NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20260
THIRD DIVISION Docket Number DC-20446

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Joint Council of Dining Car Employees
(Local 495
(Seaboard Coast Line Railroad Company

STATEMENT OF CLAIM: (a) Claim of the Joint Council of Dining Car Employees, Local 495 on the property of the Seaboard Coast Line Railroad Company for and on behalf of Mr. W. E. CARTER, Commissary Porter, who was dismissed from Carrier's service on February 15, 1973 after investigation was held on February 2, 1973 at Jacksonville, Florida.

(b) Carrier shall now restore Claimant W. E. CARTER to service with full seniority rights unimpaired and pay for time lost.

OPINION OF BOARD: In December of 1972 the Carrier discovered serious shortages in the inventory of its Dining Car Commissary at Jacksonville, Florida. An investigation, undertaken by the Carrier's Property Protection Department, placed surveillance over the activities at the commissary. Following surveillance, and disclosure of some of the resulting details, ten commissary employes resigned. The Claimant, a commissary employe, was not among the resignees, but, after a hearing on February 2, 1973, he was dismissed because of irregularities in his handling of commissary supplies. The Employes request that Claimant be restored to service, with rights unimpaired, and with pay for time lost.

The Employes raise the procedural issue of whether the Claimant received an impartial trial and the substantive issue of whether the hearing evidence supports the findings of guilt on the charges. We have considered the procedural issue, including all of its underlying facets, but, having found no merit in the issue, we now proceed to the substantive merits of the case.

The charges against the Claimant are as follows:

> "You are charged with irregularities in handling Company material and violation of Dining Car Department General Order No. 70 and Rule 3 (p) of the Manual of Instructions for Dining and Tavern Car Employees which reads as follows:

'Disloyalty, dishonesty, desertion, intemperance, immorality, insubordination, incompetency, wilful neglect, inexcusable violation of rules resulting in endangering or destroying Company property, making false statements, or concealing facts concerning matters under investigation, will subject the offender to summary dismissal.'

"Violations are listed below:

1. Assisting and/or removing Company material from Seaboard Coast Line Dining Car Commissary for personal use and/or the use of others.

2. Removing cartons from Commissary at or about 8:15 PM and 8:30 PM, December 29, 1972, and placing same in private automobile of former Assistant Storekeeper Pasco Gray.

3. Removing bags from Commissary and placing same in private automobile at or about 5:40 PM, December 31, 1972.

4. Removing cartons from Commissary and placing same in private automobile at or about 6:00 PM, December 31, 1972.

5. Removing paper bag from Commissary and placing same in private automobile at or about 2:24 PM, January 1, 1973.

6. Removing box from dumpster and placing same in private automobile after receiving gesture from another employee at or about 4:19 PM, January 1, 1973.

7. Making false statements and/or concealing facts concerning matters under investigation by making unresolved responses during polygraph examination, January 3, 1973.

8. You are further charged with failure to report for assignment at designated time January 1, 1973, and leaving assignment prior to end of tour of duty same date."

The Carrier personnel who conducted the surveillance provided the evidence to support the opening part of the charge, irregularities, etc., and the specific charges 1 through 6. These personnel, two lieutenants in Carrier's Police Department, established that surveillance had been conducted and that the Claimant had been observed as literally stated in charges 2 through 6. However, these witnesses also testified that, so far as they knew, no material or articles of company property had been found in Claimant's possession. One of the policeman testified as follows:

"MR. LINDSEY TO MR. CHAPMAN:

Q. Could you identify the material--could you identify the boxes and what was in the boxes?

A. No sir.

Q. Were you able to identify anything that was in the boxes carried by Mr. Carter according to your statement?

A. For obvious reasons we did not try to identify the items at that time because we were under investigation. We were making surveillances and it would of ruined the rest of our surveillance."

The other policeman testified to the same effect, as did the Carrier's Superintendent of Dining Cars. Thus, notwithstanding the intensive surveillance, no company property was found or observed in Claimant's possession. We have also considered the statement of a former commissary employe who had resigned because of his admitted involvement in the inventory shortages and who was not present at the hearing. Though such a statement could be used to corroborate direct hearing testimony, there is no direct testimony to which the statement would apply. Consequently, on careful analysis of the evidence, and the whole record, we conclude that the opening part of the charges, and paragraphs 1 to through 6, are not supported by substantial evidence of record and must therefore be set aside. We shall also set aside charge No. 7. Except for the opinion of the examiner who gave the polygraph examination, the record contains no evidence that the Claimant gave untruthful answers during the polygraph examination. This being the case, the opinion of the examiner-an expert witness at best-falls of its own weight. We note, incidentally, that giving false answers during a polygraph test is generally treated as evidence concerning an offense under investigation, and that it is rather curious that unresolved responses during a test has been treated as an offense in and of itself. We shall sustain the Carrier's finding of guilt in respect to charge No. 8, as the record contains substantial evidence to support this finding.

