NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20771
THIRD DIVISION Docket Number MW-20947

Louis Norris, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Kansas City Southern Railway Company

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

(1) The dismissal of Section Foreman Ira L. Toland was without just and sufficient cause and on the basis of unproven and disproven charges (Carrier's File 013.31-148).

(2) Claimant Ira L. Toland "shall be reinstated and compensated for the wage loss ... suffered by him" (Rule 13.2).

OPINION OF BOARD: Prior to October 30, 1973, Claimant was employed by Carrier as a Section Foreman, having been in Carrier's employ for a period of five years. At a formal investigation held on October 18, 1973, Claimant was charged "with unauthorized sale of wheat, soybeans and corn" to a named feed company, in 18 instances, "while employed as Section Foreman at Joplin, Missouri." Carrier found that the charge against Claimant had been sustained, and on October 30, 1973, he was dismissed from service.

Petitioner's claim is that such dismissal was without just and sufficient cause, and demand is made for reinstatement of Claimant and that he be "compensated for the wage loss."

Initially, Petitioner contends that the nature of the charge in the Notice of Hearing is markedly different from that in the Notice of Dismissal, in that the latter has been expanded in scope from "unauthorized sale" to, in effect, "removal, sale and retention of proceeds."

These issues, regardless of how worded, are substantially similar in impact. Additionally, under the facts and circumstances of this case, particularly the admissions of both sides contained in the testimony, we consider this objection to be rather minor in nature. We are not of the opinion, therefore, that we are thereby precluded from reviewing this dispute on its merits. Accordingly, this objection is not sustained.

The Carrier, on the other hand, raises the objection that the instant claim differs from that handled on the property, in that the "wage loss" claim is not similarly worded. This Board has held in numerous past Awards that in the event a claim is sustained the relief granted will be consistent with the agreement between the parties. In this case, the pertinent provision is Rule 13-2, quoted at Record Page 14, and is binding on both parties. This objection, therefore, is not sustained.

The hearing was fairly and properly conducted, with full opportunity to both sides to present such evidence and testimony as they deemed pertinent. Two aspects of the investigation, however, require further comment:

1) Testimony was introduced by Carrier relating to whether Claimant was acting "in the best interest of the Company." (rp 44,45). Further reference is made to this issue in Mr. Farrar's letter of February 27, 1974 to Mr. Arnold, in which, after summarizing certain portions of the testimony, it is stated that such testimony "clearly substantiates Carrier's charge and disciplinary action taken as Claimant created a very poor image of the Company . . . " (rp 6 through 12). It must be emphasized that this was not the "charge" against Claimant and that the issues of the Company's "best interest" or Claimant's "poor image" are entirely irrelevant to the actual charge upon which Claimant was brought to investigation, and have no bearing upon his guilt or innocence.

2) In the course of his testimony Claimant was asked "what was done with the proceeds of these sales." Claimant refused to answer and claimed the "FIFTH AMENDMENT." (rp 45). On this basis, Carrier urges that such refusal to testify is tantamount to an admission of guilt and cites several prior Awards in support of such contention. We do not disagree with these Awards, but they are not controlling here. For, Claimant did in fact answer fully all relevant questions put to him. This is quite evident in record pages 41 and 42. Claimant's "refusal to testify" related to only one question - "what was done with the proceeds." This question was irrelevant to the charge, and Claimant's refusal to answer this single question did not carry with it any admission of guilt. We find no basis in the testimony upon which to conclude otherwise.

Limiting ourselves, therefore, solely to the facts on the record, we address ourselves on the merits to the specific issue here involved. In essence, that issue is whether Claimant had authority to remove the grain in question and treat it as his own. Assumedly, if that be so, he had authority to sell the grain and retain the proceeds.

The principle is well established in prior Awards of this Board that in discipline cases the burden of proof rests squarely upon the Carrier to demonstrate convincingly that an employee is guilty of the offense upon which his disciplinary penalty is based. See Award Nos. 20471 (Anrod) First Division, 14120 (Harr) and many cases cited therein, 20245 (Lieberman) and 20252 (Sickles).

