



Award No. 4744

Docket No. 4621

2-MP-FO-'65

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**The Second Division consisted of the regular members and in
addition Referee Howard A. Johnson when award was rendered.**

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Firemen & Oilers)**

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That Laborer C S. Minor was unjustly dismissed from the service of the Missouri Pacific Railroad Company on October 22, 1962 on charge of the theft of 1,160 pounds of Milo from Track No. 13, 25th Street Yards, Wichita, Kansas at or about 1:30 A.M., Sunday morning, September 16, 1962.
2. That the investigation held with Laborer C. S. Minor on October 17, 1962 was unfair, unnecessary and without good and sufficient reason.
3. That accordingly, the Missouri Pacific Railroad Company is ordered to restore Laborer C. S. Minor to service.
 - (a) With his seniority rights unimpaired
 - (b) Compensation for all time lost
 - (c) Make whole all vacation rights
 - (d) Pay premiums (or hospital dues) for hospital, surgical and medical benefits for all time held out of service
 - (e) Pay premiums for his group life insurance for all time held out of service

EMPLOYEES' STATEMENT OF FACTS:

Mr. C. S. Minor, hereinafter referred to as the claimant was employed by the Missouri Pacific Railroad Company, hereinafter referred to as the carrier, on June 25, 1948 in the capacity as laborer. Since June 25, 1948 the claimant has been employed as a laborer at the Wichita, Kansas Shops. Prior to the claimant being dismissed from service on October 22, 1962, he had an assigned work week of Saturday through Wednesday, rest days Thursday and Friday, hours 7:30 A.M. to 4:00 P.M. On September 15, 1962, about 7:00 P.M., the claimant arrived at his home at 3126 Stadium Drive, Wichita, Kansas. He immediately took a bath and ate his dinner, after which he relaxed with his family enjoying television. He went to bed after the

"... The probable truth of claimant's explanation was for the carrier to determine.

The evidence presented at the investigation and the proper inference to be drawn therefrom do not justify a finding that the carrier acted arbitrarily or capriciously in this instance."

See also Award 3834 where your board, with the assistance of Referee William E. Doyle, denied claim for reinstatement where an employe had been discharged for misappropriation of company material.

In each of the above awards your board followed the well-established policy as stated in Award No. 1089:

"It is not the function of this Board to substitute its judgment for that of the Carrier's in matters of discipline."

Each of the divisions has similarly defined the function of your board. See Third Division Award No. 2498 and First Division Award No. 5790.

Here claimant was guilty of attempting to steal grain from the company's cleaning track. Claimant had been warned and questioned on two previous occasions concerning the disappearance of grain. This was pointed out by the special agent in his statement at the investigation. At the top of page 3 of the transcript we see that the special agent warned claimant on July 16, 1961, and November 11, 1961. The incidents on those dates are also referred to in the special agent's report. Since claimant had previously been warned, he had been given every consideration and there is no basis for extending leniency to him. None of the carrier's officers could find any basis for reducing the discipline administered.

Claimant has been given a fair and impartial investigation as required by Rule 9. The quantum of discipline assessed was clearly justified in view of the seriousness of the offense and particularly in light of the previous warning given claimant. The carrier has fully complied with the agreement. There was no abuse of the discretion lying in the hands of the carrier in dismissing claimant from service. There is no basis for overturning the action taken by the carrier. It follows that the claim must be denied.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The special agent surprised a man in the act of driving Claimant's truck in the dark with the lights off after placing stolen grain in it; finding his way blocked, the driver escaped from the truck, leaving the engine running. The agent turned off the engine and took the keys. The truck was taken away by the police.

The special agent had known Claimant for thirteen or fourteen years on the job; he testified that he was not close enough to identify Claimant when the grain was being taken, but that he was quite close when Claimant left the truck, and clearly identified him; that he fired in the air several times, and in about three minutes Claim-

ant returned panting, and pleaded for his release on the grounds that he had a family, had taken bankruptcy, and needed his job; that on the agent's refusal Claimant escaped again around some boxcars.

Claimant denied everything and his wife furnished an alibi, stating that he was at home all that night. About seven o'clock next morning Claimant had reported to the police that on his return home the preceding night he had parked his truck in the yard leaving the keys in it, and that on arising in the morning his wife had noticed that it was gone.

Thus Claimant was positively identified by the special agent, who was fully cross-examined by both of Claimant's representatives. Claimant's evidence consisted of his own denial, an alibi furnished by his wife, and his statement that his truck had been stolen in the night with the keys in it.

The charge against the Claimant is supported by positive and substantial evidence. Even if it were this Board's duty to decide the weight of the evidence it could not hold that the statements of Claimant and his wife outweighed the other evidence.

The special agent's report, which is annexed to the Carrier's Submission, is objected to as not having been offered as evidence during the investigation. It contained no further substantial evidence, its admission or exclusion will not alter the evidence before the hearing officer, and it is not considered by the Division in this Award.

The Claim includes the statement that the investigation was unfair; but no unfairness was charged during the hearing, or pointed out during this proceeding, or shown by the record.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **SECOND DIVISION**

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 30th day of July, 1965.