In view of the foregoing, we shall vacate all of the charges with the exception of charge No. 8. However, in the context of this case, charge No. 8 involves a minor offense and we believe that an official reprimand entered of record is adequate discipline. Accordingly, we shall award that the Claimant be restored to service, with rights unimpaired, and with 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 Carrier's findings of guilt are not supported by substantial evidence, except in respect to charge No. 8.

A W A R D

Claim sustained as per Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: 
Executive Secretary

Dated at Chicago, Illinois, this 31st day of May 1974.

DISSENT OF CARRIER MEMBERS
TO
AWARD 20260, DOCKET DC-20446

Award 20260 is in serious error.

The referee unquestionably concurs in the Organization's theory that "the best evidence against a chicken thief is to catch him with a hen in his possession" when he extracted only the two questions and answers of testimony from the investigations which were favorable to the claimant, overlooking completely the overwhelming evidence supporting the Carrier. The record is replete with substantial evidence supporting the discipline administered by the Carrier. Substantial evidence is defined in this Board's Award 13124 as "that material and relevant evidence which, if credited by the trier of the facts supports the findings on the property".

Obviously, the referee places no importance on the consistent holdings of this Board about not disturbing discipline unless there is a showing of arbitrariness, capriciousness or actions of bad faith. The evidence may have been conflicting but Carrier's evidence, unlike that which conflicted, was substantial, creditable, and competent. It must again be pointed out that the charge arose in the context of serious pilferage of Carrier's commissary in which numerous employes were involved, many of whom resigned. Pilferage simply cannot be condoned at any time, or any place, regardless of the value of the goods pilfered.

The referee found that charges 1-6 were not proven in that "no Company property was found in claimant's possession", and in doing so completely overlooked the fact that charges 2-6 did not even mention "Company property". At page 6 of Carrier's brief it was appropriately stated:

> "The Claimant was specifically charged with removing cartons and bags from the Commissary. The Claimant alleged that the bags he removed from the Commissary and placed in his private automobile contained personal items which he had purchased for his wife. It was substantiated that one bag, which had been inspected in accordance with special instructions which provide that no trash of any description, including empty boxes, bags, garbage cans, etc., is to leave the Commissary without being properly inspected by the Storekeeper, did contain personal items. The special instructions referred to were issued on May 22, 1970, and are posted on the employees' bulletin board at the Commissary and read, in part, as follows:

* * * *

"'Item No. 18:

'No trash of any description including empty boxes, garbage cans, stockings, baskets, and so forth are to leave the Commissary without inspection by the Storekeeper.'

* * * *

"The Claimant denied ever having seen or read these instructions However, evidence was produced (page 37 - Carrier's Exhibit "B") that they were properly posted. It is interesting to note that the Claimant did not have anyone inspect all the cartons he removed from the Commissary and placed in his automobile, but did have the one containing some personal items for his wife, such as perfume, etc., inspected in accordance with the outstanding instructions, even though he alleges he never heard of these instructions."

The referee conceded that the polygraph operator was an expert witness, but then proceeded to conveniently ignore this evidence. The statement of the former employe, which was extremely relevant, was given the same treatment by the referee, notwithstanding the fact that the claimant produced neither witnesses nor one iota of evidence to refute such statement or evidence.

Suffice to say, the referee gave too much consideration to this case legalistically and too little consideration realistically. The referee knows that in disciplinary proceedings the Carrier is not bound to prove justification beyond a reasonable doubt as in a criminal case or even by a preponderance of evidence as does the party having the burden of proof in a civil case.

It is extremely difficult for a Company to conduct its business in an economical and efficient manner when it is required by decisions such as this to return to its "service" employes such as claimant. Charges 2-6 were specific and detailed and the repeated failure of claimant to have the boxes, bags and cartons inspected as required by the rules, taken in conjunction with the other evidence produced in the investigation conclusively tied claimant to the thefts and there was no justification for the referee to find otherwise.

For the foregoing reasons, Award 20260 is palpably wrong, and we must register vigorous dissent thereto.

