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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6419
Docket No. 6263
2-N&W-CM-'73

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. 16, Railway Employees'
Department, A. F. of L. - C. I. O.
(Carmen)

{ Norfolk and Western Railroad

Dispute: Claim of Employees:

- (1) That under the current working applicable agreement upgraded Carman R. V. Barker was unjustly dealt with when the Norfolk and Western Railway Company (formerly New York, Chicago and St. Louis Railroad) assessed upgraded Carman R. V. Barker a ten (10) day record suspension from the results of an investigation held June 25, 1970 at Bellevue, Ohio.
- (2) That the Norfolk and Western Railway Company (formerly New York, Chicago and St. Louis Railroad) remove from Mr. Barker's personal record the ten (10) day record suspension.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 Board has repeatedly expressed its concern for the survival of the railroad transportation system in the United States. We have reiterated the need for satisfying shippers that their merchandise will be efficiently and safely handled and will arrive at the point destined in good condition. We have afforded to management extensive leeway in dealing with employees who malfunction or misfunction in the hopes that they will respond and, thereby protect the industry; thus, preserving their own and their fellow workers jobs and avoid injury to themselves and the public. (Awards 1575, 2996, 3081, 3430, 3874, 6346.) However, this authority must be exercised with due regard to the rights of the workers and in a manner consistent with the terms of Agreements with organizations representing them. This requires that disciplinary penalties imposed must be fair and just.

The many Awards of this Board concerning imposition of discipline have established certain basic guidelines as to what the record before us must disclose to satisfy the above stated prescription. The burden is on the carrier to prove by probative, objective evidence that the allegedly aggrieved employee did, in fact, commit an infraction and that punishment was warranted. In Award 6396, the rules relative to the requisite elements of proof were set forth as follows:

"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." First Division Award 16785 (Loring).

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 the instant case, the claimant, a Car Inspector, was charged and found guilty of negligence. He was alleged to have failed to properly check whether a trailer was securely locked onto a flat car and held responsible for the subsequent mishap when the trailer fell or rolled off the flatcar. A ten-day suspension of record was assessed against him.

The Carrier put great stress on the alleged infallibility of the equipment used to secure trailers onto flat cars and that, if properly locked, it could not become undone in transit. It avers that the trailer was not properly secured when claimant was supposed to have inspected the car and its contents and only his failure to inspect or follow the proper procedure caused the dangerous misadventure and loss. Disregarded was the fact that the trailer came loose approximately three hundred miles from the Yard where the inspection was to have taken place and the possibilities for intervening forces or factors which might have come into play during the time the flat-car traversed the distance from claimant's station to the point where the trailer became disengaged and detrained.

This record does not meet the standards of the substantial evidence rule which were succinctly stated as follows:

"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." First Division Award 12952 (Yeager)

"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..."
Our Award 4046 (Anrod).

Therefore, the discipline assessed cannot be held to be just and proper.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of January, 1973.