

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 - Administrative Assistant

Dated at Chicago, Illinois, this 4th day of January, 1979.

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: ( System Federation No. 76, Railway Employees'  
( Department, A. F. of L. - C. I. O.  
( (Carmen)  
( Chicago and North Western Transportation Company

Dispute: Claim of Employees:

1. Freight Car Inspector Alex Novakovic was unjustly assessed sixty (60) days suspension effective November 18, 1976.
2. Freight Car Inspector Alex Novakovic was erroneously charged with instructing and/or suggesting to carman Bruce Scaramuzzi that he falsely testify at his investigation of October 20, 1976.
3. That the Chicago and North Western Transportation Company be ordered to compensate Freight Car Inspector Alex Novakovic for all time lost plus any other benefits he would have been entitled to had he not been unjustly suspended.

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.

Freight Car Inspector Alex Novakovic, who serves as Local Chairman of Carman Lodge 1076, was ordered to appear for investigation on November 3, 1976, in reference to the following charge:

"CHARGE: Your responsibility for instructing and/or suggesting to carman Bruce Scaramuzzi that he falsely testify at investigation of October 20, 1976 that he was not sleeping while on duty October 9, 1976, when he had already told you that he was sleeping while on duty October 9, 1976."

Following the hearing, Novakovic received a 60-day disciplinary suspension. The Carrier thus held Novakovic responsible for what it considered his improper actions as a union official, rather than as one of the Carrier's employees. In so doing, the Carrier takes on a heavy burden of proof in defense of its action, since Novakovic is protected by the applicable Agreement in certain rights as an employe, and is also entitled to non-discriminatory treatment as a union official.

The background facts leading to the accusation against the Claimant may be briefly summarized as follows:

Carman Bruce Scaramuzzi (and another employe) were discovered in a waycar on October 10, 1976. Scaramuzzi was subject to an investigative hearing on October 20, 1976 in that he had been "found sleeping" on the waycar. Prior to the hearing, Scaramuzzi had a conference with Novakovic and Bogdan Vitas, who were to represent him. During the hearing, Scaramuzzi denied he was sleeping. After the hearing, word was given informally to the Organization representatives that Scaramuzzi would be dismissed, in part because he was "lying" when he denied he was asleep. This information was conveyed to Scaramuzzi. On October 21, 1976, Freight Car Department Manager W. C. Pugh (who had conducted the Scaramuzzi hearing) received a letter from Scaramuzzi as follows:

"I went for an investigation on October 20, 1976 at 1:30 p.m. At that time two representatives for me asked me what happened for me to be getting investagate. I explained to them that I was caught sleeping in a way car on the Rip Round around. They asked me what happened and I explained to them that I was caught sleeping by Gen. Bowens on that night. They told me that it was my word against his that I should go in and tell them that I was not sleeping. I was sleeping on that night and I told a few people that I was sleeping. I was going in there to tell the truth but they said there was no witness that I should be able to get away with it. I am making this statement on my own free will. I was sleeping that night and I'm guilty of it.

/s/ Bruce Scaramuzzi  
FCR North Rip."

With Scaramuzzi's permission, he was subjected, by the Carrier, to a polygraph examination which appeared to buttress the validity of Scaramuzzi's accusations in his letter to Pugh. The charge against Novakovic, the subsequent hearing, and the disciplinary suspension for Novakovic followed.

The Board will find that the Carrier has simply not met the burden of proof required to impose a disciplinary penalty on an employe/union official for "instructing and/or suggesting" that an employe/witness testify falsely.

At his own hearing on October 20, was Scaramuzzi lying or telling the truth? Neither the Carrier nor the Board can know for certain. He might have been asleep, but lied in saying he was awake; or he might have been awake (as he testified with some emphasis, since he recounted the discussion between the Carrier official and his fellow worker before the Carrier official turned to him) and then lied in his letter to Pugh in an attempt to gain leniency (since he had learned that the Carrier believed he was lying at the hearing).

If he lied at the hearing, he is hardly the most reliable witness to be the sole support for a 60-day suspension of Novakovic. If he lied in the letter to Pugh, then of course Novakovic is blameless.

What is also not known is what Scaramuzzi said to Novakovic and Vitas in preparation just before the hearing. If Scaramuzzi had said, as is quite possible, "I wasn't sleeping" it would be responsible for the Union representative to advise, in effect, "Then say so, at the hearing; it's your word against theirs." What the Board is asked to believe, and this is the only explanation which would warrant possible disciplinary action against Novakovic, is that Scaramuzzi said to his Union counselors, "They caught me; I was asleep." To which the Union representatives (one or both) would have to reply, in effect, "Go in there and deny it". The Carrier needs far more proof than it has offered to show that this dialogue actually occurred.

Certainly, Scaramuzzi's testimony at either his own hearing or at Novakovic's hearing is hardly helpful. How did he observe what happened to his fellow employe while he was asleep? Or is that account also false? The use of the word "they" in his letter and then his certainty that only Novakovic advised him is, at best, confusing.

This is not a case of an accusation against a union official for an action taken in direct confrontation with management; it is limited to a hurried exchange between a union representative and an inexperienced and no doubt frightened accused employe.

The findings of the polygraph test, administered on behalf of the Carrier without the knowledge of the Organization, do not otherwise convince the Board. A more fair and impartial approach might have been to suggest such a test for both the accusing employe and Novakovic, but such was not done.

A W A R D

Claim sustained.


Form 1  
Page 4

Award No. 7783  
Docket No. 7646  
2-C&NW-CM-'79

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