Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6969
Docket No. 6703
2-SLSW-CM-'75

The Second Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

Parties to Dispute: (System Federation No. 45, Railway Employes' Department A. F. of L. - C. I. O.
(St. Louis Southwestern Railway Company

Dispute: Claim of Employes:

1. That the St. Louis Southwestern Railway Lines unjustly dealt with Temporary Carman B. A. Gardner, Pine Bluff, Arkansas when his personal record was assessed with twenty-five (25) demerits in violation of the terms of the controlling agreement.

2. That the St. Louis Southwestern Railway Lines be ordered to remove the twenty-five (25) demerits and any and all material relating to this incident from Mr. Gardner's personal record and that a suitable officer of the Carrier personally apologize to Mr. Gardner for the affront to his dignity.

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 is employed as a Carman at Carrier's Gravity Yard at Pine Bluff, Arkansas on the 3:00 to 11:00 p.m. shift. Following a hearing and investigation, Claimant on June 22, 1973 was assessed twenty-five (25) demerits for allegedly failing to complete his assignment as Carman and giving false reason for laying off on May 19, 1973. Petitioner, on behalf of Claimant filed the instant grievance on August 2, 1973 seeking excision of the demerits as well as a personal apology to Claimant for the "affront to his dignity". Failing resolution on the property the claim comes to our Board for disposition.

The incident out of which the claim arose is best described by testimony of the various participants, as transcribed in the record of the hearing conducted June 7, 1973.

The Claimant's immediate supervisor testified as follows:

> "On the given date Mr. Gardner told me about 3:15 that he needed to go home at 7:00. I told Mr. Gardner that I was working two men short already and no one on the Rip Track to take his place. If he had to lay off to see Mr. Kelley. At about 7:15 Mr. Gardner called me on the radio, stating that he needed to go in at 8:00. I told him that I was still working two men short and Rip Track was still short of men and asked him if he had talked to Mr. Kelley about laying off. He stated that he hadn't but would if he was here. He then told me that he was sick and going home at 8:00. I told Mr. Gardner that if he was sick, he had no business continuing work until 8:00. He punched out at 7:46."

Claimant testified as follows:

> "First of all I told the Foreman, C. T. Rodgers that I may have to take off at 7:00 P.M. and he told me that I would have to go talke to Mr. Kelley. So I decided that I wouldn't bother Mr. Kelley and stay on at work. But I was feeling sick from the time I came to work and I was beginning to feel even worse, so I told C. T. Rodgers again that I needed to take off because I wasn't feeling good. He asked me had I talked to Mr. Kelley and I told him that Mr. Kelley wasn't anywhere around. So he told me that if I was sick to go on home. I punched out about 7:46 and on my way home a friend stopped me and I talked to him and I proceeded to go on home. When I got home there wasn't anyone there. So I thought maybe my wife would be down at a neighbor's house. So I decided to go down there. And she wasn't there. One of my neighbors informed me that she was over at her brother's house and that my daughter was sick. I proceeded to go over to my borhter-in-laws house and my wife and children were there. My little girl was sick, so we called Doctor Townsend concerning her sickness which was a type of Bronchial Asthma. He instructed us to use a vaporizer and see if that would get her any better, and if not to bring her on to the hospital. We knew what to do after he instructed to use the vaporizer because she had been in the hospital several times before. At that time, I still wasn't feeling very good, but my daughter sick and she meant a little more to me than myself. After about 30 minutes, she did get better. I instructed my wife to call Dr. Flower's office and see if he was in because we knew he would be open late at night. She called him and he was in. He instructed her for me to come on up and I went to Dr. Flower's office. He treated me there. After leaving Dr. Flower's office I went back to my brother-in-law's house to get my wife and daughter. I stayed at my brother-in-laws house for about another hours. I proceeded to go home."

The record indicates that when Claimant left the Yard at about 7:45 P.M., Carrier officials contacted a Special Agent of Carrier and arranged to have Claimant surveilled. The Special Agent testified as follows:

> "On the night in question I was in the Yard checking as part of my duty and received a call from Mr. Heird asking me to come to the Spot Rip which I did. He informed that Car Inspector Gardner had informed him that he was going to leave work at about 7:00 or 7:30. The foreman at that time told Mr. Gardner that he had no one to replace him with. At about 8:00 Mr. Gardner went home sick. Mr. Heird asked me to accompany him to Mr. Gardner's residence. We were at Mr. Gardner's residence at approximately 9:50 PM. At that time, there was no one home at the Gardner residence. In order to make sure that there was no one home, we knocked on the door and rang the doorbell for 5 to 10 minutes. We then went back to the Yard and I continued my regular duties."

In addition to the foregoing testing, the hearing record contains a certificate signed by Claimant's physician, Dr. Flower, stating that Claimant underwent treatment in Dr. Flower's office on May 19, 1973 at 9:00 p.m.

We are met at the outset by Carrier's assertion that the entire claim should be dismissed because the remedy sought by Claimant is not authorized by the Agreement. Moreover, Carrier contends that Claimant was afforded a fair and impartial investigation, that substantial evidence supports the finding of culpability and that the penalty assessed is not arbitrary, unreasonable or capricious.

Upon review of the record and the parties positions, we are not persuaded that an apology is warranted or properly awarded under the Agreement and facts herein. Nor do we find any substance in Petitioner's contentions that the hearing was other than fair and impartial and proceedings correct. But, however, Petitioner's position is persuasive regarding the inadequancy of the evidence upon which the finding of guilt was based.

It is well established that in disciplining proceedings, Carrier has the burden of establishing by substantial evidence on the record that the accused is culpable of the charges made against him. Circumstantial evidence of the type adduced at the hearing in this case is not inadequate per se to support a finding of guilt. But the inferences upon inferences drawn in this case by Carrier are more conjectural than circumstantial, especially when viewed in light of the unrefuted doctor's certificate introduced by Claimant. Mere suspicious circumstances and suppositions are not substantial evidence of wrongdoing and in our judgement Carrier in this case failed to carry its burden of proof.

The principle underlying this decision is well set out in our Award No. 3869 to wit:

> "The law is well settled that circumstantial evidence is not only sufficient but may also be more certain, satisfying and persuasive than direct evidence. See Michalic v. Cleveland Tankers, Inc. 364 U. S. 325, 330; 81 S. Ct. 6, 11 (1960).
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> However it is also a firmly established rule of law that, in discipline case circumstantial evidence does not relieve the employer from the burden convincingly to prove that the employe disciplined is guilty of the wrongdoing with which he is charged. Mere suspicious circumstances are insufficient to take the place of such proof. See Second Division Awards 1178, 1197, 1969 and 2583."

Accordingly, we shall sustain the claim to the extent of directing Carrier to remove the twenty-five (25) demerits and all related material from Claimant's personnel record.

A W A R D

Claim sustained to the extent indicated in the Findings.

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 12th day of December, 1975.