

The Second Division consisted of the regular members and in addition Referee Walter C. Wallace when award was rendered.

Parties to Dispute: (International Association of Machinists and
(Aerospace Workers
(
(
(St. Louis-San Francisco Railway Company

Dispute: Claim of Employees:

1. That the St. Louis - San Francisco Railway Company unjustly suspended Machinist D. G. Harkey from service on July 26, 1976 and later dismissed him from service on August 2, 1976 for allegedly being absent from work without proper authority, for driving a vehicle containing unauthorized property of the St. Louis - San Francisco Railway Company and a loaded pistol.
2. That accordingly, the St. Louis - San Francisco Railway Company be ordered to compensate Machinist D. G. Harkey at the pro rata rate of pay for each work day beginning July 26, 1976 until he is reinstated to service. In addition, he shall receive all benefits accruing to any other employee in active service, including vacation rights and seniority unimpaired.
3. Claim is also made for Machinist D. G. Harkey's actual loss of payment of insurance on his dependents and hospital benefits for himself, and that he be made whole for pension benefits, including Railroad Retirement and Unemployment Insurance.
4. In addition to the money claimed herein, the St. Louis - San Francisco Railway Company shall pay Machinist D. G. Harkey an additional sum of 6% per annum, compounded annually on the anniversary date of said claim, in addition to any wages earned elsewhere in order that he be made whole.

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 employees 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 Claimant was a machinist with seven years service. He worked the shift from midnight to 8:00 a.m. at carrier's installation at St. Louis, Missouri. On the morning of July 25, 1976, Claimant requested permission at approximately 2:00 a.m. to take his lunch period. At approximately 3:30 a.m. the Foreman searched for him and could not locate him. Thereafter between 3:45 a.m. and 4:00 a.m., Foreman Murrell received two telephone calls informing him Claimant was in the custody of the local police at Maplewood, Missouri because the vehicle Claimant had been driving contained unauthorized property of the Carrier and a loaded pistol. Accordingly, Claimant was suspended from service pending investigation of alleged violation of Rules B, C, H, K and P of the applicable agreement. Those rules provide in pertinent part:

"RULE 'B'", that part reading:

"Employees who are negligent or indifferent to duty, dishonest, ... will not be retained in the service."

"RULE 'C'", that part reading:

"Employees must be alert, devote themselves exclusively to the service, give their undivided attention to their duties during prescribed hours ..."

"RULE 'H'", that part reading:

"... Property of the railway must not be sold, loaned, borrowed, or in any way disposed of without proper authority."

"RULE 'K'", that part reading as follows:

"Employees, except Special Service Department employees, are prohibited from carrying fire arms or other weapons while on duty."

"RULE 'P'", that part reading:

"Employees must not absent themselves from their duties, ... without proper authority."

Thereafter, Claimant received notice of investigation and on July 30, 1976 a hearing was held to investigate such charges and Claimant was represented by the Organization's General Chairman. Following the hearing and based on the conclusions reached, Claimant was dismissed from service.

The Claimant denied that he did not have permission to leave the property for lunch when he was apprehended. In addition, he explained the

railroad property found in the vehicle he was driving (a van owned by another) involved six boxes of "Frisco scott wipers" and eight to ten rolls of toilet paper. In addition, a locomotive seat was mounted between the driver and passenger seat. All of this property belonged to the railroad. The Claimant explained that he had intended to drop the wipers and toilet paper at the washroom on the property but had forgotten these items were in the van when he went to lunch. It is undenied that it was his weekly practice to deliver such materials to the washroom. As for the locomotive seat, Claimant explained he found it in the scrap bin. He had mounted it in the van so his daughter could sit on it. He explained it was his intention to return the seat when the use ended. With respect to the loaded pistol, Claimant maintains he had no knowledge it was in the van. The van belonged to another and he did not inspect it when he borrowed it.

The Carrier has the burden of proving by substantial evidence the charges brought against an employee in disciplinary cases. Under the circumstances here we do not believe that burden has been met. This Board will not disturb findings of a Carrier in such cases where there is ample evidence in the record to justify its conclusions. We do not suggest that Carrier should have believed Claimant's story. Rather, it is our view the seriousness of the charges warrant more persuasive evidence than this record reflects. The Claimant's explanation regarding the seat and the washroom supplies has not been rebutted, and, insofar as it serves to shift the burden of going forward with the evidence to the Carrier, the latter has not produced sufficient evidence to support its contention that the railroad property was stolen. This Claimant typically left the property to secure lunch for himself and others. There is no indication here he manifested any intent to dispose of the washroom supplies in any way other than as he explained. As for the seat, it was recovered from the scrap bin and his use of it in the borrowed van was open and observeable by everyone and we find no indication of a larcenous purpose.

His explanation regarding the loaded pistol has not been rebutted. Insofar as he did not own the van, and he claims he had no knowledge that it was located in the vehicle, we do not believe this charge is substantiated.

With respect to the charge that he was absent without permission, we have a different view. The Carrier's witnesses were clear and forthright as to all the circumstances. Claimant requested permission to go to lunch about 2:00 a.m. He was told he could go depending upon the location of an expected train. When the foreman checked and determined Claimant could go to lunch, he could not locate him. The record reflects he was missing from about 2:30 a.m. until he called in around 3:45 a.m. and thereafter he was apprehended by the police. Claimant's contention that he did not in fact leave until 3:30 a.m. is questionable in view of the fact he was not available to work on the train when it did arrive around 3:20 a.m. and he had no knowledge of its arrival. Moreover, the foreman testified he went through the shop and the parking lot and he could not "find his van". Under these circumstances the Carrier has proven its case that Claimant was absent without permission and the claim is denied in this connection.

The Organization argues further that the investigation was merely one of "going through the motions" because Carrier's investigation was held by an official who conducted the hearing, prepared the charges, acted as prosecutor and imposed the punishment. Moreover, such official had prejudged the Claimant. We have reviewed the transcript of the hearing and we cannot conclude Claimant was denied a fair and impartial investigation. Granted, the Carrier official who signed the notice of investigation, presided at the hearing and sent Claimant the notice of dismissal was the same man. But this alone does not persuade us there was unfairness. Something more must be shown to sustain such a claim and there is no such showing on this record.

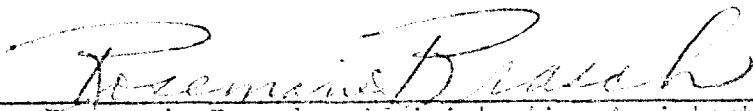
We conclude Claimant has been punished enough and although Carrier has not substantiated all its charges, it did establish a violation of Rule P. That violation does not warrant dismissal considering his service and prior record. We believe he should be reinstated with seniority unimpaired but without back pay or other benefits for the time he was under dismissal. We would consider it appropriate for Carrier to warn this employee that his total conduct placed his job in serious jeopardy and his future service should be continued with appropriate circumspection to avoid even questionable conduct.

A W A R D

Claim is sustained in part and denied in part in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 2nd day of May, 1978.