

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Elgin, Joliet & Eastern Railway Company

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

(1) The dismissal of Truck Driver L. Hayhurst for alleged failure to promptly execute his duties, dishonesty, unauthorized removal of company records and unauthorized release, exhibition, production and/or reproduction of company weighing records on September 24, 1988 was arbitrary, capricious, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File SAC-8-89/MM-3.5-89).

(2) As a consequence of the violation referred to in Part (1) hereof, the Claimant shall be reinstated with seniority and all other rights unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS:

The Third 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.

The genesis of this case is found in an action initiated by Claimant in June, 1986, when he filed suit in the U. S. District Court of appropriate jurisdiction alleging a personal injury on or about September 24, 1985. In the normal course of progression of this legal action, depositions were taken. During a deposition taken on July 14, 1988, Claimant indicated that he had accumulated at his home, but did not have with him at the time of the deposition, certain weight slips which he believed would support his contentions in the legal action. In a continuation of the deposition held on October 12, 1988, Claimant produced several copies of weight slips ranging in time from March, 1987, to and including September 24, 1988. There were six (6) weight

slips presented on October 12, 1988, covering the single date of September 24, 1988. These September 24, 1988, weight slips form the basis of Carrier's action in this case.

By letter dated October 21, 1988, Claimant was instructed to appear for an on-property Hearing on October 27, 1988, in connection with the following charge:

- "1) You allegedly failed to properly execute your duties on September 24, 1988, in that you weighed seven (7) loads of hot crops without authorization.
- 2) You were allegedly dishonest regarding your work activities when you falsified company records by not indicating that that you weighed seven (7) loads of hot crops on September 24, 1988, by not recording the weights on your Control Report.
- 3) You allegedly removed six (6) company records dated September 24, 1988, from railroad property without authorization.
- 4) You allegedly exhibited, released, produced and/or reproduced copies of company weighing records dated September 24, 1988, without authorization."

By agreement of the parties, the Hearing was postponed until November 8, 1988, at which time Claimant was present and represented. Subsequently, by letter dated November 11, 1988, Claimant was dismissed from Carrier's service. The dismissal notice made reference to Rule D, Rule M and Rule P of the General Rules of Conduct as being embodied in the above mentioned notice of charge. He was also informed that the degree of discipline assessed was based upon a consideration of not only the gravity of the offense, but also on the basis of his prior record.

As a matter of information, the above referenced Rules of the General Rules of Conduct read, in pertinent part, as follows:

"Rule D: Every employee must be prompt and firm in the execution of duty . . . dishonest behavior is forbidden."

"Rule M: No employee is permitted to exhibit, release, produce or reproduce copies of any company records . . . without authorization from the proper supervising officer."

"Rule P: * * *

- (2) Employees are prohibited from the unauthorized removal of any material from railroad property or property served by the railroads. This includes any material that may be looked upon as worthless, . . ."

As regards Claimant's prior record, which was a consideration in arriving at the degree of discipline which was assessed in this instance, the case file indicates that he had accumulated eighty-three (83) demerits in a system in which one hundred (100) demerits is reason for termination.

Following the issuance of the notice of dismissal, an appeal was taken on behalf of the Claimant in which the only remedy requested was the reinstatement of Claimant to duty. As this appeal progressed through the usual manner of handling such matters on the property, the remedy portion of the appeal was broadened to include reinstatement of Claimant to service with compensation to be paid for time out of service. This expanded appeal was handled through all of the remaining appeals channels on the property. Failing to reach a satisfactory resolution of the dispute on the property, the case has come to this Board for final and binding adjudication.

The parties have taken a relatively straightforward discipline case and have built it into a rather complex one. The Organization contends that its position must be upheld because: 1) the Carrier has attempted to punish an employee simply because he initiated an FELA claim; 2) the Carrier has violated Claimant's "due process" rights and Rule 57 of the Agreement because it failed to provide to the Organization all the exhibits which were made a part of the Hearing transcript; 3) the Carrier has not proven the charges as made for the reason that it has not cited any Rule or policy as having been violated; it has not shown that weighing of trucks takes place only on the instruction of a Supervisor, that Claimant's act of weighing his truck ". . . would only have involved a minute amount of time" and therefore the action was "de minimus", and, that the weight tickets were not Carrier property but rather belonged to the I.M.S. Company which performed the weighing service.

