NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20865
THIRD DIVISION Docket Number SG-20710

Louis Norris, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(The Texas and Pacific Railway Company

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Texas and Pacific Railway Company:

Claim on behalf of Signalman P. R. Sumpter (dismissed from Carrier's service effective 12:01 a.m. March 10, 1973, following formal investigation held at Fort Worth, Texas, on March 6, 1973, then returned to service on September 4, 1973, with seniority and vacation rights unimpaired but without pay for time lost) that his personal record be cleared of the charge and that he be paid for all time lost. /General Chairman File 141; Carrier File D-315-66/

OPINION OF BOARD: The facts involved in this dispute are not seriously in issue. Claimant, as the incumbent, was assigned to fill a temporary vacancy in the signal maintainer position at Weatherford, Texas, on specific dates. Such temporary service called for "expenses" pursuant to Rule 16(a) of the controlling Agreement, the pertinent language of which reads as follows:

> "Rule 16. (a) An employe sent to fill a temporary vacancy on a section or plant shall assume the rate of pay, if equal to or greater than his regular rate, and shall be subject to all rules applying to that position.
>
> Such employe will be allowed actual necessary expenses while performing such service."

Upon completion, Claimant filed his timeroll for the subject work, including claimed expenses of $55.43. Part of these expenses was for "lodging" in the sum of $28.71 and attached to the timeroll was a "lodging receipt", signed by Claimant's wife in her maiden name. In fact, the "lodging receipt" covered the nights that Claimant slept at home.

As a result, formal investigation was held and Claimant was found guilty of falsifying his expense account and submitting a false lodging receipt. He was dismissed from service on March 10, 1973. However, after various discussions between Carrier and Organization, Claimant was restored to service on August 31, 1973, with rights unimpaired, but was not paid for time out of service approximating six months.

Petitioner contends, firstly, that a "past practice" existed of allowing payment for such "lodging" expense at home, which was condoned and/or approved by Carrier. Secondly, that Claimant was not afforded a fair and impartial hearing in that the proffered testimony of Claimant and two witnesses in support of such "past practice" was rejected by the hearing officer. Further, that the filing of the "lodging receipt" was part of a legitimate plan by Claimant and his Organization to file a grievance for such "expense", which it was anticipated Carrier would reject. In fact, such claim was actually filed, the details of which are not stated in the record before us.

Accordingly, Claimant having been restored to service, the instant claim is limited to a demand that he be compensated for time lost and that his personal record be cleared of the charge.

We stress again that the basic facts are not disputed, for they were fully conceded by Claimant during the investigation.

Rule 16(a) is precise in allowing reimbursement for "actual necessary expenses while performing such service." Obviously, lodging at home involves no expense and does not fall within the clear purpose of the Rule. Ordinarily, therefore, Claimant's submission of a "lodging receipt" for sleeping at home would be manifestly improper. Claimant attempts to justify such action by alleging similar "past practices" on two or three prior occasions, which were assertedly countenanced by Carrier, but the record proof on the latter issue is far from conclusive. Nor do we agree that obviously improper conduct in the past justifies its repetition merely because it was undetected by Management.

Apropos the "lodging" expense, Claimant testified at the hearing that upon inquiry of Superintendent Wilson he was told specifically that he would be paid for noonday meals while on the job, but that he would not be paid for lodging if he stayed at home. He said nothing to Superintendent Wilson about filing a "lodging receipt" signed by his wife. He testified further:

> "I felt like I was entitled to it under the Signalmen's Agreement."

In response to the question by the hearing officer that "therefore, you were not actually out any rent or motel fee then, if you were staying at home?", Claimant replied:

> "This is a matter of interpretation and past practice and a matter for my General Chairman to handle. I was just filing claim for expenses, no fraud intended."

Subsequently, during the investigation, Organization officials sought to question Claimant on "past practice" relating to filing of similar claims for lodging. These questions were ruled improper by the hearing officer on the ground that they bore no relevancy to the specific charge lodged against Claimant. Additionally, proffered testimony of two witnesses, W. O. Sumpter and R. D. Dickey, was offered on the same issue of "past practice", but rejected for the same reason. On this basis, Petitioner now contends that Claimant was deprived of a fair and impartial investigation.

However, the written statements of these two "witnesses" are attached to Petitioner's submission as Exhibits "4" and "5", and are part of the record now before us. We are compelled, therefore, to examine them for relevancy and materiality and to ascertain whether their exclusion at the hearing constituted substantial error prejudicial to Claimant.

