



Award No. 15055
Docket No. MW-15689

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Don Hamilton, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

ATLANTIC COAST LINE RAILROAD COMPANY

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

(1) The dismissal of Bridge Tender V. V. Collins from service effective at the close of work on September 14, 1964 for allegedly "claiming overtime 8-2-64, 7:15 P. M. to 7:25 P. M. at Buffalo Bluff Drawbridge, Mile Post 703.4 for passing 'House Boat up, Pleasure' when you were not entitled to it" was without just and sufficient cause and on the basis of unproven charges. (Carrier's File MW-52.)

(2) The claimant be reinstated to his former position with seniority, vacation and all other rights unimpaired and that he be compensated in accordance with Rule 10, Section 3, of the controlling Agreement.

OPINION OF BOARD: Claimant, V. V. Collins, was assigned to the position of Bridge Tender at Buffalo Bluff Drawbridge. On August 11, 1964, he was advised that he had been charged with wrongfully claiming overtime on August 2, 1964. The Carrier alleged that on that date the Claimant filed a claim for overtime, stating that he had performed service from 7:15 P. M. to 7:25 P. M., in that he raised the bridge to let a House Boat pass. He claimed a call of 2 hours, 40 minutes. The Carrier alleges that the Claimant did not raise the bridge as claimed.

A hearing was held, Claimant was found guilty and subsequently dismissed from service.

At the hearing, certain background evidence was introduced tending to show the history of overtime claimed by Collins on this particular assignment. The following question was asked by General Roadmaster H. A. Stone, and the following answer was given by Division Engineer A. C. Parker, Jr.:

"Q. Will you please state what effort has been made to assign work hours at this location to eliminate excessive overtime and what facts have been revealed from the log book and overtime slip information as submitted by Bridge Tender V. V. Collins?"

- A. A study has been made of the records in the bridge tender's log, as well as the overtime slips prepared by Mr. Collins. During the period extending from April 18 to May 23, 1964, the off-duty hour at Buffalo Bluff was 7:00 P. M. Mr. Collins was on duty eleven days as relief bridge tender during this period. The log shows that he passed four boats between the hours of six and seven P. M. and eight boats between the hours of 7 and 8 P. M. On May 24, the hours were changed so the off-duty hour would be 6:00 P. M. From May 24 through June 30, 1964, Mr. Collins was on duty eleven days. During this period, nine boats passed between the hours of 6 and 7 P. M. according to the records, as compared with four in the previous period. Also, only two boats were passed between 7 and 8 P. M., as compared with eight in the previous period when the off-duty hour was 7:00 P. M. On July 1, 1964, the off-duty hour was changed to 7:00 P. M. During the period from July 1 to August 7, 1964, Mr. Collins was on duty ten days. During this period the log shows three boats passed between 6 and 7 P. M. and six boats between 7 and 8 P. M. Since August 7 to the present time, Mr. Collins has been on duty eight days. During this period the records show that no boats were passed between 6 and 7 P. M. and no boats were passed between 7 and 8 P. M. An attempt was made to fit the bridge tender's hours to do away or to eliminate the excessive overtime during the first hour after the off-duty hours. Despite the three changes that were made within approximately three months, no appreciable improvement was seen."

The Organization objected to this testimony and asked that it be stricken from the record. Their objection was overruled.

We hold that this testimony was properly admitted for the purpose of showing a common scheme or design. It is admissible to illustrate the modus operandi of the defendant.

The Organization argues that the evidence at the hearing was not sufficient to convict the Claimant. They say the charge placed against Collins was not sustained by the evidence adduced at the hearing.

The Carrier urges that the evidence substantiates the charge and proves a violation of the trust placed in Claimant by the Carrier. They further argue that the discipline was not contrary to law, unreasonable, capricious or arbitrary.

It appears certain that both advocates have framed their arguments within the guide line language previously enunciated by this Board, in order to support their respective positions.

In the instant case, Roadmaster Adkins and apprentice Buzzell testified that they went out and watched the bridge during the time period in question and that they knew for a certainty that the bridge was not raised.

Claimant Collins testified that he did in fact raise the bridge. He also introduced an affidavit from a Paul and Edna Duval, which stated:

"... While Mr. Collins, my wife and I were cleaning fish beneath the Old House at the end of the bridge, we were interrupted by a houseboat wanting to pass. Mr. Collins left us at this time to open the Bridge. . . ."

We note that Mr. and Mrs. Duval do not state that the bridge was actually raised, only that Collins, "left to open the Bridge."

We are faced with a total conflict of testimony as far as the record made at the hearing is concerned.

However, we must resolve this dispute in the light of our particular scope of review in discipline cases.

We hold that this Board should search the record and determine if there is sufficient evidence therein to support the action of the Carrier. This is not necessarily a preponderance of the evidence, as would be required in civil cases, or evidence beyond a reasonable doubt, as required in criminal cases. It is merely adequate evidence to sustain the findings of the Carrier.

In the instant case the Carrier had the testimony of two eye witnesses who were adamant in their contention that Claimant did not raise the bridge. In addition the Carrier introduced certain studies which tended to show a common scheme by Claimant in regard to overtime work. We are of the opinion that the Carrier met the burden of proof sufficient to sustain the disciplinary findings, and that in the absence of some fundamental error, the action of the Carrier should not be disturbed.

It is our position that this Board always has the responsibility, in a discipline case, to examine the record for any fundamental error which involves a violation of either procedural or substantive due process. The Carrier herein does not agree with this position and cites *Edwards vs. St. Louis-San Francisco Railroad Company, et al*, a Seventh Circuit Court of Appeals case, No. 15400, decided May 13, 1966, as authority for the proposition that the only due process to which an employee is entitled, is that which has been specifically bargained for in the Agreement.

In the *Edwards* case, the appellant argued that he had been denied due process by the First Division of the National Railroad Adjustment Board. The court held that there was no violation of due process by the First Division, in their handling of the case. The case does not stand for the proposition that the employee is not entitled to due process in the discipline hearing. In fact the court held that it had no right to review the order of the National Railroad Adjustment Board, denying appellant's claim for reinstatement, and so it did not reach the question which Carrier submits that it stands for in the instant dispute. Collins has not raised any specific objections based on due process. Therefore, our scope of review is limited to an examination of the record for fundamental, procedural or substantive due process violations.

We have searched the record and we fail to find any such errors.

Therefore, the discipline of the Carrier will be affirmed, and the claim will be denied.

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 Employes involved in this dispute are respectively Carrier and Employes 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 the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of December 1966.