

The Second Division consisted of the regular members and in addition Referee William O. Hearn when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers  
(CSX Transportation, Inc.  
(Chesapeake and Ohio Railway Company)

STATEMENT OF CLAIM:

1. That the Chesapeake and Ohio Railway Co. in violation of agreement rules, arbitrarily and capriciously dismissed Electrician W. L. Hardbarger from service effective May 25, 1988, as a result of investigation held on April 20, 1988, and;
2. That the Chesapeake and Ohio Railway Co. reinstate Electrician Hardbarger and make him whole for all time lost as a result of the arbitrary dismissal, from the date of the improper dismissal until Electrician Hardbarger's seniority rights are reinstated, and;
3. Furthermore, that the Chesapeake and Ohio Railway Co. make Electrician Hardbarger whole for all benefits to which he would have been entitled by reason of his continued employment, such benefits to include but not limited to vacation entitlement, credit for compensated service for retirement purposes, health, welfare, life insurance and protective benefits, and;
4. That Electrician Hardbarger's record be expunged of all mention of this matter.

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.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

In a letter dated March 21, 1988, Claimant was charged as follows:

"You are charged with falsely claiming and receiving monies from CSX Transportation, Inc., to which you were not entitled, in that you claimed and received protection payments for the months of December, 1987 and January, 1988 and did not report outside earnings from all sources, including money you received from your employment with Hardbarger Electric, in violation of Article III, Section 2(c) of the November 11, 1974 C&O-B&O-WM Coordination Agreement. You are further charged with having falsely claimed protection payment for the month of February, 1988 and not reporting outside earnings from all sources, including money you received from your employment with Hardbarger Electric."

The Investigation was scheduled for March 30, 1988. At the request of the Local Chairman it was postponed until April 6, 1988. At the request of the General Chairman it was postponed until April 20, 1988, and was held on that date.

By letter dated March 15, 1988, Claimant wrote to the Mechanical Superintendent, stating that he was furloughed July 1, 1987 and filed Claim under the Protection Agreement on July 10, 1987. He received official notification that he was a protected employee on December 15, 1987, and received his first payment on January 22, 1988. He further stated that during the long period of uncertainty and financial insecurity he was approached by BARC Electric Company in October 1987, to do contract work for them. He stated he decided to form a company in his wife's name in order to afford her some financial security which would be independent of his future earnings. She would handle the business and he would be doing the electrical work; all the earnings of the company were paid to his wife.

He further stated that his General Chairman suggested that in order to satisfy the Agreement Article III, Section 2(c), he should claim some of the earnings since he was doing the electrical work for the company. He then stated after figuring the company's overhead and expenses, they determined that he would receive as salary 40 per cent of his wife's net pay. He attached a copy of his revised earnings for October, November, and December, 1987, and for January and February 1988. Total earnings for these five months were \$3800.00.

In a letter dated March 9, 1988, the Mechanical Superintendent advised Claimant that it had been reported that he was gainfully employed by his wife's company who had a contract with the BARC Electric Company. He stated further that Article III, Section 2(c) of the Master Transfer Agreement requires that earnings in other employment be reported and offset against the monthly guarantee. Claimant was instructed to furnish information and supporting data of his employment and all earnings in such employment beginning with his effective date of protection, August 10, 1987. As heretofore mentioned, Claimant complied with this request on March 15, 1988.

On page 19 of the transcript of the Investigation Claimant testified as follows:

"Q. Mr. Brown, my question is as earlier stated, if he worked for someone other than CSXT.

A. I worked.

Q. Mr. Hardbarger, who was that for?

A. My wife.

Q. Does your wife have a company or could you explain that please?

A. She has a company called Hardbarger Electric.

Q. Did you receive compensation for that work you performed for her in December?

A. No, sir.

Q. Mr. Hardbarger, I'd have to ask you if you didn't, why did you submit as shown in Carrier's Exhibit F-1, why did you submit, and it's been earlier testified by Mr. Hall this came in with your letter dated March 15, why did you submit information that said you had?

A. Because my General Chairman recommended it. As a matter to be clarified as far as the gainful employment in the interest of fairness to the company that I should put some type of compensation, that I may be somehow

deemed a benefactor since this company is my wife's and since we live in the same household that I may be deemed as some type of beneficiary. There is no check, no monies, whatsoever in my name. And one of the reasons that that amended form was submitted was at his request.

Q. Mr. Hardbarger do you tell me that your General Chairman told you to submit the compensation you didn't receive?

A. Correct."

On page 22 of the transcript of the Investigation the Claimant testified further:

"Q. Mr. Hardbarger, one other thing I'm curious about, when was Hardbarger Electric established?

A. October, 1987.

Q. Do you have regular days of assignment?

A. No.

Q. Are you on an hourly rate?

A. No.

Q. Per job?

A. No.

Q. BARC doesn't pay you per switch installed?

A. BARC doesn't pay me anything.

Q. BARC pays Hardbarger Electric a fee for each switch installed?

A. They do."

Then on page 23 of the transcript Claimant was asked the following questions:

"Q. Mr. Hardbarger could you tell me how your wife determines your compensation?

