

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr., when award was rendered.

Parties to Dispute: (System Federation No. 7, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Burlington Northern Inc.

Dispute: Claim of Employees:

1. That the Burlington Northern Inc., improperly withheld Carmen G. Darden and E. Harris, Cicero, Illinois, from service November 21, 1973 pending investigation and unjustly dismissed them from service April 15, 1974.
2. That the Burlington Northern, Inc., be ordered to:
 - (a) Compensate Carmen G. Darden and E. Harris, Cicero, Illinois, in the amount of eight (8) hours pay for each work day starting November 21, 1973, until restored to service.
 - (b) Restore to Carmen Darden and Harris, Cicero, Illinois, all seniority, vacation rights, unimpaired; that premium be paid for Hospital, Surgical, Medical Benefits and Group Life Insurance for all time held out of service; and that they receive all other benefits accruing active employees during this period be restored.

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.

The two claimants in this matter were dismissed by the Carrier for theft, following an investigation of events occurring on November 20, 1973, in the Carrier's yards. The dismissals were based on Rules 661 and 663 which read as follows:

"661. Employees will not be retained in the service who are careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who do not conduct themselves in such a manner that the railroad will not be subjected to criticism and loss of good will, or who do not meet their personal obligations."

"663. Theft or pilferage shall be considered sufficient cause for dismissal from railroad service."

Apprehension of the two claimants was made by a Carrier special agent, trained in detection and identification of suspected wrongdoers. The record indicates that the Carrier undertook dismissal of the two employees, with three and five years' service respectively, only after full review of the special agent's testimony and claimants' defense.

This Board finds that the Carrier acted upon sufficient evidence that the claimants were in the act of removing property from a freight car to a private vehicle, and that those observed in these acts were indeed the claimants who were dismissed. The Board finds further that the Carrier was within its own proper judgment, which this Board has no basis for questioning, in rejecting the self-serving explanations of the claimants.

Rules 661 and 663 make it clear that "theft or pilferage" is sufficient cause to warrant the penalty of dismissal, rather than some lesser punishment.

The Organization offers as defense the fact that criminal court action against the claimants was undertaken but not completed in the sense of finding the men guilty of the act with which they were charged. The fact is that the court case was dismissed on other grounds than proven guilt or innocence. It is too well established to require documentation by this Board that disciplinary action by an employer and criminal court action for the same offense need not always proceed together in lock step. This is especially so in this instance where the claimants cannot point to exoneration by the court.

There are myriad awards supporting this position, as well as dealing with the type and degree of evidence required to sustain disciplinary action where there is a dispute as to what actually took place. One such Award, No. 6155 (Simons) covers these points. Another is Award No. 6368 (Shapiro), which in itself refers to many other previous Awards.

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*
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 30th day of November, 1976.