

The Second Division consisted of the regular members and in addition Referee Harold M. Weston when award was rendered.

Parties to Dispute: (System Federation No. 4, Railway Employees'
(Department, A.F.L. - C.I.O. Firemen and Oilers
(
(The Baltimore and Ohio Railroad Company

Dispute: Claim of Employes:

1. That under the current agreement Laborer R. Willingham was unjustly dismissed from the Carrier effective February 9, 1973.
2. That accordingly the Carrier be ordered to reinstate this employee with seniority unimpaired, vacation rights unimpaired, made whole for all health and welfare and insurance benefits including Railroad Retirement and unemployment insurance, and pay for all time lost retroactive to February 9, 1973.

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.

The question at issue is whether Claimant was dismissed without the "fair and impartial hearing" prescribed by Rule 9 of the applicable Agreement.

Claimant was charged with attempted theft of company property and, after hearing had been held on the charges, was "found guilty" and dismissed from Carrier's service. There is substantial credible evidence in the record that Claimant had been observed by Foreman Palm carrying four pieces of brass from the storage bulk shed to the edge of the property and setting it on the ground in the parking lot. It also is established that his assignment required him to work on the fuel track, a considerable distance from the bulk shed, and that no one had requested him to go to the shed area or carry brass that day. Although Claimant denied removing or carrying the brass, it is well settled in Railroad Adjustment Board practice that Carrier's findings will not be disturbed if supported by substantial, though controverted, evidence.

Petitioner contends that Claimant was not given a "fair and impartial hearing" since the hearing officer's questioning of Foreman Palm exhibited prejudgement and Claimant was not afforded the opportunity of cross-examining two of the adverse witnesses until all three adverse witnesses' direct examinations had been completed. The latter objection was not raised at the hearing or while the claim was being processed on the property and, in line with established principles, will not be considered at this date.

There is no question but that several of the hearing officers questions of Foreman Palm were far too leading and exceeded the bound of propriety. Again, no objection was raised to them at the hearing or while the case was being considered on the property. Nevertheless, if it did appear that they materially prejudiced Claimant's case, we would set aside the discipline imposed in this matter. While Carrier hearing officers may not be technically trained in court-room procedure and rules of evidence and may therefore be given some latitude in interrogating witnesses, they must comply with elementary principles of fair play and due process. Upon examining this record in its entirety, including the questions propounded of all witnesses and the specificity of the evidence, we are satisfied that Claimant was not deprived of a fair and impartial hearing and that reversible error was not committed by Carrier.

We will not substitute our judgment for that of Carrier and will deny the claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 15th day of August, 1975.