Obviously, this principle is particularly applicable to cases where the commission of a crime is charged. Here, it is apparent on the record that, regardless of how worded, "theft" is being charged against Claimant.

Basically, Claimant contended that he was "authorized" to remove the grain and treat it as his own. Roadmaster Phillips denied that he gave Claimant such authority (rp 53). Claimant, on the other hand, stated:

> "I had authority by Roadmaster Phillips to sell the grain and pick it up..."(rp 46)

Again on record page 42 "I was authorized twice by Roadmaster Phillips once on December 16 at a derailment site, a spillage of soybeans, and we asked permission to pick up and sell it and he gave his permission stating that he would rather that we would sell it than leave it there to rot. Also on March 11, 1973 ..." etc. The latter date is a reference to a radio conversation between Claimant and Mr. Phillips, in which the latter is stated to have said "again he stated to go on about our business that the Company didn't care who picked up the grain along the tracks . . ." (see also rp 43).

Witness Lewis testified similarly and fully corroborated Claimant (rp 47). Specifically, he stated:

> "Q. Who do you say authorized you to pick this grain up at Saginaw and Joplin?
>
> A. Dale Phillips - he said the Company would rather we picked it up than it go to waste and everybody in the depot at Joplin heard him when we called him on the radio.
>
> Q. Did you personally hear or were you present when Mr. Toland was authorized to pick up this grain?
>
> A. Yes, I was sitting in the front cab of the truck."

Claimant was further corroborated as to his "being authorized" by the written statement of Dennis Helton submitted by Claimant. (rp 55). There was further corroboration to the same effect in testimony of other witnesses. See rp 48, 49 (Mapes), rp 47 (Lewis) and rp 50 (Creekmore).

The testimony of Special Agent Hall, although generally denying such authority, is of particular significance in the following respect:

> "Q. Have you personally authorized any removal of grain from the property?
>
> A. Not from derailment sites." (rp 40)

The inference is clear that under other circumstances "removal of grain from the property" was authorized. He stated further (rp 40):

> "I have given permission in the North Yard area to pick up spillage from a leak in the box car, which was usually a small amount."

On this question of "small amounts" and the nature of the grain here involved, there was testimony by these employees that they picked up "small amounts of waste grain mixed with rock" (rp 50, 51), that they picked it up "from the ground only" (rp 41), that they made their own sifter "and sifted it themselves" (rp 51), that they did it openly (rp 44), and that where large amounts were involved, it was "bagged for the Company" (rp 52). Further, that "it was common knowledge that everybody was picking it up and if there was the slightest chance that anybody could be fired nobody would have touched it" (rp 50, 54).

The testimony of these witnesses was not shaken on cross examination and the only complete negation of "authority to remove the grain" came from Mr. Phillips.

Carrier cites a number of prior Awards dealing with incidents of theft and dishonesty, but in only one of these was the question of "authority" involved. These cases therefore are not deemed pertinent to the issues involved in this record. In the case cited by Carrier which is in point, Award No. 20409, Claimant was charged with removal of 20 sheets of plywood from company stores. In that case it was held that Carrier had not made out a prima facie case "that Claimant was not told that the plywood was scrap and that he could have it for his own use."

Upon full review of the testimony it becomes increasingly apparent that there was knowledge on the part of the Carrier that grain was being picked up on the property by employees and others, and retained by them. The testimony is clear that employees, including Claimant, had authorization, actual and implied, to do so, albeit with certain proscriptions. This being so, they had the right to sell the grain and retain the proceeds. These conclusions are supported by the testimony of all the employees and the testimony of Mr. Hall. Only Mr. Phillips denies completely that any such authorization was given. Such denial is insufficient when viewed in the light of all the evidence.

Upon the entire record, therefore, we are not able to conclude that Carrier has, on balance, submitted evidence preponderating to its benefit. In short, it has failed to sustain the burden of proof required of it by past precedents in similar cases, some of which are cited above. The Carrier has failed to prove by substantial probative evidence "that the Claimant had no authority to pick up the grain." Nor did it convincingly establish any intent to commit theft. The evidence is to the contrary.

