Award No. 5862
Docket No. 5762
2-BRCofC-CM- '70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Nicholas H. Zumas when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 20, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

THE BELT RAILWAY COMPANY OF CHICAGO

DISPUTE: CLAIM OF EMPLOYES:

1. That the Belt Co. of Chicago violated the Agreement when they deliberately and arbitrarily and unjustly dismissed Carmen F. Aquino and C. Wisniewski from the services of the Carrier on September 6, 1967, as a result of a hearing held on September 5, 1967. The Claimants were erroneously accused of removing and possession of unauthorized property, belonging to the Belt Railway Co. from Belt Railway Co. property.

2. That accordingly, the Belt Railway Co. of Chicago be ordered to compensate Carmen F. Aquino and C. Wisniewski, eight (8) hours pay for each day, that they were denied their right to work, plus all benefits due them under the current working Agreement and have their record cleared of all charges and be reinstated with full benefits and their seniority unimpaired.

EMPLOYES' STATEMENT OF FACTS: The Belt Railway Co., hereinafter referred to as the carrier, maintains a freight yard, located at 69th & Cicero Ave., in Bedford Park, Illinois, where Carmen F. Aquino and C. Wisniewski, hereinafter referred to as the claimants, are employed as carmen. The Claimant F. Aquino has been employed by the carrier since January, 1951, approximately seventeen (17) years, and the Claimant C. Wisniewski, has been employed by the carrier since July 1949, approximately eighteen (18) years, both with unblemished records.

Under date of August 31, 1967, Carrier addressed a letter to claimants suspending them from service pending investigation. Also, by letter dated August 31, 1967, carrier charged claimants "with the unauthorized possession and removal of Kerosene Heater part and/or parts from Belt Railway property" and scheduled investigation for 9:00 A.M., September 5, 1967. Investigation was held as scheduled September 5, 1967. Claimants were dismissed from service by letter dated September 6, 1967.

Claim was filed with the proper officer of the carrier under date of September 8, 1967. On September 18, 1967, the carrier's officer, Car Foreman

heater parts in their automobiles and regardless of how the union representative may object, their trunks are not in our opinion belt property.

This railroad has been plagued with a serious pilferage problem for many years, both internally as well as externally. We have repeatedly tried to impress upon our employees not to remove articles from the premises without permission, scrap or otherwise. The claimants in this case are very much aware the company rules and feeling in this repsect. This carrier has made continuous efforts to combat the problem of theft. The carrier has not sat idle until one of its employees is apprehended, as in this case, but we have constantly briefed our employees on the rules and regulations of this company as well as the Federal laws covering I.C.C. shipments.

The carrier takes no pride in dismissing an employee from the service of this company. However, we have never in the past not do we intend now or in the future to condone willful acts of theft or the intent thereof

From the testimony presented at this hearing the board will recognize that the claimants were, beyond reasonable doubt, guilty as charged. Further, the record should prove that the claimants received a fair and impartial hearing and that the discipline was warranted by just cause.

Carrier asserts that, in view of the facts and circumstances hereinbefore placed in evidence, the claim is without merit because it is not supported with any probative evidence in the union's appeal or at the investigation. Therefore, we request this claim 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.

Claimants were charged with "the unauthorized possession and removal of Kerosene Heater part and/or parts from Belt Railway property." After an investigation was held, Claimants were dismissed from Carrier's service.

Claimants had been in the employ of Carrier 18 and 16 years respectively, and the record shows no similar violations at any prior time.

Claimants were charged with violation of Rule S of the Book of Rules which provides:

> "All employes are hereby notified that it is **unlawful** and contrary to the rules and regulations of the Interstate Commerce Commission as well as rules and regulations of this company **to remove** any articles of freight, company material or any other property frmm the premises of the Belt Railway Compahu.
>
> Employes are **not permitted to remove** articles of any kind (except personal effects) **from the premises** of the Belt Railway Company of Chicago unless they have in their possession written authority from the Superintendent of Police.

Employes apprehended on or off the Belt Railway Company of Chicago premises with articles or materials in their possession in violation of the above instructions, except when the complying with Rule L will be dealt with strictly in accordance with the law." (Emphasis added.)

Despite the fact that Claimants were charged with violation of Rule S, Carrier in its submission states:

"This dispute does not involve a question of Claimants removing Belt property, as stated in paragraph #1 of the Union's Statement of Claim. The particular merchandies found in the possession of the Claimants was not Belt Railway equipment, but instead was part of a shipment."

While such statement could be construed to limit and modify the charge, we will examine both aspects, i.e., unauthorized possession and removal from Belt property.

Removal from Belt Property

The testimony adduced at the investigation shows that Claimants were apprehended after they had been observed placing certain objects (later identified as the bottom parts of kerosene heaters) in the trunks of their automobiles. The automobiles were parked on Carrier's property. Later inspection of the locker of one of the Claimants revealed the top part of a heater.

Claimants contend that they intended to use these heaters during cold periods to keep warm while working, and had no intention of appropriating the heaters for any other purpose.

It is clear that the language of Rule S prohibits the removal of property from the premises of Carrier. Since there was no removal of any property from the premises, Rule S does not apply.

Unauthorized Possession

As indicated earlier, the primary thrust of Carrier's assertion of culpability is that Claimants were in unauthorized possession of merchandise which was not the property of Carrier, but part of a shipment.

Claimants contend that the heater parts were picked out of a "scrap" gondola located on B-Rip track.

Carrier contends that box car SA682, containing oil stoves and gas heaters, was "bad ordered" to the B-Rip track for an open door.

Since Claimants were observed in the area by Carrier's special agents, Carrier presumed that the heater parts were taken from box car SA682.

The special agents, however, testified that they did not observe Claimants take anything from the box car; and there was no evidence or testimony that they were in the immediate area of the box car. Moreover, there was no inventory or other determination that the heater parts were in fact taken from the box car. The only testimony in this regard was Lt. Rouen's testimony that upon inspection, a Belt Patrolman named Wahland inspected the box car and reported that there was room for 5 heaters in the doorway of the open box car. Patrolman Wahland did not testify. Even if the Board were to give weight to Lt. Rouen's testimony of Patrolman Wahlan's report, which

was pure heresay, such statement in no way establishes that the heater parts in question were part of the shipment.

* * * *

Under the facts and testimony adduced, the Board concludes that Claimants were dismissed on the basis of insufficient evidence. As such Claimants are entitled to be compensated for each day not worked as a result of the dismissal (less sums earned during that period from outside employment), restoration of all benefits under the Agreement, reinstatement with seniority unimpaired, and their records to be cleared of all charges

AWARD

The Claim is sustained consistent with Findings herein.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 12th day of March, 1970.

CARRIER MEMBERS' DISSENT TO AWARD 5862 (DOCKET 5762)

(Referee Nicholas H. Zumas)

We disagree with the Majority's conclusion that the Claimants were dismissed on the basis of insufficient evidence.

The evidence developed clearly established that the Claimants were apprehended with materials — materials which they were not authorized to have and which did not belong to them. Certainly when an employe locks such material in the truck of his automobile or places it in his personal locker under key, he has converted same to his own possession and use. Such conduct, of which the Majority has absolved the Claimants, cannot by any stretch of the imagination, be condoned.

For these and other reasons, we dissent.

/s/ H. S. TANSLEY
H. S. Tansley

/s/ H. F. M. BRAIDWOOD
H. F M. Braidwood

/s/ W. R. HARRIS
W. R. Harris

/s/ P. R. HUMPHREYS
P. R. Humphreys

/s/ J. R. MATHIEU
J. R. Mathieu

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