

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25411
Docket Number MW-25347

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Seaboard System Railroad (former Chicago & Eastern Illinois
(Railroad Company)

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

(1) The dismissal of Machine Operator D. R. Larkins for alleged violation of "Rule 'G' third paragraph relating to acts of dishonesty, and Rule 'O' relating to unauthorized removal of gasoline credit card from Company truck and subsequent use of credit card to purchase gasoline for your personal automobile on the dates of September 30, 1981, and October 1, 1981" was improper, unwarranted and on the basis of unproven charges (Carrier's File D-107977).

(2) The Claimant shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.

OPINION OF BOARD: Prior to the occurrence giving rise to the dispute herein, Claimant, with about two and one-half years of service, was employed by the Carrier as a Machine Operator and held a temporary assignment as such in Evansville Division Gang No. 208, under the supervision of Foreman D. E. McIntyre. Carrier states that Claimant worked as a Machine Operator in Gang 208 for a one-week period, September 28 through October 1, 1981. On November 30, 1981, Claimant was notified by the Roadmaster:

"You are hereby charged with violating the following rules contained in the Rules and Instructions of the Maintenance of Way Department: Rule 'G' third paragraph relating to acts of dishonesty, and Rule 'O' relating to unauthorized removal of gasoline credit card from Company truck and subsequent use of credit card to purchase gasoline for your personal automobile on the dates of September 30, 1981, and October 1, 1981.

Arrange to attend formal investigation to be conducted in L&N Office at Evansville, Indiana, at 9:00 AM, Tuesday, December 8, 1981, along with representation if you desire and any witness who has knowledge of this matter.

Your personal file record will be reviewed at the investigation."

The Rules referred to in the letter of charge read in part:

"'G'

Acts of dishonesty, desertion from duty, insubordination, willful neglect, gross carelessness, making false reports or statements, or concealing facts concerning matters under investigation, will subject the offender to dismissal.

.....

'O' No employee is allowed to contract any bill or other obligation on account of the Company, nor to use the Company's credit, unless authorized by the proper officer."

The Carrier contends that Claimant was written another letter on December 1, 1981, by the Roadmaster, which letter was sent certified mail to Claimant's registered address:

"Reference your being charged with violation of the following rules contained in the Rules and Instructions of the Maintenance of Way Department: Rule 'G' third paragraph relating to acts of dishonesty, and Rule 'O' relating to unauthorized removal of gasoline credit card from Company truck and subsequent use of credit card to purchase gasoline for your personal automobile on the dates of September 30, 1981, and October 1, 1981.

This is to advise that we have in our possession a signed witnessed statement from Mr. Joe Jenkins of Clinton, Indiana, which will be presented as evidence and made a part of the transcript of formal investigation which is scheduled to be conducted in the L&N office at Evansville, Indiana, 9:00 AM, Tuesday, December 8, 1981.

All other details as stipulated in original letter of charge dated November 30, 1981, still stand."

The investigation was conducted as scheduled. Claimant was present and represented. A transcript of the investigation has been made a part of the record. Following the investigation, Claimant was notified of his dismissal from service on December 23, 1981.

In the investigation Claimant denied receipt of the Roadmaster's letter of December 1, 1981, in which the Roadmaster advised him of the possession of a signed witnessed statement from Joe Jenkins of Clinton, Indiana, which would be presented as evidence and made a part of the transcript of the formal investigation. In the investigation, the statement of Jenkins was introduced by Carrier's Assistant Inspector of Police and Special Services, who testified concerning his investigation of the alleged improper possession of and use of Company credit card by the Claimant to purchase gasoline for his personal automobile. The Organization Representative objected to the introduction of the statement made by Jenkins without the writer being present at the investigation, which objection has been continued by the Organization in its submission to the Board.

The Carrier, of course, has no power of subpoena to force non-employees to attend disciplinary investigations. Further, the Board has issued numerous awards upholding the admissibility of written statements in investigations without the writers of such statements being present. In Third Division Award No. 9311 it was held:

"...This Board, in a long line of awards, covering many years of experience, has rather consistently held that written statement of witnesses not present at the investigation are admissible. We concur in the reasoning and findings in those awards, too numerous to list here."

See also Third Division Award No. 24131, and Second Division Awards Nos. 8379, 9285, 9360 and 9521. The admissibility of Jenkins' written statement in the investigation was proper, especially since the Carrier made a good faith effort to advise the Claimant of the possession of such statement prior to the investigation.