We are cognizant of the principle enunciated in many prior Awards that this Board will not substitute its judgment for that of the Carrier, in evaluating the evidence, provided, however, that substantial probative evidence is presented in the record supporting the charge against Claimant. See Award Nos. 20245 and 6387 (Lieberman) Second Division, 19487 (Brent), 17914 (Quinn) and 15574 (Ives). Such substantial evidence is not present in this record.

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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: G. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 16th day of July 1975.

Serial No. 286

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 20771

DOCKET NO. MW-20947

NAME OF ORGANIZATION: Brotherhood of Maintenance of Way Employes

NAME OF CARRIER: The Kansas City Southern Railway Company

Upon application of the representatives of the Employes involved in the above Award, that this Division interpret the same in light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

The record documents subsequent to the date of issuance of the Award in this dispute indicate that a dispute has arisen with respect to what payment is to be made to Claimant by virtue of the Award which sustained the claim that:

> "(1) The dismissal of Section Foreman Ira L. Toland was without just and sufficient cause and on the basis of unproven and disproven charges.
>
> (2) Claimant Ira L. Toland 'shall be reinstated and compensated for the wage loss --- suffered by him' (Rule 13.2)."

Carrier has taken the position, for reasons detailed hereafter, that no compensation is due Claimant. The Organization, therefore, requests interpretation of the Award, particularly with respect to the following:

> "(a) May the Carrier properly and validly refuse any payment to the Claimant thereunder because of an on-duty injury sustained by the Claimant on July 24, 1973 and, if so,
>
> (b) For what period of time between the date of his discharge (10-30-73) and the date he resumed service (10-6-75) is the Carrier obligated to compensate the Claimant for wage loss suffered by him?"

Basically, it is Carrier's contention that the wage loss suffered by Claimant is not attributable to his dismissal upon which the claim was based; that in view of his injury sustained on July 25, 1973, Claimant was incapable of resuming his normal work functions; that Carrier was not timely or properly notified that Claimant was able to return to work; and that his

wage loss is attributable, not to his dismissal, but to his injury. Accordingly, that he suffered no wage loss as a result of the dismissal and is entitled to no compensation by virtue of this Award.

The Organization responds that the issue of whether Claimant's injury affected his wage loss was never raised by Carrier previously, and, accordingly, that this constitutes a new issue not now properly before the Board as a proper subject of this interpretation. Furthermore, that in any event Claimant was physically "able to return to work" on April 10, 1974, as evidenced by his doctor's statement, and that at the very least he should be compensated "for all wage loss suffered from April 10, 1974 to October 6, 1975."

The general principle has been well established, and is amply supported by precedent, that this Division has no authority under the guise of an interpretation to amend, modify or expand the scope of an Award and can only explain and interpret it in light of the circumstances that existed when the Award was rendered.

See, for example, Serial No. 203, Interpretation No. 1 to Award 10878 (Hall); and Serial No. 228, Interpretation No. 2 to Award 11798 (Dolnick), among others.

Nevertheless, Serial No. 283, Int. No. 1 to Award 20033 (Eischen) (cited by Carrier) did sustain the contention, not previously raised, that "outside earnings" should be deducted from the "wage loss" of the Award. To hold otherwise, the interpretation stated, would "give Claimant a windfall over and above compensation for his loss." See, also, Interpretations cited therein.

To the contrary, several Interpretations cited by the Organization have held that deductions for "outside earnings" could not be allowed as an offset account not raised by Carrier as an issue when the Award was made.

See, for example, Serial No. 91, Int. to Award 4607 (Whiting); and Serial No. 175, Int. to Award 7409 (McMahon), among others.

Thus, prior Interpretations are not consistent on the latter issue. However, we do not consider these precedents directly controlling upon this dispute. For, in none of these is the issue raised as to whether an Interpretation can properly consider "wage loss" resulting from an injury disability as an offset against an Award for wage loss resulting from a dismissal found to be unjust.

Consequently, insofar as the relevance of the cited precedents to the specific issue here involved is concerned, the instant dispute appears to be one of first impression. This is not to say that we intend to deviate from the General Rule cited above, with which we do not disagree, as to the

purpose and scope of an Interpretation to an Award. We do intend, however, to interpret this Award specifically on the basis of the precise claim which was "sustained".

