PUBLIC LAW BOARD NO. 3445

Award Number: 46
Case Number: 46

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM

Claimant, T. L. Fannon, 1115 Liberty Avenue, Norton, VA 24273, was dismissed on December 26, 1986 for allegedly falsifying payroll from November 17, 1986 and with unauthorized removal and disposition of Company property. Claim filed on behalf of T. L. Fannon, 230-62-0823, for restoration to service with seniority and all other rights unimpaired. Pay for all lost time subsequent to December 26, 1986.

FINDINGS

Claimant entered the Carrier's service on August 26, 1971.

By letter dated December 12, 1986, Claimant was directed to attend a formal investigation regarding charges that he had falsified payroll records for November 17, 1986 and that he had removed and disposed of the Carrier's property without authorization. The investigation was held on December 19, 1986. By letter dated December 26, 1986, Claimant was dismissed based on evidence adduced at the investigation.

The question to be resolved in this dispute is whether Claimant was dismissed for just cause under the Agreement; and if not, what should the remedy be.

On December 4, 1986, Claimant's landlord, Donald Tate, advised the Carrier's police that Claimant was stealing various petroleum lubricants from the Carrier and storing them in a granary on Tate's property. On December 8, 1986, the Carrier's police took photographs of nearly 70 cases of lubricants stored by Claimant in Tate's granary. They also took a statement from Tate in which he described how Claimant had approached him about first storing and then purchasing the lubricants. Claimant had told Tate that he did not always change the oil in the Carrier's equipment. Claimant solicited Tate's preference as to quarts or gallons of oil. The gradall that Claimant operated used consumed 466 more quarts of oil than a like machine working on the same division during the same time.

Claimant did not work on November 17, 1986. Claimant submitted a time card and was paid for eight hours and allowances for November 17, 1986. At the investigation, Claimant admitted having done so, stating that he was due make up time. This action had not been authorized by the Carrier. No regular past practice existed whereby the Carrier allowed employes due overtime to be compensated for that time by marking on duty but not working.

The position of the Organization is that Claimant was dismissed without just cause as to both the merits and matters of procedure.

As to procedure, the Organization maintains that Claimant did not receive a fair and impartial hearing because the hearing officer allowed into evidence prepared statements made by Tate, who was not present at the investigation, and offered by Sgt. D. E. Lucas (one of the Carrier's police officers who conducted the investigation at Tate's). Further, the Organization contends that the Carrier should not have been allowed to present a transcript of an interview of Claimant by employe Sam Hall in which Claimant denied knowledge of any oil or lubricants traded to Tate.

On the merits, the Organization maintains that the Carrier has failed to meet its burden of proof that Claimant had stolen any materials from the Carrier because Claimant repeatedly denied doing so and there was no indication on the oil and lubricants that it belonged to the Carrier. The Organization rejects the probative nature of the oil consumption evidence, but it is unclear precisely what its exact argument is. The Organization contends that it was common practice to take time off for hauling fuel despite the denial of the practice by supervisors. Finally, the Organization challenges the discipline as being too severe in the circumstances.

The position of the Carrier is that Claimant was dismissed for just cause under the Agreement having been provided a fair hearing and having been proven guilty.

As to the procedures of the hearing, the Carrier contends that it could not compel Tate's attendance at the hearing since he is not an employe and that Claimant did not object to Tate's failure to be called. Further, the

Carrier asserts that Claimant was provided a fair hearing because he did not desire to call further witnesses at the hearing and the hearing was conducted impartially.

On the merits, the Carrier contends that the testimony of various witnesses, including Claimant's admission, establish that he was not at work on November 17, 1986 but that he claimed and was paid for eight hours work and allowances. Further, the Carrier maintains that Tate's statement and the evidence of the excessive consumption figures for Claimant's gradall conclusively prove that Claimant stole the oil and lubricants as charged. In light of the charges, the Carrier contends that the discipline was not excessively harsh.

After review of the entire record, the Board finds that Claimant was dismissed for just cause under the Agreement.

The Carrier has established by substantive credible evidence in the record that Claimant both falsified his time record and stole oil and lubricants from the Carrier. The evidence on the first charge is overwhelming including Claimant's own admission against interest. The Organization has failed to prove the existence of any past practice of permitting employes to mark out with pay in compensation for working overtime. As to the theft of the lubricants, Tate's statement is certainly persuasive and the circumstantial evidence as to the excessive "consumption" of oil by Claimant's gradall is incriminating.

Claimant was afforded a fair and impartial hearing. The use of Tate's testimony was not improper. The Carrier was not arbitrary, capricious or discriminatory. Claimant stole from the Carrier; he stole materials outright and stole time and money by his falsification of his records. These are extraordinarily serious offenses since they strike at the heart of the trust represented by the employment relationship. This serious breach of that trust may be punished by dismissal.

AWARD

Claim denied.

Nicholas H. Zumas, Neutral Member

Carrier Member

Organization Member

Date: June 12, 1989