Dickey stated "I told Mr. Wilson by phone that I was staying at home . . ." W. O. Sumpter stated "Mr. Wilson should have been aware I was staying at home . . ."

In concluding their statements, both employees then made precisely the same assertions, as follows:

> "I furnished an ordinary rent receipt signed by my wife because the Carrier requires a receipt to support lodging expense claimed. No one questioned the type of receipt furnished and the amount of expense was paid as claimed."

It is quite obvious, therefore, that Claimant and these two "witnesses" did in fact engage in such "past practices", in respect to making claim for lodging expense when they actually slept at home. Claimant states "I felt like I was entitled to it". W. O. Sumpter asserts that Supt. Wilson "should have been aware" of such practice, and he and Dickey allege that "no one questioned" the receipt and that the amount "was paid as claimed".

These statements, however, are no better than mere assumptions and self-serving declarations on their part, and are hardly sufficient to establish approval or, in fact, knowledge thereof by Carrier.

Accordingly, we are unable to conclude either from the testimony of Claimant or the statements of the two proffered witnesses that any officials of Carrier were aware of the practice being followed as to claim for lodging expense while sleeping at home, or in fact that

such practice was condoned or approved. There is no such testimony or evidence in the record before us. Conversely, it appears that such practice went undetected; but this is hardly sufficient to establish knowledge, approval or condonation by Carrier or justify its repetition.

We do not find, therefore, that the rejection of such proffered testimony by the hearing officer constituted prejudicial error; nor was it of such material value as to deprive Claimant of a fair and impartial hearing, particularly in view of Claimant's admissions on the specific charge against him.

See Awards 11238 (Sheridan) and 16348 (McGovern).

In connection with proffered evidence, it is often a matter of extreme difficulty for a hearing officer to determine whether it is purely conjectural or fails to bear directly and materially on the confronting issue. In consequence, errors may occur; but non-prejudicial errors should not be considered a basis for reversing findings of guilt that are otherwise proper and supported by conclusive testimony in the record.

See Awards 16172 (Perelson), 11775 (Hall), 20238 (Eischen) and 20682 (Edgett).

We have reviewed the prior Awards cited by Petitioner as precedent, but have not found them materially relevant to this dispute, nor contradictory in principle to the controlling Awards cited above. Thus, for example, Awards 2771, 2923 (2nd Div.) and 2158 (4th Div.) deal generally with the right of the Board to inquire whether basic concepts of fairness and due process were complied with in the conduct of the hearing. Awards 7210 and 12362 related to the failure to comply with specific procedures in discipline rules, and 11172 and 14496 dealt with factual situations on insubordination and timely investigative procedures. Finally, 15368 related to refusal to permit testimony of an alibi witness, which in itself would have completely negated the charge. Such issues are not involved in the instant dispute.

Parenthetically, we cannot accept as valid Petitioner's assertion that the subject conduct of Claimant was part of a "plan" to file a grievance for payment of lodging expense. Certainly, such expense, if properly within the scope of Rule 16(a), did not require the filing of a patently false "lodging receipt" signed by Claimant's wife in her maiden name. Use of such device evidences attempted concealment and colors Claimant's conduct adversely.

Thorough review of the entire record, therefore, fails to disclose that Claimant was deprived of the benefit of due process. The hearing was fairly and impartially conducted and Claimant was vigorously represented by Organization officials. Although the proffered testimony of two witnesses was rejected, this was within the discretion of the hearing officer and was not prejudicial to Claimant, as has been fully demonstrated above. The entire evidence adduced at the hearing, particularly the admissions of Claimant, was of sufficient probative value to sustain the charge. Nor do we find any evidence in the record to warrant the conclusion that Carrier was motivated by bad faith or that it was in any sense arbitrary, capricious or discriminatory.

In these circumstances, we have no alternative but to sustain Carrier's findings that Claimant was guilty as charged, and that the discipline here imposed was neither excessive nor unwarranted, measured by the offense committed. See Awards 3149 (Carter), 5032 (Parker), 11968 (Stack), 16171 (Perelson), 19216 (Edgett), 19787 (Sickles) and 20034 (Eischen), among many others.

Accordingly, based on the record evidence and the findings and controlling authority cited above, we will deny the claim.

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

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 14th day of November 1975.