Carrier, on the other hand, argued that: 1) the Claim as amended was untimely and should therefore be dismissed; 2) that the Hearing as conducted accorded Claimant all of his Agreement due process rights; 3) that there was more than substantial evidence to support the conclusion of guilt including Claimant's own testimony; 4) that the Organization's argument relative to receiving an incomplete Hearing transcript is not dispositive because neither the Claimant nor his representative at the Hearing requested, in writing, a copy of the Hearing transcript and further that there was no apparent problem encountered when the Organization initiated and handled the appeal on Claimant's behalf.

We will first address the procedural argument raised by Carrier relative to the amended Claim. To be sure, the Claim was expanded as the appeal moved through the appeal process on the property. But, our examination of the Carrier's replies to the expanded Claim clearly shows that no exception was

taken to the expanded Claim even though Carrier had three (3) opportunities to take such exception [April 19, 1989, October 5, 1989 and January 4, 1990]. Carrier, by its inaction, waived its right to raise this issue before our Board and its contention in this regard is rejected.

A review of the record as developed during the on-property handling of this dispute shows that all of Claimant's due process rights were accorded him. The Organization cites with favor First Division Award 23930 of this Board in support of its contention relative to the absence of certain exhibits to the Hearing transcript. In the first instance, the Organization failed to comply with the provisions of Rule 57 by not making a request, in writing, at the time of the Hearing for a copy of the transcript. The initial appeal was handled with no apparent difficulty with the Hearing transcript which had been gratuitously provided by the Carrier. The subsequent handling of the appeal was also handled through at least three (3) stages with no apparent difficulty still with the gratuitously provided copies of the Hearing transcript. Our reading of Award 23930 does not reveal even a slight similarity to the fact situation which exists in this case. The Organization's argument in this regard is rejected.

This case involves Claimant's actions on only one (1) date - September 24, 1988. On that date he took it upon himself, at the behest of his attorney, to secure weight slips for loads which he was transporting in Carrier's truck during his tour of duty. He was not instructed by any Carrier official to weigh these loads. After weighing the loads, he retained the weight slips and turned them over to his attorney for possible use in his FELA action against the Carrier. Further, after weighing the loads and keeping the weight slips, Claimant, of his own volition, elected not to include this information on his Control Report forms which he prepared and submitted to Carrier to cover and describe his activities for the date of September 24.

Claimant's actions in this case constitute a breach of the fundamental employee-employer relationship as it applies to basic loyalty and honesty. We express no opinion whatsoever relative to the FELA action involving this Claimant. We restrict our comments and opinions strictly to his action while on duty and under pay in Carrier's service on September 24, 1988. In this regard, we subscribe wholeheartedly to the opinion expressed in Second Division Award 10780, to wit:

"In this regard, suffice it to say that arbitral authority has established that some aspects of employee behavior are so basic, so fundamental in an employee-employer relationship that they are presumed to be applicable, and therefore enforceable, even though they may not have been written down or the product of negotiations between the parties. An employee's loyalty to his employer is deemed to be one of these considerations."

The Organization's argument relative to the ownership of the weight slips and the fact that some other employees may discard their weight slips begs the issue which exists in this case. From the record, it is apparent that the sole reason for Claimant weighing his loads on this date was to procure evidence for his attorney's use in the pending legal action. The weighing company functions as an agent for the Companies who use their services. The weighing company does not exist for the purpose of providing Claimant with material for his use in his extra-curricular legal actions. Once a Carrier truck is weighed, the weight report belongs by proprietary right to the Carrier. Claimant's removal of Carrier's documents from the railroad property without authorization for use in an action against the Carrier subjects the perpetrator to disciplinary action for violation of Carrier's rules. When this action is compounded by the deliberate omitting of the weight information from the Control Report forms, which are prepared and maintained to reflect the employee's activities during his tour of duty, we have a situation involving dishonesty as well as disloyalty.

Carrier's Rules D, M, and P are clear and unambiguous. General Rules of this type are, or should be, known by all employees who are subject to them. These Rules stand on their own without the requirement of any other policy statement. In this case, based upon the evidence in this record, Claimant violated these Rules. Carrier's decision to impose discipline of dismissal, based upon the seriousness of the proven violation, when coupled with the unsatisfactory prior discipline record of Claimant, does not constitute an arbitrary, capricious or excessive act. We will not interfere with the action taken.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of August 1991.