CARRIER MEMBERS'
DISSENT TO AWARD 20260

P. C. Carter

W. B. Jones

H. F. M. Braidwood

G. T. Naylor

G. M. Youhn

Carrier Members

CARRIER MEMBERS'
DISSENT TO AWARD 20260

Labor Member's Answer to Carrier Members' Dissent to Award 20260, Docket DC-20446

It is the Carrier Members' Dissent rather than Award 20260 which is in serious error. The Dissent would not warrant a reply if it were not so palpably wrong that it cannot remain uncontested or unanswered.

Award 20260 sets out in full the charges against Claimant which were irregularities in handling company material and the specific charges 1 through 6, charge 7 making unresolved responses during polygraph examination, January 3, 1973, and charge 8, failure to report for assignment and leaving assignment prior to end of tour of duty on January 1, 1973.

The Referee diligently searched the record for evidence in support of the charge of irregularities in handling company material or property and found such evidence lacking. The Carrier Members' comment in their Dissent regarding the Referee extracting "only the two questions and answers of testimony from the investigations which were favorable to the Claimant" are not based on fact and indicate the Carrier Members failed to closely read Award 20260. Award 20260 states "The other policeman testified to the same effect, as did the Carrier's Superintendent of Dining Cars. Thus, notwithstanding the intensive surveillance, no company property was found or observed in Claimant's possession."

The Carrier Members' comments regarding charges 2 through 6 not mentioning "company property" as well as recitation from Carrier's Ex Parte Submission including Item No. 18, the trash handling special instruction, are also without value. Notwithstanding the fact that the Carrier had twenty-five (25) days (from January 2, 1973 when Claimant was interrogated three times, subjected to a polygraph examination and removed from service continuing until subsequently dismissed from service until January 27, 1973 when the notice of charges was issued) to perfect and determine the charges to be lodged against the Claimant, the Carrier did not charge the Claimant with irregularities in the handling of trash and did not cite Item No. 18, the trash handling special instruction in the notice of charges scheduling the investigation. The Carrier could not perfect the charges in its Ex Parte Submission, long after the final formal investigation, to substantiate its finding of guilt and likewise the Carrier Members in their Dissent cannot perfect or change the notice of charge to detract from the sound findings on "the substantive merits of the case" as contained in Award 20260.

The Carrier Members' statement regarding the Referee ignoring the evidence from the polygraph operator, an expert witness, also indicates the Carrier Members failed to closely read this portion of the Award. Award 20260 very clearly shows the only evidence submitted by the polygraph examiner was his opinion and there was "no evidence that the Claimant gave untruthful answers during the polygraph examination". Suspicion is not a substitute for evidence.

The Carrier Members in their Dissent also state "The statement of the former employe, which was extremely relevant, was given the same treatment by the referee, notwithstanding the fact that the claimant produced neither witnesses nor one iota of evidence to refute such statement or evidence." This "same treatment" referred to is to be ignored. The statement in question was a supplemental statement and the original or first statement was not submitted in evidence. The former employe who allegedly made and signed the statement was not present for cross-examination. The statement alludes to Claimant's attempt to do wrong then clearly shows the alleged attempt was foiled and then a general statement the Claimant, among others, had given this former employe money, however, none of these incidents were included in charges 1 through 6 of the notice of investigation. Yet, the Dissenters hold this statement to not only be evidence but extremely relevant evidence. Carrier Members' error in reason is apparent when they state "the Claimant produced neither witnesses nor one iota of evidence to refute such statement or evidence." In a discipline case the burden of proof to substantiate the discipline assessed rests squarely on the Carrier and this burden of proof must be established substantial credible evidence otherwise the discipline can only be considered to be arbitrary and/or capricious.

Carrier Members' Dissent statement that "the referee gave too much consideration to this case legalistically and too little consideration realistically" is false. In fact, the exact opposite was true. When viewed legalistically, the three prior interrogations, without benefit of representation, at which the Claimant was quoted his constitutional rights as in a criminal action, a polygraph examination and suspension for a month before the investigation (twenty-five days of which before a notice of charges and/or investigation was issued) and the former interrogation officer appearing as witness and entering testimony or evidence from the prior interrogation statements, could only be viewed as a denial of due process, i.e. the right to a fair and impartial trial. The Referee ignored these meritorious procedural arguments and proceeded to "realistically" rule on the merits which more than gave the Carrier the benefit of any doubt.

Award 20260 made a sound finding on the merits for Carrier failed to satisfy its burden of proof, i.e. that "tied claimant to the thefts" as Carrier Members' Dissent contends.

Suspicion or allegations are not a substitute for proof.

J. P. Erickson
Labor Member