Accordingly, based on our analysis of the Submissions of the principals in this Interpretation request, and the documentary exhibits and docket references contained therein, we reach the following conclusions and findings:

1. The language of the Award "CLAIM SUSTAINED" was not rendered in a vacuum. It related specifically to the claim presented by the Organization, which, paraphrased, consisted of two parts. Firstly, that the dismissal of Claimant, "was without just and sufficient cause"; and, secondly, that Claimant "Shall be reinstated and compensated for the wage loss suffered by him". The two assertions are inseparable, and the second hinges upon the first. Our Award found the Claimant to have been dismissed unjustly and sustained the claim. Claimant thereby became entitled to the "wage loss suffered by him" as a direct result of the dismissal. This was the precise nature of the claim presented by him.

2. Claimant sustained an on-duty injury on July 24, 1973, as a result of which he was disabled and unable to resume his normal work functions from that date until April 10, 1974, as evidenced by Dr. Roy E. Kenney's written statement of August 30, 1975. The latter indicates that Claimant's injury was sufficiently serious to require hospitalization and constant medical treatment from August 13, 1973 to April 10, 1974, at which time "he was dismissed from care to return to work." His medical case was "closed" on April 10, 1974, and the doctor stated "He is, in my opinion, able to resume work".

During such period of disability, therefore, any "wage loss" suffered by Claimant is directly attributable to his injury and disability, and is not attributable to his dismissal by Carrier. Accordingly, he is entitled to no compensation by virtue of the Award for any "wage loss" suffered by him prior to April 10, 1974.

3. For the period from April 10, 1974 to October 6, 1975, the date he resumed service, Claimant's wage loss is directly attributable to his unjust dismissal and he should be so compensated by Carrier.

4. We acknowledge Carrier's contention that Claimant testified on June 25, 1975, in his deposition in the law suit then pending, that he was "not able to do physical work". However, this was a self-serving statement to which we give little credence, particularly in view of Dr. Kenney's statement referred to above.

5. We are aware of Carrier's claim, which is not denied, that Dr. Kenney's letter is dated August 30, 1975 and that Carrier was not advised of its contents until some time in May or June, 1976. In short, that

Carrier was not properly notified that Claimant was "able to resume work" as of April 10, 1974. However, the issue of such notification is of peripheral relevancy; such notice, in any event, would have constituted a vain and useless gesture. Obviously, in view of the dismissal, it would have had no effect and would not have resulted in Claimant's reinstatement. In the context of this dispute, therefore, the more important factual issue is the date when Claimant was able to resume work. Here, Dr. Kenney's written statement, which we have no reason to disbelieve and which is not controverted in the record before us, is controlling on this factual issue. There is no evidence before us indicating the contrary.

6. Although the original record does contain various references to Claimant's on-duty injury, we take cognizance of the Organization's contention that Carrier did not prior hereto specifically raise the issue of offset against "wage loss" occasioned by Claimant's disability. We do not, however, consider this as a "new issue" not properly before the Board on this Interpretation. This Interpretation is based specifically on the original Award and the very language of the claim itself. Accordingly, on that basis we have interpreted the Award, in accordance with the foregoing findings, by limiting it to any wage loss suffered by Claimant as a direct result of his dismissal.

7. We are not of the opinion as urged by Carrier, that in rendering this Interpretation this Board is "making a decision involving a controversy pending before another tribunal", the latter reference obviously referring to the pending litigation between Claimant and Carrier. Our original Award and the dispute upon which it was based, as well as this Interpretation, are matters clearly within the province of the Board's authority as set forth in the Railway Labor Act. We concern ourselves solely with the issues in this dispute. We do not concern ourselves, nor can we, with the litigation issues involved in the Court proceeding.

We conclude, therefore, by reaffirming Award No. 20771, but limiting Claimant's recovery for wage loss suffered by him as a result of the dismissal to the period from April 10, 1974 to October 6, 1975.

Referee Louis Norris, who sat with the Division as a neutral member when Award 20771 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 15th day of October 1976.