

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 7634
Docket No. 7489
2-WT-CM-'78

The Second Division consisted of the regular members and in addition Referee Arthur T. Van Wart when award was rendered.

Parties to Dispute: (System Federation No. 106, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Washington Terminal Company

Dispute: Claim of Employees:

1. That the Washington Terminal Company violated the controlling agreement when they dismissed and dropped from the rolls and seniority roster Edward H. Bell on August 26, 1976.
2. That accordingly the Washington Terminal Company be ordered to return car cleaner Edward H. Bell to the service of the Washington Terminal Company with seniority and vacation rights unimpaired and compensated for all time lost since August 26, 1976.

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 had been employed by Carrier as a Car Cleaner for two and one-half years prior to receiving the following letter from his Master Mechanic, dated August 26, 1976.

"Dear Mr. Bell:

On August 20, 1976, a Hearing was held for you in the office of the Master Mechanic, The Washington Terminal Company, Union Station, Washington, D. C. on the following charge:

Violation of Washington Terminal Company General Rule 'N' paragraph 7: 'Stealing... participating in any illegal, dishonest or immoral activity, while on duty, or while on Company property, is prohibited' for your

"participating in the forging and cashing of an Amtrak Employee's check in the amount of \$349.12 on July 26, 1976.

The transcript of the Hearing will prove the charge, and you are hereby found guilty, as charged.

Your participating in the forging and cashing of an Amtrak Employee's check in the amount of \$349.12 on July 26, 1976, is a very serious offense and is major in nature. This offense requires that appropriate discipline commensurate with this offense must be necessarily assessed, and, accordingly, you are hereby notified that, effective immediately, you are dismissed from the service of the Washington Terminal Company."

The eleven page transcript reflects that Claimant, while in his locker room after eating lunch had found an Amtrak employee's check near a trash can. He picked it up and went up to an Amtrak train on track 30 to water said train. A fellow employee, a Victor Robinson, came by and Claimant told him that he (Claimant) had found a check and asked did he know the Amtrak Employee, Lawrence James, Jr., whose name appeared on the check. Mr. Robinson said that he did not and asked Claimant for the check and said he would take it up to the window. Claimant turned the check over to Robinson and proceeded to water the Amtrak train. Mr. Robinson and another employee, Reginald Thomas, forged Lawrence James, Jr.'s name on the check. They subsequently cashed the check and spent the money. Claimant never received any of the monies thus illegally gained by the other two.

The Board is impelled on the record made to conclude that such record does not provide sufficient competent, credible and probative evidence to support Carrier's conclusion as to Claimant's culpability in violating General Rule "N". The necessary nexus to link Claimant's actions, with those of the other two individuals who cashed the check in question was missing. Carrier here failed to carry the necessary burden of proof. Hence, its conclusion that Claimant "stole" or had "participated" clearly lacked sufficient support therefor. Certainly Claimant's handling of the check was improper and led to the unauthorized cashing thereof. He was wrong and deserving of some discipline. Yet Carrier chose to not place the appropriate charge against Claimant to permit thereof. This Division in its Award 4468 pointed out:

"The law of labor relations is firmly settled that the burden of proof squarely rests upon the employer convincingly to prove that an employee committed the offense upon which his disciplinary penalty is based. In meeting the burden, the employer is free to rely on circumstantial evidence which may often be more certain, satisfying, and persuasive than direct

"evidence. However, irrespective of whether the employer relies on circumstantial or direct evidence or both types of evidence, he is not relieved from proving convincingly that the employee is guilty of the wrongdoing with which he is charged. Mere suspicious circumstances are insufficient to take the place of such proof. See Awards 1198, 3869, 4046, and 4338 of the Second Division and cases cited therein."

Consequently, we find that Claimant was unjustly dismissed from the service. As per Rule 29, he shall be reinstated with his seniority rights unimpaired, and compensated for his net wage loss covering the work period in excess of thirty (30) days.

A W A R D

Claim sustained.

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 31st day of July, 1978.

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Serial No. 97

(The Second Division consisted of the regular members and in addition Referee Arthur T. Van Wart when the Interpretation was rendered.)

INTERPRETATION NO. 1 TO AWARD NO. 7634

DOCKET NO. 7489

NAME OF ORGANIZATION: Brotherhood Railway Carmen of the United States
and Canada

NAME OF CARRIER: Washington Terminal Company

QUESTION FOR INTERPRETATION:

Did the Board intend that the language in the findings of Award No. 7634, reading as follows:

"... we find that Claimant was unjustly dismissed from the service. As per Rule 29, he shall be reinstated with his seniority rights unimpaired, and compensated for his net wage loss covering the work period in excess of thirty (30) days."

and the award reading:

"Claim sustained."

exclude "vacation rights" as requested in the Dispute: Claim of Employees, and granted the Carrier the right to deny vacation (or pay in lieu thereof) for the years 1978 and 1979?

The Carrier implemented Award No. 7634, rendered July 31, 1978:

"by restoring the Claimant to service as of August 21, 1978. The Claimant and his General Chairman on September 8, 1978 signed for and accepted a Company voucher in the amount of \$24,523.76, less appropriate taxes and lien totalling \$18,229.38 in full and complete settlement of the Washington Terminal Company's liability under Second Division Award No. 7634 National Railroad Adjustment Board."

The Carrier argued that it intended said September 8, 1978 settlement to be a full and complete satisfaction of its monetary liability under Award 7634. Carrier avers that the question of vacation was discussed prior to said voucher being drawn.

The Organization responded that the vacation question was never discussed until it was raised by the General Chairman on October 23, 1978. Further that the September 8, 1978 settlement did not and was not intended to cover due vacation pay and vacation credits but only covered the net wage loss due under the Award.

INTERPRETATION NO. 1 TO AWARD 7634 (DOCKET NO. 7489) Serial No. _____

This Board does not have the jurisdiction or the facts to pass upon the September 8, 1978 settlement.


It is quite possible that the Board in the last paragraph of the Award, might have by the absence of one word or imprecise use of another, inadvertently caused the Carrier to misinterpret the Award. Had the adverb "wrongfully" or "improperly" been used in lieu of "unjustly" to depict the type of "dismissal" and had the words "and vacation" been added after the word "seniority" then the last paragraph of the Award would have been crystal clear.

Nevertheless and notwithstanding, the Board did not intend to, and believes that it did not, either exclude the vacation rights as requested in the dispute in Docket No. 7489 or grant to Carrier any right to deny vacation, or pay in lieu thereof, for the years 1978 and 1979 by the Finding and Award of Award No. 7634.

Referee Arthur T. Van Wart who sat with the Division as a Member when Award No. 7634 was rendered, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever, Executive Secretary

Dated at Chicago, Illinois, this 5th day of June, 1985