NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24712

THIRD DIVISION Docket Number MW-24932

Tedford E. Schoonover, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(National Railroad Passenger Corporation

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

(1) The dismissal of Trackman Linwood Walker for alleged violation of 'Rule H' and 'Rule I' was without just and sufficient cause (System Docket 267D).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: Under date of November 25, 1980, Carrier sent the following notice to Claimant Linwood Walker:

> "You are hereby directed to report to the Division Hearing Office, Room 209, Baltimore Penn Station on December 2, 1980 at 11:30 a.m. At such time you will be afforded a trial on the following charge:
>
> 'Violation NRPC General Rule A, reading in part: Employees must render every assistance in carrying out rules and special instructions and must promptly report any violation thereof'.
>
> 'Violation NRPC General Rule H, reading in part: Employees must take every precaution to guard against loss or damage to Company property from any cause'.
>
> 'Violation NRPC General Rule I, reading in part: Employees will not be retained in service who are dishonest'.
>
> Specification - In that on September 3, 1980 you wrongfully used an AMTRAK gasoline credit card to purchase gasoline for your personal automobile."

The hearing was postponed until December 16, 1980 because Brotherhood representative unable to attend on the date originally scheduled.

On the basis of Rule 71 the Brotherhood contends the charge notice to Claimant was untimely. The rule provides:

> "An employee who is accused of an offense, and who is directed to report for trial thereafter, shall within fifteen (15) days of the offense, be given notice in writing of the exact charge on which he is to be tried, and the time and place of the trial."

This case originated out of an excessive amount of gasoline purchased with Amtrak Credit Card #005-970-000-5-5995-4831-3503 at the Bowie Belair Amoco Service Station. The credit card was issued to Eugene Thomas, Gang Foreman. Carrier investigation was made by Special Agent Greene.

The initial point raised by the Brotherhood against the disciplinary action is that the charge was not sent to the employee 15 days prior to the hearing as required by Rule 71. The evidence adduced during the hearing does not support this allegation. Special Agent Greene, who investigated the matter, interviewed the Claimant on November 17, 1980, as shown on Trial Exhibit 4, not on November 10, as stated by the Brotherhood. The notice of hearing and charge was sent to Claimant on November 25, which is well within the 15 day period specified in the rule. Thus, we must conclude that Carrier complied with the procedural time limits as required in the rule.

On the substance of the charge i.e., alleged violation of General Rules H and I, we find considerable merit in the Brotherhood contentions.

Although Claimant admitted using the Amtrak credit card for purchase of gasoline for use in his own car he stated such use had the acquiesence of his Foreman Eugene Thomas. Such acquiesence was apparently based on the fact that claimant used his car at least on some occasions to transport company tools and other employees to the job site; also his car was used when the Company bus was not functioning properly. Although Foreman Thomas admitted giving Claimant Walker permission to fill up his car, the Carrier did not include Mr. Thomas in the hearing to either verify or deny Claimant's statement that his use of the credit card was permitted. On this point the Carrier contends it had no need to include the foreman in the hearing; that if the Brotherhood felt his testimony important it was at liberty to summon him as a witness. In cases where the evidence is more conclusive we might agree. However, in this case, the testimony of Claimant was frank and open in admitting he used the Company credit card but with an explanation showing he did so with permission of his direct superior. Resolution of such conflicts in testimony is basic in assuring the accused a fair and impartial hearing.

Moreover, Trial Exhibit 3, a copy of the statements made by Foreman Thomas to Special Agent Greene, is a part of the evidence adduced at the hearing. Foreman Thomas admits some of his trackmen, including the Claimant, had the credit card overnight on occasion. In addition, he named others, i.e., Kevin Hobbs, Williams and Leurhem Salisburt, other trackmen in the gang, who filled their cars with gasoline by using the credit card. Our immediate question is why Linwood Walker, the Claimant was singled out from this group for disciplinary action. Why were not the others brought up on similar charges and why wasn't Foreman Thomas included in the investigation hearing to determine why he permitted the credit card to be used to the benefit of these men. At the very least the inclusion of Foreman Thomas in the hearing would have cleared conflicts in the evidence and filled in important details that would serve to enlighten as to the Claimant's testimony. As the record stands his claim that he used the card for gasoline with the permission of his foreman; also that his car was used to transport other workmen and tools stands unrefuted. We are left in wonder at Carrier's reason for not including Foreman in the investigation hearing to clear up these points. In this connection it is pertinent to reflect on Third Division Award 15444 cited in the Brotherhood submission:

"... when a party has in its peculiar control evidence of probative value which it fails to adduce it can be presumed that if such evidence was adduced it would be unfavorable to the party."

Another procedural question was raised by the Carrier with reference to Rule 74 which provides:

"An employe who considers that an injustice has been done him in discipline matters and who has appealed his case in writing to the Chief Engineer within fifteen (15) days, shall be given a hearing."

The record shows that an appeal hearing was held on April 3, 1981 and Carrier decision affirming the discipline was issued on April 10. Although General Chairman's Leece's letter to the Assistant Chief Engineer dated May 10, indicates the case was being progressed with the Assistant Vice President, no documented request for consideration of this case was made by the General Chairman until November 6, 1981. The fact that this request was some seven months beyond the time limits specified in the rule was noted in Carrier letter of December 29, 1981, affirming the disciplinary action. It was also stated in that letter that no agreement had ever been made to waive the time limits in progressing the appeal.

On balance we find ample culpability for all concerned in this case. It is clear the Carrier failed to develop all of the relevant evidence and for this reason it cannot be determined if there were justifiable and mitigating factors in Claimant's use of the credit card for his own benefit. At the same time it cannot be reasonably determined that all the gasoline he purchased by use of the card was for benefit of the Carrier; it also served Claimant personally. Nor are we persuaded that Claimant was not aware that use of the company credit card for his personal use was contrary to established rules. He leaned heavily on his assertion that it was all right because it was done with his foreman's permission and that on occasion his car was used for benefit of the Carrier. To the extent Carrier failed to develop all the relevant and material evidence we feel its action in dismissing Claimant was arbitrary and capricious. There is, however, the additional fact to consider that the appeals against the discipline were not timely as required by Rule 74. There is no evidence that Carrier ever waived its position on this point.

On balance we determine that while the dismissal action was not just and reasonable, the factors pertaining to the untimeliness of appeals handling must also be taken into account. Therefore, it is our determination that Claimant be restored to his former position with seniority rights unimpaired but without pay for time lost.

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 discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of March, 1984.