NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20781
THIRD DIVISION Docket Number CL-20814

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7687) that:

1. Carrier violated the terms of the Current Agreement, particularly Rule 21, when under date of June 29, 1973 it dismissed Mr. Ronald Ellis and Mr. Andrew Jackson, Jr., Yard Clerks at 40th Street Yard, from the service of the Carrier, and;

2. Carrier shall be required to compensate Mr. Ronald Ellis and Mr. Andrew Jackson, Jr. for all time lost commencing June 13, 1973, the date suspended from service account of Carrier's charges, and to continue until restored to service with all rights unimpaired.

OPINION OF BOARD: Claimants were employed as Clerks with assigned hours 3:00 to 11:00 p.m., in Carrier's 40th Street yard. Following notice and investigation on June 25, 1973 Claimants were advised on June 29, 1973 of their dismissal from service of the Carrier for alleged violation of Rule 9 of the General Regulations and Safety Rules which reads as follows: "Theft or pilferage is prohibited."

Our responsibilities in discipline cases are well known ie: to determine whether 1) Claimants were afforded a fair and impartial investigation, 2) Whether substantial evidence on the record supports a finding of culpability and 3) Whether the penalty assessed is arbitrary, unreasonable or capricious in all of the circumstances.

Petitioners argue that the dismissal herein violates Rule 21 of the controlling Agreement and asserted at the outset that Claimants were deprived of a fair hearing. This position is grounded on two points: 1) That they were under criminal investigation at the time they were called to appear at the disciplinary hearing and 2) The same Carrier official who preferred the charges assessed the discipline and ruled on the initial appeal. In

connection with the latter point, we have in appropriate cases held that duality of roles in the investigation can be prohibitive of a fair and impartial hearing, and where demonstrable prejudice has been shown we have sustained such claims. We do not condone or encourage duality of roles such as is shown here but neither have we by past awards found such practice in every instance a per se violation. In the instant case we are shown no infringement of Claimant's substantive rights arising out of the Agreement and accordingly must dismiss the objection in this regard. Whatever may be said for the timing of the investigation during the pendency of the criminal proceeding, we can find therein no violation of Rule 21 and that objection similarly must fail.

We turn to a consideration of the evidence of record to determine whether the finding of culpability is supported by substantial evidence. About one hour after they went off duty on June 12, 1973, at 12:30 a.m. on June 13, Claimants and two other employes were arrested by Chicago police on a street one and one-half blocks from a freight car which had been broken into in the 40th Street yard. The police report indicated that the freight car was loaded with Sears bicycles destined for Alsip, Illinois. Claimants Ellis and Jackson were, respectivly attaching pedals to a Sears 10 - speed racing bicycle and observing this process when arrested. Examination of an automobile driven by one of the other employes arrested with Claimants revealed two more Sears 10 speed racing bicycles; one in the back seat and one locked in the trunk. Also, one of the employes had in his pocket an instruction booklet for Sears bicycles. The railroad manifest and serial numbers on the bikes showed that the three bicycles were taken from the pilfered railroad car. The police report also states that two switchmen told police they had seen three men running from the yard near the car carrying what appeared to be bicycle frames.

At the time of their arrest one of the four employes stated that they did not know who owned the bicycles and maintained that they found them after some boys dropped them. Subsequently, at the investigation, Claimant Ellis declined to state how he came into possession of the bicycles, citing advice of counsel.

On May 13, 1974 the burglary charges against Claimants were dismissed on a Motion to Suppress. Dismissal was grounded on a finding that at the time of their arrest (ie: before the automobile and the pilfered railroad car were searched) there was not probable cause to believe they had participated in any criminal action. Also it is noted, one of the other employes arrested with Claimants was reinstated by Award No. 1879 of Special Board of Adjustment No. 235 on October 24, 1974.

The Award cited supra was submitted in its rebuttal statement by Petitioner and is strongly objected to by Carrier as untimely, irrelevant and distinguishable on its facts. We find that in the peculiar circumstances of this case, Award No. 1879 clearly is significant and we cannot ignore it.

At first blush the cited Award appears to be on all fours with our case and it would be an apparently easy and perhaps popular thing to slavishly follow it herein. Upon careful consideration and analysis we find that it would be a disservice to the parties and an abdication of our responsibilities to do so. Careful analysis of that Award shows a reliance therein upon the dismissal of the criminal charges against Claimants. In the first place, it is established that acquittal in law courts is no bar to disciplinary action against an employee. Awards 12322, 13166, 13127, 15456 et al. More importantly, in the instant case the criminal proceedings were dismissed on the basis of a Motion to Suppress all of the evidence gathered after the arrest because no "probable cause" existed to make the arrest without that evidence. Emphasis added. Such is the effect of certain rulings of the Supreme Court of the United States pursuant to the Fourth and Fifth Amendments to the Constitution.

As we read Award 1879 the majority therein weighed the evidence in light of the Motion to Suppress noted supra. As an arbitration tribunal we are not bound by prophylactic rulings of criminal courts which exclude consideration of certain evidence of record. Specifically, we take cognizance herein of facts which the court could not viz; two other stolen Sears bikes were found inside the automobile in which Claimants apparently were passengers, an instruction manual for Sears 10 speed bikes was in the pocket of one of the suspects and all three of the bikes in the possession of Claimants and the other suspects were taken from the freight car one and one-half blocks away. Moreover the Award in 1879 indicates that the Claimant therein offered at least some explanation for his possession of the bicycles. We are not at liberty to comment on the plausibility thereof but we do note that Claimants herein offered no such explanation despite every opportunity to do so.

There is no direct eyewitness that Claimants pilfered the car and removed the bikes therefrom and to this extent the mass of evidence against them is circumstantial. But the direction and weight of the evidence all point inescapably to the conclusion that Claimants are culpable. In our considered judgement there is no other reasonable conclusion than that substantial evidence of record supports the findings against them. Nor, in the circumstances can we say that the discipline assessed was arbitrary, unreasonable or capricious. The claims must be denied.

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 not violated.

A W A R D

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of July 1975.