

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

Parties to Dispute: (International Brotherhood of Electrical Workers
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(The Burlington Northern Railroad Company

Dispute: Claim of Employees:

1. That in violation of the current Agreement, Rule 35 in particular, Electrician G. Jemming was unjustly suspended and dismissed from service of the Burlington Northern Railroad following an unfair investigation held on June 17, 1983.

2. That accordingly, the Burlington Northern Railroad be ordered to make the aforementioned G. Jemming whole by restoring him to its service with seniority rights unimpaired, plus restore to him all other rights, benefits and privileges which he is entitled to under the Rules. Claim begins June 8, 1983 and includes eight (8) hours wages per day for each day Electrician Jemming is unjustly withheld from service plus additional compensation for any overtime work he would have been available for.

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 employes within the meaning of the Railway Labor Act as approved June 21, 1934.

The 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, G. Jemming, an Electrician in service for a period of eight years, was dismissed from service as a result of an investigation held June 17, 1983. The Claimant was charged with alledged theft of Company property at approximately 11:30 P.M. June 7, 1983, at or near the 20th Street viaduct entrance ramp.

The record shows the following incidents happened on the night in question. At approximately 9:55 P.M. on June 7, 1983, two detectives observed a truck parked beneath a bridge not on Company property. The truck appeared to be, but was not proven to be, a Carrier truck. The person in the truck unloaded six newly threaded metal pipes from the rear of the truck. The individual was never positively identified. The pipes were hidden in the weeds next to a bridge support in such a way that one would be unable to observe them unless they were standing over them. The pipes had no identifying markings on them other than some green paint which had rubbed off onto the pipes from another project. This appeared to be the same color paint that the Carrier uses to paint their trucks and again, this was not proven during the investigation. At approximately 11:30 P.M. on the same evening, the two detectives observed two people parked under the viaduct in a private vehicle. One detective testified that the two individuals, which were later discovered to be the Claimant and another Carrier employee, never got out of their vehicle. The other detective testified that they did get out of their vehicle and stand very close to the vehicle. At this time, both the individuals were detained and ultimately dismissed as a result of the investigation held on June 17, 1983.

The Organization argued that the investigation held on June 17, 1983 was not fair and impartial in accordance with Rule 35 of the current agreement. They based their argument on the instances of alleged predetermination by the Carrier as to the guilt of the two employees being investigated. Upon complete review of the evidence, the Board finds that the Claimant was given sufficient due process and the Carrier complied with the meaning of Rule 35. As was stated in Award 10510, proven theft is, except for the most unusual circumstances, cause for dismissal. Proof in theft cases must be substantial, in that not only the jobs of the Claimants are at stake, but their reputations and ability to earn a living would be substantially hampered by having this on their record.

The Carrier argued that the two Claimants did not have sufficient reason to be in the area (a dangerous area) at 11:30 in the evening. Additionally they acted in a suspicious manner when confronted by the two Carrier detectives.

The Organization argued that there was no showing that the pipe in question was Carrier property, there was no identification of the person who dropped the pipe at 9:30, nor was the truck used to drop the pipe positively identified. Finally and most crucial to the case, although the Claimant was in close proximity to the alleged stolen material, at no time did he touch the material or attempt to load it into his truck.

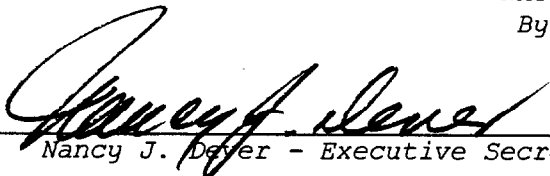
The Carrier has not proven the main contentions of this case, that is, the material was theirs, and that the Claimant intended to steal it. Rule 35 (g) states in part, "If it found that an employee has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from the record." The Board finds that upon complete review of the evidence presented, the Claimant, in accordance with Rule 35 (g), shall be reinstated with his seniority rights unimpaired, and be compensated for the wage loss, during such period that disciplinary action was in effect. In its statement of claim, the Organization asked for in addition to the above, compensation for overtime work that the Claimant would have been available for. The Board is expressly denying this part of the claim.

AWARD

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 4th day of September 1985.