Award 16785
Docket 31756

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

39 South La Salle Street, Chicago 3, Illinois

With Referee Charles Loring

PARTIES TO DISPUTE:

SWITCHMEN'S UNION OF NORTH AMERICA

SOUTHERN PACIFIC COMPANY (Pacific Lines)

STATEMENT OF CLAIM: "Claim is made for Switchman R. J. Clemmons, Bakersfield Yard (San Joaquin Division), for reinstatement with full seniority rights unimpaired and pay for each day withheld from service from March 11, 1953."

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Claimant seeks reinstatement with seniority rights and pay for time lost. He was discharged because he testified falsely in court in regard to a material issue in a personal injury suit against the carrier. The suit against the carrier was for injury received by a member of the claimant's yard crew on the night of August 15, 1951. Claimant was at the time working as field man. C. P. Mathew was working as herder. The accident to Mathew happened while a switch movement was being made. The issue as to the company's negligence turned on the question as to whether there should have been a man with a white light on the leading car of the string of cars being pushed along the track at the point where Mathew was injured. In court Clemmons testified: "The custom and practice in that yard, while shoving all cuts of cars anywhere in the yard, there should be someone on the point displaying a white light, a lantern." After he had so testified, the court asked: "The question is, was that the custom and practice for them to do that? Did they do that, all of them?" To which claimant answered "Yes sir." Again the court asked, "All you can tell us is what the practice was and what the men do there." And he answered "Yes sir."

This testimony would doubtless have made a question for the jury on the issue of negligence so the case was settled by payment to plaintiff of a substantial sum.

Upon the investigation of the charges against claimant that he had testified falsely upon the trial, three men with long experience in that yard

testified that in movements of the kind in which Mathew was hurt no such custom ever prevailed.

Rule 103 which was in force at the yard provided:

> "When cars are pushed by an engine, except when switching or making up trains in a yard, and even then when conditions require, a member of the crew must take a conspicuous position upon the leading car."

But claimant was the strongest witness against himself. On the day after the accident, he made a two page statement as to how the accident occurred so far as he saw it, a statement which he must have carefully read because he made at least three corrections in it which he initialed in the margin. In this statement he said, "No one was riding head end of cut, as on a short move like that in order to get through the various switches, it is the custom to walk ahead to line the switches for the movement and clear switches for other movements." He then stated the positions of the foreman and the other yardman just prior to the accident. This statement is in direct conflict with his testimony in court and corroborates the three witnesses who testified at the investigation in regard to custom and practice.

In these investigations as to whether a discharge was wrongful, the carrier is not bound to prove justification beyond a reasonable doubt as in a criminal case or even by a preponderance of evidence as does the party having the burden of proof in a civil case. The rule is that there must be substantial evidence in support of the carrier's action. The evidence here would have sustained a verdict of guilty in a criminal case.

It is argued here that this employe may not be discharged for "dishonesty" under the carrier's rule because false testimony in court was not in the performance of duty. But in this case, the testimony related to a time when claimant was on duty. Moreover, if there were no rule in regard to dishonesty, any court would hold that an employer who has been prejudiced by perjured testimony in a case where it was involved would be amply justified in severing the relation of employer and employe. Honesty and a fair regard for truth is an implied provision of every contract of employment.

The contention is also made that the delay of three and one-half months from the time of the trial until the company made the charges vitiates the proceeding. But here the claimant was not under suspension and there is no showing whatever of prejudice. On the other hand, the offense was vicious and the consequences serious. The five-day rule is evidently mostly for the protection of suspended employes.

AWARD: Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: (Signed) J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois, this 18th day of October, 1954.