

Award No. 14225
Docket No. MW-15505

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The dismissal of B&B employees Gerald Priefert and Darwin V. Schwisow from service as of December 30, 1963 for alleged "violation Rule K of Form G-147 Rev. in connection with fire damage Bridge 5303 at South Bend, Nebraska, October 10/11, 1963" was without just and sufficient cause and on the basis of unproven charges. (General Chairman's file 10-D-178 — Carrier's files PR-D-210733 and PR-D-210734.)

(2) The claimants be reinstated to service with seniority, vacation and all other rights unimpaired; their records cleared of the charges; reimbursement be made for all wage loss suffered; all in accordance with Rule 19 of the Agreement.

OPINION OF BOARD: Claimants were dismissed from service as of December 30, 1963, according to the Notice of Termination of Employment, "because violation Rule K of Form C-147 Rev. in connection with fire damage Bridge 5303, at South Bend, Nebraska, October 10/11, 1963 as developed in investigation. . . ."

Rule K, referred to, reads, in pertinent part, as follows:

"GENERAL RULES.

In case of danger of loss of, or damage to, railroad property by fire, theft, or other causes, employees must unite to protect it. They must exercise care in use of railroad property, . . ."

On the day in question Claimants, another employe, Gary Cole, who did not join in this claim, and three young ladies went out to a "set-off platform" they had helped to construct that day. They had some beer and stayed there a short time. After returning to their car, Cole went back to get a sweater and some beer he had left behind. He reported that he saw a fire under the bridge and thought he had heard voices. He called out but no one answered. He told

his companions about it but they thought it was a camp fire of some fishermen and left.

After they had returned to town they heard fire engines and followed. They found the bridge on fire.

In the subsequent investigation they denied being on the bridge but later admitted it. They said they had lied to protect the young ladies who had been with them.

Carrier construes Rule K to include the obligation not to unite to cause a fire, whether willfully or irresponsibly. One may quarrel with this interpretation of a rule which seems merely to require employees not to shirk their fire-fighting responsibilities but, accepting Carrier's interpretation, the record clearly indicates that Claimants were discharged because they were held responsible for the fire damage. This point needs emphasis because, while the Claimants were guilty of other improprieties, there was insufficient, positive proof that they were responsible for the fire. We must not permit the guilt, which they admitted, to color and thereby create the guilt that Carrier was obliged to prove. The fact that they had lied when first asked whether they had been at the bridge that evening and that they had trespassed on railroad property, passing a no trespassing sign to do so, is not proof that they were responsible for the fire damage.

The record reveals that both Claimants said that they did not remember smoking on the bridge. Only Cole, who did not join in this claim, admitted he had smoked but could not remember that anyone else did. He said he did not know the manner in which he had disposed of the cigarette. He admitted it was possible that he had thrown it on the deck of the bridge but he did not remember that he had done so. He later admitted he had flipped a cigarette off the bridge into the water.

It was also Cole who returned to the bridge and noticed a fire below it and said he had mentioned it to the Claimants. They said he mentioned it as a camp fire made by some fishermen.

The record is thus barren of any proof that either of the Claimants had smoked on the bridge or had seen a suspicious fire. The fact that they could not remember having smoked is not proof that they did, in fact, smoke. The fact that Cole had reported a fisherman's camp fire below the bridge cannot be held to have required them to investigate it.

Carrier insists that there is enough circumstantial evidence to involve the Claimants. Circumstantial evidence may be sufficient to establish guilt but in this case the evidence does not point to the Claimants unless we cloak them with responsibility for Cole's actions. It was Cole who may have been responsible and even that conclusion is far from certain or proved.

In our system of jurisprudence, guilt is personal. The fact that Cole may have been responsible does not make his companions responsible unless they acted in concert or were in a conspiracy to perform the offense and there is no such evidence.

Carrier was under an obligation to prove that Claimants were responsible for the fire damage not by conjecture or mere suspicion but by evidence of complicity. The suspected guilt of a companion is a slim reed upon which to hold them responsible.

Claimants may have been guilty of trespass but this not why they were discharged. They had, indeed, lied in the beginning, but this, too, was not why they were discharged. It would be improper to say that because they had lied and had trespassed, they were guilty of wrong doing and should have been punished even though they may not have been guilty of responsibility for the fire damage. Guilt is not only personal but specific. The guilt of one offense does not automatically prove the guilt of any other offense.

Carrier insists that Claimants' defense consists only of a denial which is to be expected of employees in a discipline case. This is true but our decision is not based on their contradiction of evidence against them. There was no evidence that they smoked on the bridge or were careless with matches or cigarettes. It is this lack of evidence which dictates that a sustaining award be given. Claimants had no obligation to prove how the fire started, so long as they were not responsible for it.

While the Claimants are entitled to reinstatement to their jobs they are not entitled to full back pay for the time lost. On July 8, 1964 Carrier offered reinstatement to Claimants on a leniency basis, with seniority rights and vacation rights unimpaired. The employees refused the offer because it would leave an assumption of guilt for the fire damage. At a subsequent conference, on August 3, 1964, Carrier's Mr. Gilkerson offered reinstatement while the claim was submitted to this Board to determine the rule violation. This offer was refused.

It is our opinion that the latter offer of the Carrier, if accepted, would have refuted any implication of guilt arising from the leniency reinstatement.

Claimants had an obligation to mitigate damages. By failing to accept Carrier's compromise proposal, they unnecessarily added to the damages. They are, therefore, not entitled to back pay after August 3, 1964.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That Carrier violated the Agreement.

AWARD

Claims sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of March 1966.

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