

Award No. 5601
Docket No. 5394
2-L&N-CM-'68

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the provisions of the current Agreement Carman I. J. McClure, Jr., Mobile, Alabama, was unjustly dismissed from service effective February 18, 1966, and

2. Accordingly, the Louisville and Nashville Railroad should be ordered to —

- (a) Restore him to service with seniority and all other employe rights unimpaired,
- (b) Compensate him for all time lost as a result of his dismissal,
- (c) Pay all premiums for his hospital, surgical, medical, and group life insurance benefits for the entire time he is withheld from service, and
- (d) Furnish him a letter over the signature of the proper Company Official exonerating him of the unwarranted charge of stealing.

EMPLOYEES' STATEMENT OF FACTS: On December 30, 1949, Mr. I. J. McClure, Jr., was employed as a regular Carman Apprentice in South Louisville Shops, Louisville, Kentucky by the Louisville and Nashville Railroad, hereinafter referred to as the Carrier. He was upgraded to fill a position as freight car repairer on May 5, 1952 and continued to work in an upgraded capacity until he completed his apprenticeship on August 2, 1954. He remained in the Carrier's service as a carman at South Louisville Shops after completing his apprenticeship and established seniority as a triple valve repairer (carman) in the Air Room on August 3, 1954. After being briefly furloughed in 1958, and after having worked in other seniority dis-

his rights were fully protected. He was afforded a fair and impartial investigation, at which he was ably represented by his duly accredited representatives. While denied by him, there is substantial and convincing evidence in the record in support of the fact that he was guilty of stealing gasoline, as charged. In view of the seriousness of the offense, carrier did not abuse its discretion in removing him from its service. To the contrary, his dismissal was fully justified, and the claim for his reinstatement with pay for time lost should be denied in its entirety.

SECOND DIVISION AWARD 1323

"... It has become axiomatic that it is not the function of the National Railroad Adjustment Board to substitute its judgment for that of the carrier's in disciplinary matters, unless the carrier's action be so arbitrary, capricious or fraught with bad faith as to amount to an abuse of discretion. Such a case for intervention is not presently before us. The record is adequate to support the penalty assessed."

FIRST DIVISION AWARD 14421

"A dismissal for cause terminates the employment relationship and the dismissed employe has no enforceable right to be reinstated or rehired by the employer. Reinstatement or rehire of a former employe dismissed from service is within the discretion of the employer. In the absence of any enforceable right to reinstatement there is no basis for this time claim."

(Exhibits not reproduced.)

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.

Claimant, a lead Carman, was dismissed from service for being found guilty by Carrier of the charge of theft of gasoline from company gasoline pump located at Sibert Car Shop on November 22, 1965.

M. E. Middleton, Inspector of Special Services for Carrier, stated upon receiving information that Claimant was suspected of removing company material from Carrier's property, he placed a close surveillance on Claimant; that on November 22, 1965, he and Assistant Inspector of Special Services, J. F. Cowling, saw Claimant alight from a green Ford pickup truck with 1966 Alabama license No. 2H 361, which had driven up and parked by a gasoline pump at the south end of the shop; that he observed Claimant look in all directions and then Claimant stooped down beside his truck and inserted the gasoline hose from the tank to the gasoline tank of his truck and started

to pump gasoline; that as they approached him, Claimant disconnected the hose from his truck, ran the gasoline pump to no gallons showing, and ran into the shop; that he noticed spilt gasoline on the running board of Claimant's truck; that Claimant told him that he had only put 2 gallons into his truck and was preparing to go to the roundhouse on Company business with his truck; that Claimant asked him not to report the incident and told him he would never do it again; that upon informing Claimant he had been kept under close surveillance, Claimant replied: "Well, you never caught me before"; that Claimant kept insisting that the incident not be reported.

J. F. Cowling, Assistant Inspector of Special Services, stated that he was with Inspector Middleton on the date in question and observed Claimant squat beside his truck and put gasoline in his truck, and upon advancing toward Claimant, saw him head into the car shop at a very rapid pace; that he hollered at Claimant to wait, but Claimant continued on into the car shop; that Claimant admitted to him having taken 2 gallons of gasoline as he used his private vehicle on numerous occasions to make trips to the roundhouse.

Assistant Departmental Foreman, H. B. Smith, stated that on the date in question, he left the shop at about 4:00 P. M. for the train yard and about 8:30 P. M. Claimant called and asked him to come to the shop; that he and Claimant and Local Chairman Compton all went inside his office and was informed by Claimant that Special Agent Middleton had caught him getting about 2 gallons of gas from the company pump; that Claimant offered to pay for the 2 gallons of gas; that he never instructed Claimant to use his personal automobile for company business; that he did not give Claimant permission to take gasoline out of the company pump and put it in his personal automobile; that Claimant was familiar with the company rule authorizing reimbursement for mileage expense when using personal automobile in company business.

