

The Second Division consisted of the regular members and in addition Referee Walter C. Wallace when award was rendered.

Parties to Dispute: (System Federation No. 21, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Southern Railway Company

Dispute: Claim of Employees:

1. That under the Agreement, Carman G. S. Crawford and E. J. Brown, Atlanta, Georgia were unjustly dismissed from service on January 13, 1976.
2. That accordingly, the Carrier be ordered to return Carmen G. S. Crawford and E. J. Brown to service with all rights unimpaired including vacation, health and welfare benefits, and beginning January 13, 1976 they be paid for all time lost.

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 were given due notice of hearing thereon.

The two claimants were car inspectors employed in the service of the carrier, for some years, at its Inman yards in Atlanta, Georgia. They worked the third shift and admittedly they were good, conscientious employees who had no prior records of dishonesty, drinking or rule violations. During the early hours of January 13, 1976, on the third shift when they were on duty, they were apprehended in connection with breaking and entering a sealed freight car containing auto tires. In addition, the original charges included violations of the rules governing consuming alcohol while on duty and the bulletin against carrying firearms on the property. These latter charges were subsequently dropped by carrier in view of its finding of guilt on the "breaking and entry" charge.

The background indicates there had been a prior history of breaking into sealed cars containing auto tires. The railroad investigators had pin-

pointed the losses at the Imman yards and specifically Train 116. It was determined that three cars under seal containing auto tires would be placed under surveillance during the night of January 13, 1976. Two railroad policemen located themselves in a concealed position to permit such surveillance on each side of the train that morning. The seals of the three cars were inspected and found to be intact. Their wait was rewarded. A pickup truck approached the cars. One passenger got out and looked at the cars. Thereafter, the truck returned and three passengers got out joined by a fourth on foot from the yard and proceeded to remove the seal and wire. At that time, the railroad policemen could not identify the men by their build and the color of their clothing. Something warned the men and they ran. Two escaped somehow. The third and fourth immediately crossed the coupling to the other side of the train and entered the truck attempting to leave the scene. The railroad policemen maintained their surveillance of these two men as they departed, crossed the coupling and entered the truck. For a few seconds, they were out of view while one policeman moved to the other side of the train. He then waved the truck to stop, flashing his flashlight. The truck revved up and came to sudden stop. It finally attempted to cross the main track and got hung up in the cross ties and the two were apprehended.

The claimants were then identified. They denied all charges.

The hearing was held on January 30, 1976 and claimants were represented in accordance with the agreement. They asserted they were not involved in the breaking and entry of the sealed cars. Insofar as it was admitted two men escaped, they contend they were finishing up their car inspection duties and had nothing to do with the break-in, and, presumably, all the guilty parties escaped. Some stress was placed upon the foggy weather conditions, the darkness and the admitted inability of the railroad policemen to specifically identify them from their surveillance positions. Subsequent to the hearing, both men were found guilty of the alleged offense of breaking and entry of the sealed car and dismissed from the service. The matter was progressed on the property to the carrier's highest labor relations officer and carrier affirmed its decision that the conclusions reached were supported by substantial evidence and the dismissals were upheld.

The thrust of the employees' claim to this Board is that the claimants were unjustly dismissed in that the carrier failed to take such action for just cause under Rule 34(a) of the agreement.

We have reviewed the transcript of the hearing with care. We note that the representatives of the claimants made a valiant effort in their presentation of the facts, both direct and on cross-examination. They explored all aspects of the fact situation. The carrier's case, however, is based upon substantial evidence.

This Board must support the carrier's findings in discipline cases where the employees are afforded a fair and impartial hearing including the right to representation, the right to produce witnesses and evidence of their own and

the right to cross-examine carrier witnesses. All this was done in an atmosphere of objectivity. The conclusions reached were justified by the substantial evidence provided by carrier witnesses who were there. We may not disturb such findings absent the showing that carrier was arbitrary, capricious or unreasonable. That is now shown here.

This Board is not authorized to weigh evidence for the simple reason that is the function of the official conducting the hearing on the property. What we might believe or construe to be true, based upon a paper record cannot override the findings of the official who hears and observes the witnesses and determines their credibility. We are limited to the record developed on the property and absent a showing of unfairness or partiality, we must sustain the carrier's findings where there is substantial evidence in support of it.

The procedural matters raised before this Board are outside the ambit of our consideration insofar as they were not raised on the property. It is also argued that this Board consider the fact these claimants were charged with a criminal offense for the same occurrence and found not guilty. Presumably, we are asked to consider that finding as persuasive. We do not agree and in accordance with numerous awards of this Board, we hold that a "not guilty" finding by a criminal court on the same facts is not controlling. The standards involved and the interests served in these separate proceedings are different. Here the carrier is bound to enforce the agreement and its rules governing employee conduct. So long as it complies with those requirements, including the procedural safeguards, it need not be governed by the result of a criminal action.

With respect to the discipline imposed we take note of the prior good record of these claimants. That fact serves to underscore the tragedy of this occurrence. It does not serve to mitigate the seriousness of their offense. Stealing or any form of dishonesty on the railroads is a dismissal offense. The carrier's actions were proper here and the contract was not violated.

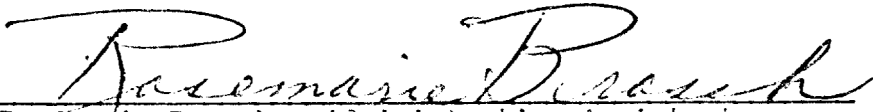
A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 21st day of April, 1978.