation rights and seniority unimpaired. Claim is also made for Carman Bankston for his actual loss of payment of insurance on his dependents and hospital benefits for himself, and in addition to the money claimed herein, the Carrier shall pay Mr. Bankston an additional sum of 6% per annum compounded annually on the anniversary date of said claim.

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.

Claimant was discharged, following a formal investigation, on November 25, 1970. The notice of hearing stated that its purpose was to ascertain facts relative to an allegation that claimant misused Carrier credit card to obtain gasoline for his personal use.

From the outset of the proceedings on the property, Petitioner raised various objections to the manner in which they were conducted by Carrier's officials.

This Board has afforded great latitude to carriers in their administration of discipline in order to assure proper, safe, efficient and economical operation and to protect their property and that of their customers. However, we have required that the employers deal with their employees in a fair and equitable manner and that their imposition of disciplinary penalties not be arbitrary, capricious, or unreasonable. We have set forth the rules by which we will be guided in determining whether action taken against an employee was consistent with such concepts. In our Award 6204, we cited these decisions, the most significant ones, applicable to the instant case, being:

"First Division Award 16785 (Loring):

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 rules 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)"

Rule 32(a) of the controlling agreement provides that an employee with more than 30 days of service "shall not be disciplined or dismissed without first being given a fair and impartial investigation by an officer of the railroad".

The Carrier's hearing officer found the claimant, an employee of the Company for more than twenty-eight years, guilty as charged and dismissed him from service. The entire case against the claimant rested on the testimony of one witness, a Special Agent of the Carrier who was assigned to check on the misuse of Company credit cards. The hearing officer admitted into the record a signed statement of an automobile service station operator and an attendant employed by him, implicating claimant in the alleged appropriation, at Company expense, of gasoline for his own vehicle.

We are not unmindful of the limitations to which investigations on the property are subject. We have, in many awards, held that written statements may be accepted by a hearing officer when securing to testify of the authors thereof would be impractical or impossible. The record herein, however, reveals that the two signatories of the statements prepared by the Special Agent, were within easy reach of the place of hearing. The Agent testified that he induced the signing of the documents by indicating to the owner of the gas station that failure to cooperate would result in a cessation of patronage by the Carrier. It is therefore,

ifficult to accept the Carrier's argument that its lack of subpoena power prevented it from producing the two witnesses who were the only ones able to corroborate the implications of the documents through which the initial suspicions of misuse arose. There is nothing in the record to show that any effort what-so-ever was taken to secure their appearance at the hearing at which they would be subject to proper examination. Had this been done and their refusal to appear been duly entered in the record of hearing, it would be proper to give due weight to their signed statements. The absence thereof is a fatal defect going to the very essence of the Carrier's case.

The record further indicates that the hearing officer appeared to have completely ignored the testimony of several witnesses, some of them in supervision, to the effect that there was a regular practice at the installation where claimant was employed, to bypass Carrier's purchasing regulations for the securing of necessary tools and equipment for operating the jobs in the Yard. The credit card was to be used only for the acquisition of gas, oil, and service of trucks used on the job. However, supervision instructed claimant to purchase various and sundry items at the gas station for which use of the credit card was not permitted by the regulations. The substitution of permitted items for the prohibited ones with the approval of Management employees was apparently disregarded by the decision making officer. He appeared to be impressed with the reduced cost of operation of vehicles subsequent to all becoming aware of the Special officers study. He did not seem to consider that correct procedures might have thereupon been followed and the purchases of the items other than gas and oil no longer purchased with the credit cards. It is noteworthy that the higher officers, to whom appeal was taken, gave little or no weight to the data submitted by the Petitioner showing extensive purchases of gasoline by the claimant n his own credit cards.

The above does not indicate that evidence was adduced satisfying our standards. In First Division Award 12952 (Yeager), it was said:

"It must be true that the evidence at least must have sufficient substance to support a reasonable inference of fact as distinguished from a possibility or an unsupported probability."

And our Award 4046 (Anrod) in which we held:

"The best that can be said in favor of the Carrier is that there exists a suspicion that the Claimant may have been negligent. Mere suspicion is not sufficient to prove that he committed the offense for which he was discharged. See: Awards 1325 and 1969..."

(See also First Division Award 14479.)

The Carrier's case at best can be described as a "mere scintilla" and not one which meets the requirements of the substantial evidence rule quoted hereinabove.

We are sustaining the claim except for the last sentence of paragraph (2) thereof. Our many Awards have limited Carrier's liability to claimant to be that he "shall be compensated for wage loss, if any, suffered" as provided in Rule 32(d) of the controlling agreement.

A W A R D

Claim sustained to the extent set forth in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killam
Executive Secretary

Dated at Chicago, Illinois, this 31st day of October, 1972.