

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6615
Docket No. 6502
2-TRRA of STL-CM-'74

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

Parties to Dispute: { System Federation No. 25, Railway Employees'
Department, A. F. of L. - C. I. O.
(Carmen)
Terminal Railroad Association of St. Louis

Dispute: Claim of Employees:

1. That Carmen E. R. Blaylock and G. A. Timpe were unjustly dealt with by the Terminal Railroad Association of St. Louis when they were dismissed from service October 23, 1972.
2. That accordingly, the Terminal Railroad Association of St. Louis be ordered to compensate Carmen Blaylock and Timpe as follows:
 - a) Paid for all time lost in the amount of eight (8) hours per day, five (5) days per week beginning October 23, 1972 until returned to service;
 - b) Made whole for all vacation rights;
 - c) Returned to service with seniority right unimpaired;
 - d) Made whole for all health and welfare and insurance benefits;
 - e) Made whole for pension benefits including Railroad Retirement and Unemployment Insurance;
 - f) Made whole for any other benefits that they would have earned during the time they were held out of service.

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 suspended effective 10:07 P.M. on October 23, 1972 for violating the second paragraph of Rule "L" which reads: "Unauthorized possession of, removal or disposal of any material from railroad property or property served by the railroad is prohibited." They were specifically charged with "opening door and removing part of contents of car RBCS 2560 at track 42, Madison East Bound Yard." An investigation followed and they were dismissed from service on October 31, 1972.

The record of the investigation shows that a Carrier's patrolman discovered the seal on car RBCS 2560 broken. Upon instructions to keep surveillance on the car, he saw the Claimants carefully surveying the surroundings for observers, open the car door, rip open a cardboard container, took whiskey bottles and put them into the truck they were driving. He arrested them after they attempted to leave the location in a hurry. They took seven bottles from two boxes.

The substance of Claimants' defense is that they saw the car door open when returning from their lunch break, they tried to close the door but were not successful. Instead, they opened the door further and saw the whiskey bottles laying in the threshold. They admitted that they did not try to shove them back into the car. As Mr. Tempe testified: "I didn't know whether I should or not, I thought well I would just put them in the truck and we will take them north and give them to Mr. Rash and that's what we did we put them in the car on the inside bay." Claimants then closed the car door.

There is no question that the Claimants illegally removed property from the car. Not only is this a violation of Rule "L", but it is also a criminal offense. They could, as they admitted, easily have pushed the alleged loose bottles back into the car, close the door and notify Carrier's proper agent. Instead, they ripped open two boxes, took the bottles and loaded them into their truck for their own use. The intent to steal has been established by more than substantial evidence. In fact, there is even more than a mere preponderance of evidence that the Claimants unlawfully took the whiskey with every intent to appropriate for their sole use. Their attempted explanation or defense is an after thought which the hearing officer had every reason to disbelieve in view of the positive evidence in the record.

It is indeed unfortunate that employes with 8 and 19 years of service should be dismissed. Employes with long years of efficient service generally receive consideration when the penalty is dismissal. But such a consideration applies where there may be some doubtful evidence and when the proof of guilt is on the border of "substantial". Here the evidence of guilt is more than "substantial". The only reason for reducing the penalty would be leniency, which this board may not entertain.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Test: Executive Secretary
National Railroad Adjustment Board

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By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 15th day of January, 1974.