Carman I. C. Thornton stated that on several occasions Claimant used his own personal truck on company business to haul rerailling equipment to both north and south end of the train yard when the company truck was not available; that the shop was out of grab iron material on the date in question and Claimant was to go to roundhouse to check on said material, and Claimant informed him his truck was out of gas and that he, Claimant, would have to get a couple of gallons.

Claimant testified that after Foreman Smith left, Employee Thornton and Bates requested grab irons and Employee Compton a release rod; that he went to the company truck and found it locked and without keys; that he knew his own personal truck was low on gas, and he drove his truck to other end of the shop and noticed that the lock was laying on top of the gasoline tank, and he decided to get 2 gallons and pay Foreman Smith for it as was done before; that he thought it was his prerogative to do so, inasmuch as he had no other way of getting material; that he had never been instructed to use or not use his own truck on company business; that he knew of a Mr. Akers buying gas as well as a laborer and turning the money in to a Mr. Wittmann; that he left the gasoline pump so hastily because the telephone was ringing; that he had intended advising Foreman Smith of the details upon Smith's return; that he did request Special Agent Middleton not to report the incident because he felt it would be hard to explain; that at the time of the occurrence the sun was shining, and it was broad open daylight.

Department Foreman P. A. Wittmann testified that he has never reimbursed an employe for auto mileage by giving him gasoline out of the company pump; that on one occasion a night man ran out of gas in the early morning hours and an Assistant Foreman sold him 45 cents worth of gasoline so that he could go home; that on one occasion Claimant used his truck to haul blocks from the wrecker track to the turntable, but that Claimant did not ask for gasoline or compensation for the use of his truck.

It is clearly seen from the record that there was substantial evidence adduced showing that Claimant was guilty of the charge of theft of gasoline from company's gasoline pump located at Sibert Car Shop on November 22, 1965. Claimant attempts to excuse his actions on the grounds that other employes had acted in a similar manner. However, Claimant was not authorized nor instructed or received permission to take the gasoline in this instance. The fact that he needed the materials for other employes did not justify a violation of company rules, or authorize him to summarily take the gasoline in this instance. Taking company property without proper authorization is a very serious offense. Carrier is entitled to exact the highest degree of integrity from its employes, especially an employe such as Claimant herein, who was a "lead carman" and as such, in an acting supervisory capacity when the foreman was temporarily away from the premises. The example he sets acting in such a supervisory capacity is important to the rest of the men under his jurisdiction as well as to the other employes of Carrier.

However, in view of Claimant's clean record over approximately 24 years of service, and giving Claimant the benefit of the doubt that he misunderstood his authority as lead carman in taking said gasoline, we feel that reduction of the penalty of dismissal is therefore justified under the circumstances. This does not in any manner mean that we are condoning or approving Claimant's actions in this matter. On the contrary, we feel that under no circumstances should an employe be permitted to take, as in this instance, gasoline without proper authorization or permission of Carrier's officers, and any misunderstanding that may have existed in Claimant's thinking over the taking of said company gasoline should be clearly rectified so that in the future Claimant clearly understands that he and any other company employe shall not under any circumstance be entitled to take company gasoline unless specifically authorized by proper company officials.

Therefore, it is our judgment that Claimant's dismissal is hereby set aside and Carrier is directed to reinstate Claimant with accumulated seniority and vacation rights, but without compensation for time lost.

AWARD

Claim partly sustained and partly denied in accordance with the foregoing findings.

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

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 26th day of November, 1968.

**CARRIER MEMBERS' CONCURRING AND DISSENTING
OPINION IN AWARD 5601**

The Board has held in the instant claim that testimony adduced at the hearing, including Claimant's own testimony, established conclusively his responsibility as charged, and that the charge was of a very serious nature. We concur fully with the Board's finding that the facts and the evidence supported action taken by carrier.

The Board should have held that since claimant's guilt was definitely established, his dismissal was justified. Carrier should not be burdened with returning an employe to service who has the tendencies possessed by the claimant. There can be no valid reason depriving the carrier of the right to protect itself by dismissing dishonest employes.

The Board's action of modifying Carrier's discipline is completely uncalled for, and is contra to many better reasoned prior awards holding that the only function of this Board in claims such as the instant one is to determine whether on the evidence introduced at the hearing the charge was proven, and, if so, the Board will not substitute its judgment for that of the carrier even though in light of the claimant's previous record we might have imposed a lesser punishment. In matters such as this the carrier has a right to exercise its discretion, and our interference in this right without a valid legal reason amounts to capriciousness.

For reasons hereinbefore stated Carrier members dissent.

**P. R. Humphreys
H. F. N. Braidwood
H. K. Hagerman
W. R. Harris
F. P. Butler**