We think it well to again point out that Railroad disciplinary proceedings are not court proceedings and strict rules of evidence do not apply, nor is the burden of proof the same. Many awards of all Divisions of the Board have upheld the dismissal of employees where there was produced substantial evidence in support of the Carrier's action. In Second Division Award No. 6419, it was held:

"The substantial evidence rule referred to was set forth by the Supreme Court of the United States as follows:

'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.' (Consol. Ed. Co. vs Labor Board 305 U.S. 197, 229)."

The substantial evidence rule is so well established in Railroad disciplinary cases as to require no citation.

In the investigation conducted on December 8, 1981, evidence was taken from the Foreman of Gang No. 208, the Carrier's Assistant Inspector of Police and Special Services, and Claimant in addition to the written statement of Service Station Operator Jenkins. It was developed that on September 30, 1981, 10.1 gallons of gasoline at a cost of \$13.25 were purchased at the Jenkins Shell Station, in Clinton, Indiana, and was charged to the credit card issued for the Foreman's truck; and on October 1, 1981, 24.3 gallons of gasoline, at a cost of \$32.00, were purchased at the same station and charged to the Foreman's credit card. The gasoline receipt tickets, bearing Claimant's signature, were introduced, but the Claimant denied having signed them. The Foreman testified as to how he discovered the tickets involved, and as to the possible access Claimant had to the credit card. The statement of Joe Jenkins, previously referred to, indicated that he had put gasoline in a car which he described as at least similar to Claimant's car, and the gasoline was charged to an L&N credit card. He also gave a description of the occupant of the car that he had put the gasoline into. While the receipt tickets bore Claimant's signature, Claimant denied having signed the tickets and denied any involvement in the transaction. His signature on other documents was introduced to show the similarity. It was also developed that Claimant's personal appearance resembled, at least in part, the description given by Jenkins.

From our review of the transcript, we conclude that there was substantial evidence, as defined by the United States Supreme Court (Second Division Award No. 6419) to support the conclusion of the Carrier that Claimant was guilty as charged. His dismissal was justified as dishonesty cannot be condoned. The fact that while there was conflicting statements in the investigation this is not a proper basis for reversing the Carrier's action. It is well settled that this Board does not weigh evidence, attempt to resolve conflicts therein, or pass upon the credibility of witnesses. Such functions are reserved to the Carrier, and the Board has stated many times that it is not justified in reversing the determination of the Carrier simply because of conflicts in testimony.

The record shows that in the handling of the dispute on the property, the Carrier offered, on March 3, 1982, to reinstate Claimant on a leniency basis, which offer was declined. On April 23, 1982, Carrier offered Claimant reinstatement as of May 1, 1982, with seniority unimpaired and without waiving Claimant's right to progress his claim for pay for time lost from December 23, 1981. This offer was declined by Claimant, stating that he wanted to return to service "but not till payment for my time off". He ended his response with an ultimatum to Carrier to respond by May 6, 1982, or face court action.

Again on May 10, 1982, Carrier's highest designated officer of appeals advised the General Chairman in part:

"We, however, have given this case further consideration and by copy of this letter are authorizing Superintendent G. H. Moore, Jr., to promptly restore Mr. Larkins to service with seniority rights unimpaired without prejudice to your right to handle claim for lost time in favor of Mr. Larkins through the grievance procedures."

The Claimant refused the second offer of reinstatement even though his right to progress his claim for pay for time lost was not waived.

We consider Claimant's action in refusing to accept Carrier's offers of reinstatement without prejudice to his right to progress his claim for pay for time lost to be arbitrary and at his peril. He had an obligation to mitigate his damages, which he declined to do.

As Claimant's dismissal was justified by the investigation conducted on December 8, 1981, the claim will be denied.

We notice in passing that a number of the Carrier's exhibits, Exhibit BB-1, Exhibit BB-2, Exhibit BB-4, and Exhibit BB-6, are almost illegible. We have heretofore taken occasion to caution that if Parties to disputes before this Board desire that exhibits and other materials be considered by the Board, then such exhibits and material must be submitted in legible form. We renew that caution.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 the Agreement was not violated.

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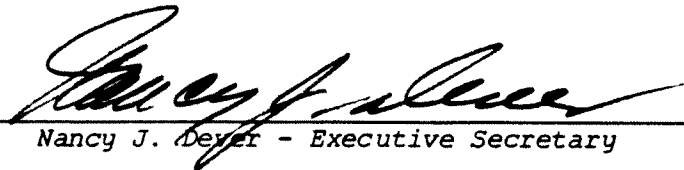
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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:



Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1985.