

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21122
Docket Number CL-21199

James C. Mc Brearty, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees

PARTIES TO DISPUTE: (

(Grand Trunk Western Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7816) that:

1. Carrier violated the Agreement between the parties when it failed to give Mr. D. R. Gillespie a fair and impartial hearing, and in abuse of discretion dismissed Claimant based on charges not substantially proven.

2. Carrier shall return Mr. Gillespie to service and compensate him for all wage and other losses sustained account dismissal.

OPINION OF BOARD: Claimant entered service for the Carrier on December 2, 1966, as a yard clerk at Pontiac, Michigan. Prior to his dismissal on June 19, 1974, Claimant had no serious disciplinary record. Carrier's records indicate the only prior disciplinary action was an entry of ten (10) demerit marks received on May 17, 1970, for injury sustained when he tripped on debris.

On May 24, 1974, Claimant was notified by Carrier that an investigation would be held to determine Claimant's responsibility in connection with falsifying a time ticket dated April 9, in alleging an illness on April 9, 1974, and in an attempt to collect eight (8) hours sick pay under Rule 69-Sick Leave, of the Clerks' Working Agreement.

A formal investigation into this matter was held on June 11, 1974. As a result of the evidence adduced at this investigation, Claimant was discharged from the service of the Carrier, effective June 19, 1974. Claimant was found by Carrier to have submitted a fraudulent claim alleging illness in an attempt to collect sick pay under Rule 69-Sick Leave, of the Clerks' Working Agreement.

Numerous prior awards of this Board set forth our function in discipline cases. Our function in discipline cases is not to substitute our judgment for the Carrier's nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question whether, without weighing it, there is substantial evidence to sustain a finding of guilty. If that question is decided in the affirmative,

the penalty imposed for the violation is a matter which rests in the sound discretion of the Carrier. We are not warranted in disturbing Carrier's penalty unless we can say it clearly appears from the record that the Carrier's action with respect thereto was discriminatory, unjust, unreasonable, capricious or arbitrary, so as to constitute an abuse of that discretion.

The term "dishonesty" means misconduct that involves either money or property. It goes beyond misappropriation or theft in that it includes any conduct that tends to perpetuate a fraud on a carrier resulting in financial loss. A list of abuses in the category of dishonest acts would include taking or giving bribes, misusing carrier's records, tampering with vending machines, padding expense reports, and using carrier's funds for personal purposes. Falsifying work records or information on job applications are two particularly troublesome and common acts of dishonesty.

Such dishonest acts as these, among others, have been established as providing just cause for discipline or discharge. The burden of proof rests with the Carrier, as always, and the punishment must be timely and befit the employee's work record. Because a charge of dishonesty reflects upon a person's character and standing in society at large, the evidence presented by the charging party, the Carrier, must be fully persuasive, i.e., truly substantial.

This Board appears to agree generally that some discipline is warranted when an employee is proved to have falsified time or production records, employment applications or other Carrier documents. However, it must be shown that the act was a deliberate one with intent to defraud rather than a mere oversight or lapse of memory.

Looking at the record as a whole, the Board finds there is not substantial evidence to sustain a finding of guilty.

Claimant was sick with the 24-hour flu, sought out a medical doctor through another employee, was given a dentist's office by mistake, and did go to the dentist's office thinking it was a regular medical doctor's office.

Claimant later had one of the dentist's receptionists sign a certificate that he was there, although it said for "Emergency Treatment", of which Claimant was unaware.

For the foregoing reasons we find that the charge against Claimant was not substantially proven. We, therefore, are compelled to sustain 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 Employees involved in this dispute are respectively Carrier and Employees 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:

A. W. Paulke
Executive Secretary

Dated at Chicago, Illinois, this 16th day of July 1976.

Serial No. 289

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 to AWARD NO. 21122

DOCKET NO. CL-21199

NAME OF ORGANIZATION: Brotherhood of Railway, Airline and Steamship Clerks,
Freight Handlers, Express and Station Employees

NAME OF CARRIER: Grand Trunk Western Railroad Company

Upon application of the representatives of the Employees 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 Award in this case sustained the claim as presented. The claim as presented requested that claimant be returned to service and that Carrier "compensate him for all wage and other losses sustained account dismissal."

Carrier has reinstated Claimant Gillespie to service and has allowed him the lost straight time wages which would have accrued during the period he was out of service.

Petitioner has requested this Interpretation based on the allegation that certain unspecified amounts of overtime would have accrued to Claimant Gillespie if he had not been removed from service.

Both Carrier and Petitioner cite Award No. 20413 (Lazar) in support of their respective positions. Award No. 20413 is significant in that it clearly establishes that:

"*** Speculative or conjectural losses, or enrichment of a claimant, are not included in the doctrine of compensatory damages ***." (Underscore ours)

Carrier has properly pointed out that the overtime assignment procedures on this Carrier do not require that overtime be accepted and there is no penalty assessed for failure to accept overtime assignments. Therefore, we can only speculate on whether or not Claimant Gillespie would have accepted all overtime to which his seniority position would have entitled him. This we cannot do.

In Interpretation No. 1 to Award No. 5856 (Seff) of the Second Division of this Board we find the following:

"As to the Carrier's objection to add to the amount of the claim pay for overtime and holidays there is a customary yardstick which applies to back pay matters. If Claimant had not been withheld from service he would have received the amount of overtime and holiday pay which his replacement received. We, therefore, find that Claimant be additionally compensated for the overtime and holiday pay which was received during the period in question by his replacement." (Underscore ours)

Similar logic was applied in Interpretation No. 1 to Award No. 19934 (Rubenstein) where the Board ruled that the occupant of the position in question determined the amount of overtime that would have accrued to the claimant.

A similar application would be appropriate in the instant case.

Referee James C. McBrearty, who sat with the Division, as a neutral member when Award No. 21122 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 19th day of May 1977.