A. I have no compensation. If you're asking me how the amended money was determined, I can answer that.

Q. I'll ask that in a moment, but you're telling me that you install four to five hundred switches, which we'll just use an hour as a rough figure to put in, and you receive no compensation for that?

A. That's right.

Q. Yet, you perform work but receive no compensation.

A. That's right.

At page 24 of the transcript Claimant was asked:

"Q. Who receives the profits from the company?

A. My wife."

Carrier's Investigating Officer continued to question Claimant through the middle of page 27 of the transcript. At no time did Claimant admit that he drew compensation from Hardbarger Electric, except at the request of his General Chairman.

The transcript further revealed that Claimant turned in the earnings he received as Financial Secretary of the Local Union. From his testimony he thought he was complying with the Agreement in regard to his earnings when he reported the \$75.00 per month he received from the Local. He had not given it a thought concerning the work he performed for Hardbarger Electric as earnings until his General Chairman advised him he should arrive at some figure in the interest of fairness to the company he should put down some type of compensation. Until that time, all the evidence of record indicates that Claimant thought he was complying with Article III, Section 2(c) of the November 11, 1974 C&O-B&O-WM Coordination Agreement.

Therefore, based upon the record before us it is the opinion of the Board that Claimant was not aware of the fact that he was falsely claiming and receiving monies from CSX Transportation, Inc. in violation of Article III, Section 2(c) of the November 11, 1974 Agreement.


Based upon the evidence of record the Claimant should be restored to service with all rights and paid all monies due just as if he had remained in service, less any outside earnings.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:

  
Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 16th day of May 1990.

CARRIER MEMBERS' DISSENT  
TO  
AWARD 11857, DOCKET 11823  
(Referee Hearn)

The Majority grossly erred in determining to sustain the claim of the Organization in this dispute.

The Award disregards the substantial evidence in the record that sanctions the Carrier's conclusion that the Claimant was guilty as charged, and that the assessment of dismissal is discipline commensurate with the offense.

Leading up to this palpably erroneous decision, the Majority stated:

"At no time did Claimant admit that he drew compensation from Hardbarger Electric, except at the request of his General Chairman,"

underscoring the fact that only after he was caught with the smoking gun in his hand, did he attempt to remedy the situation so that he could continue to exploit the Master Transfer Protection Agreement.

Conclusively, this pronouncement that the Claimant had no intent of reporting any income from the cunning scheme he had concocted, demonstrates the Majority's contempt for the negotiated Agreement, which governs disciplinary procedures on the property and the acceptance of substantial evidence in railroad arbitration. The Majority has chosen to spurn the negotiated Agreement's rules governing ethical conduct and the responsibility of Carrier's employees to adhere to Carrier's standards of conduct and the Agreement.

The grievance procedure has never required that there should be a "preponderance of evidence" in support of the charge, as is required to satisfy the requirements of civil legal proceedings. Nor does a review of the transcript require that we look for evidence "beyond a reasonable doubt," or "beyond moral certainty," in order to determine guilt or innocence. Countless Awards establish that the Substantial Evidence Rule governs railroad arbitration, the character of which has been defined by the United States Supreme Court in the following terms:

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (Consolidated Edison Company vs. National Labor Relations Board, 305 U.S. 197, 229)

The fact that the Claimant was charged and found guilty of falsely claiming and receiving monies from CSX to which he was not entitled, and for not reporting outside earnings from all sources as required, is lost while we wade through a recitation of the Organization's position and an apparent reading of tea leaves in determining Claimant's intent, in substitution of the substantial evidence of record, when the Majority states, "...it is the opinion of the Board that Claimant was not aware of the fact that he was falsely claiming and receiving monies from CSX Transportation, Inc. in violation of Article III, Section 2(c) of the November 11, 1974 Agreement." The Majority found no flaw in



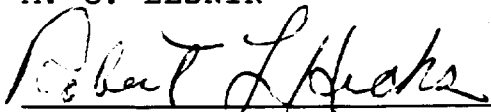
the Claimant's Agreement due process, or evidence that the Carrier had been arbitrary, capricious or unreasonable, and yet substituted its judgment for that of the Carrier's Hearing Officer, an action contrary to established precedent.

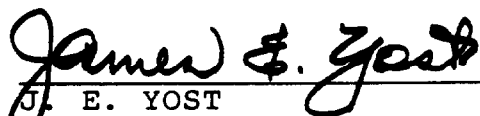
While it may be that the Majority does not share the Carrier's concern with regard to the administration of protection payments as established by the Master Transfer Agreement for those employees who are eligible and who comply with established requirements, that is a decision for the Carrier to make, not this Board.

This Award does nothing to discourage the continuation of such unscrupulous conduct in defiance of the Carrier's rules, and is palpably erroneous, as the Award is not based on the facts of record, but on some other unknown frame of reference.

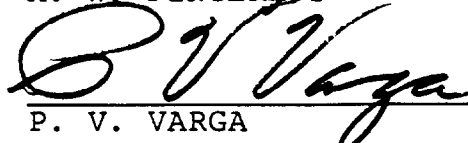
We vigorously dissent.

  
M. C. LESNIK

  
R. L. HICKS

  
J. E. YOST

  
M. W. FINGERHUT

  
P. V. VARGA

6/4/90

