



Award No. 6155

Docket No. 5965

2-CB&Q-CM-'71

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Jesse Simons when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 95, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

**BURLINGTON NORTHERN, INC.
(Formerly Chicago, Burlington & Quincy Railroad Company)**

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Chicago, Burlington & Quincy Railroad Company violated the controlling Agreement on September 26, 1968, when it held Carman Warren Williams and Carman Willie E. Huston, Cicero, Illinois, out of service pending investigation.

2. That the Carrier violated the controlling Agreement by unjustly dismissing Carman Warren Williams and Carman Willie E. Huston on October 31, 1968, following investigation held on October 10, 1968, and by continuing their dismissal since that date.

3. That accordingly, the Carrier be required to return Carman Warren Williams and Carman Willie E. Huston to active service and reimburse each for all time during suspension, restoration of all fringe benefits, including vacation, seniority, pass rights, health and welfare premiums, all paid for by Carrier, and compensation for any costs in connection with such benefits incurring during their suspension.

EMPLOYEES' STATEMENT OF FACTS: The Cicero, Illinois Train Yard and One-spot Repair Track is located at 5300 West Ogden Avenue, Cicero, Illinois, a suburb of Chicago, Illinois, and is the eastern freight terminal operated and maintained by the Chicago, Burlington & Quincy Railroad Company, hereinafter called the carrier.

Carman Warren Williams was first employed by this carrier as a carman helper on January 11, 1963.

Carman Willie E. Huston was first employed by the carrier as a carman helper on September 14, 1963.

When the three-fold contention embodied in the claim of the employes is viewed in the light of the argument and evidence herein and herewith presented, the carrier is firmly of the opinion that the seriousness of the charge warranted holding the claimants out of service prior to the investigation; the evidence disclosed by the investigation established their guilt and justified their dismissal; and that there are no procedural deficiencies or mitigating circumstances that should influence of the warranted discipline.

The claim for reinstatement with restoration of rights and privileges and pay for time lost should therefore be denied in its entirety.

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.

This is a claim that Carrier, in violation of the controlling agreement, on September 26, 1968, held out of service Carman Warren Williams and Carman Willie E. Huston, pending investigation, and a further claim that both Williams and Huston were unjustly dismissed following said investigation.

The Organization alleges that carrier's placing both employes on "out of service" status was violative of Rule 31, as amended on March 1, 1968, and particularly section (b) of said rule, quoted as follows:

"(b) In the case of an employe who may be held out of service in cases involving serious infraction of rules pending investigation, the investigation shall be held within ten (10) days after date withheld from service. He will be notified at time held out of service of the reason therefor."

The investigation was conducted in timely fashion and due notice was served on the two grievants, and the organization makes no complaint regarding these two aspects of Rule 31 (b). Rather, the Organization contends that the grounds for "holding out of service" do not meet the test specified in a letter interpreting Rule 31, dated January 31, 1968 addressed to the various organizations representing the Carrier's employes, signed by A. E. Egbers, for the Carrier and accepted by G. R. DeHague, General Chairman IAMAW and A. L. Kohn, General Chairman IBBISBBF&H quoted in part as follows:

"Personal conduct cases have reference to violation of rules involving an individual's conduct such as dishonesty, immorality or vicious actions."

The organization holds that the company did not have substantive proof on September 26, 1968 that the two grievants' conduct consisted of "dishonesty, immorality or vicious actions" and that therefore the company violated Rule 31 as interpreted in the letter of January 31, 1968, quoted above.

On due consideration of all the facts and arguments contained in the record before it, the Board finds, in the first instance, that the organization has placed an unwarrantedly narrow construction on the interpretative letter referred to above, holding that the exception to placing an employee out of service prior to an investigation, could occur as if the interpretative letter stated, (which it does not) that "only" or "solely" if carrier possesses evidence of "dishonesty, immorality or vicious action." The Board finds that a straightforward reading of this interpretative letter leads to the conclusion that reference made therein to these three categories of personal misconduct is made merely in the interest of setting forth examples. This is made clear, first, by the phrase "such as," which precedes the words "dishonest, immorality or vicious action." Such a finding is further buttressed by the actual text of Rule 31 (b) which speaks in general terms of "serious infraction of rules" as being the triggering factor justifying holding an employee out of service before an investigation. The board does not, therefore, accept the Organization's interpretation of Rule 31(b) or its interpretation of the letter of January 31, 1968.

Secondly, the Board finds that Carrier, on September 26, 1968 was in receipt of information that the two grieving employees had been arrested on the charge of, among other matters not germane here, "being in possession of merchandise stolen from freight cars on Chicago, Burlington and Quincy Railway property." The Board recognizes that as of September 26, 1968 not all the facts were in. However, it also recognizes that the Carrier accepted in good faith the information made available to it by the Chicago Police Department and its own Security Department representative, did not act capriciously, but rather with prudence to protect the goods consigned to it for transit through its facilities. In any event, the Board notes that had the charges for which the employees were held out of service been proven to be without foundation, either via investigation or by appeal to the Second Division Adjustment Board, the employees would have been made whole. This is a necessary risk the Carrier takes when Carrier invokes Rule 31(b).

Ultimately, the Organization's challenge to the propriety of the Carrier's placing the two grievants on "held out of service" status, turns on the prime question of whether the subsequent investigation developed substantive grounds for the Carrier's initial action.

Thus the Board turns to the Organization's second claim, namely, whether employees Williams and Huston were or were not justly dismissed.

On September 26, 1968 these two employees were in possession of various items of merchandise totaling in value some \$750.00, which items were originally loaded aboard Northern Pacific freight car 15213 in Philadelphia and destined for Spokane, Washington. Said freight car was on the Cicero Repair Track on September 24 and 25, and both employees worked on those nights in the vicinity of said freight car, and said car arrived in Cicero with its seals intact and said car left the Cicero yards with the seals removed.

Both employees insistently denied that they removed these items from the freight car and consistently asserted that they purchased them for cash on the streets of Chicago from a vendor, which action they stated was not an unusual event.

The Board upon review of the entire record finds that such a remarkable convergence of coincidence justifies the conclusion that the denials of grievants

Williams and Huston are simply not credible. The merchandise was removed from the freight car on the 24th or 25th of September, and was in the hands of Williams and Huston on the night of the 26th. The possibility that said merchandise inadvertently could have legitimately come into the hands of the grievants stretches credulity beyond any reasonable shape.

The Board recognizes that the evidence upon which it grounds its findings is circumstantial in nature, and that only. However, such a state of affairs is not a bar to sustaining a dismissal, and innumerable previous board decisions have so held. In fact, in Award 12491 (George Ives, Referee) states:

"The mere fact that the evidence is circumstantial, makes it no less convincing and the board cannot say as a matter of law that the carrier was not justified in reaching its conclusion following the trial."

Similarly, the absence of a conviction by a court following an arrest is not a bar to the sustaining of a discharge for the same act for which the grievant may have been arrested. Impartial tribunals and arbitrators and this board have so held on numerous occasions. In fact, in Award 13116 the following principle was enunciated:

"It is basic that the evidence which is admissible and the degree of proof which is necessary for a conviction, varies greatly between a criminal case, in a court of record and that to be found in a discipline case on the property. We have held an acquittal by the court is not a bar to disciplinary action by the carrier."

The Board finds that Carrier had just cause for dismissing the two claimants, and further finds nothing in the record to substantiate a charge or to sustain a finding of arbitrariness or capriciousness on the part of the Carrier, and therefore concludes that the relevant clauses of the agreement were not violated by the Carrier.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 14th day of July, 1971.