

The Second Division consisted of the regular members and in addition Referee Ralph W. Yarborough when award was rendered.

Parties to Dispute: (System Federation No. 162, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Southern Pacific Transportation Company

Dispute: Claim of Employees:

1. That the Southern Pacific Transportation Company (Texas and Louisiana Lines) violated the rights of Carman M. D. McVay when they suspended him from service March 4, 1976, and following investigation held on March 22, 1976, dismissed him from service effective April 6, 1976.
2. That accordingly, the Southern Pacific Transportation Company (Texas and Louisiana Lines) be ordered to reinstate Carman McVay with all rights restored such as health and welfare benefits, seniority rights and be compensated for all time lost beginning March 3, 1976, and continuing until such time as he is reinstated.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 case arises from the Car Department of Carrier at San Antonio, Texas and involves the discharge of former Carman M. D. McVay by letter dated April 6, 1976, for what Carrier alleges was dishonest conduct in breaking the seals on the numbered and identified cars and recovering merchandise from said cars while on duty as a car inspector at approximately 2:20 a.m., March 3, 1976 in violation of Rule 801 of the Rules and Regulations of Southern Pacific Transportation Company.

Claimant, M. C. McVay was employed as a car inspector in the train yard of Carrier at San Antonio, Texas on date in question, and was to be on duty from 11:00 p.m. on March 2nd to 7:00 March 3rd, 1976. Carrier claims that while on such duty Employee, in cooperation with another employee, broke seals on several boxcars, took out cartons of goods in shipment, placed them in his personal pick-up camper truck, and that after his tour of duty ended at approximately 7:00 a.m. on March 3rd he drove his pick-up containing merchandise alleged to have been taken from the cars and alleged by Carrier to have been stolen, from company property and was subsequently stopped and arrested by agents of the Federal Bureau Investigation in San Antonio.

The charge letter of March 4th notified Employee McVay that he was suspended from service pending investigation, and was charged with responsibility for being allegedly dishonest at about 2:20 a.m. Wednesday, March 23rd when he broke the seals on the cars UPFE 459621, SSW 26018, and removed merchandise from such cars in violation of Rule 801.

A hearing was set for March 11th, but was postponed until March 22nd at the request of Employee.

This is a voluminous record, the writer has carefully read all 187 pages.

There had been complaints of seals broken, on cars in this yard for some time, and on this particular night there was a stake-out of about five special agents watching the particular train which came in from the West at 1:42 a.m. and left at 2:35 a.m. Four special officers testified that Mr. McVay did take boxes from cars; they were watching with high-powered binoculars. Agent Biggs testified positively that he watched with a pair of borrowed FBI binoculars, good for night viewing, that he knew McVay, and personally saw McVay break seals, remove the merchandise from an identified car on the train, put the merchandise in his personally owned pickup camper truck, and when he was leaving after his tour of duty, ended March 3rd at 7:00 a.m., 1976, was apprehended by Federal Bureau of Investigation agents, who searched his camper truck, and found merchandise from the train cars in his truck.

At this voluminous hearing, Mr. McVay was represented by three members of his local. There was a very able cross examination of all Carrier witnesses by K. S. Carter. When Mr. McVay was called to testify and answer question on behalf, he refused to answer on the grounds that his testimony might incriminate him. He was under indictment by a Federal grand jury for the events of that night at the time of the hearing. The hearing began at 9:00 a.m. Monday, March 22nd, and until 4:37 p.m., March 26th, covering 105 pages of the record.

It is not necessary to write a long opinion reviewing all of the testimony in the case. There was a positive identification by Special Officer R. B. Biggs, of Employee doing the dishonest acts alleged at the time in question. There was much corroborated testimony by the other Special Officers. The defense consisted in lengthy cross-examinations attempting to develop discrepancies and conflicts in the testimony of the Officials and Special Officers of the Carrier. But Employee offered no single witness to refute the Carrier's testimony. No one testified the Employee McVay was not at the time and place charged; no one testified that he did not break seals and remove merchandise; no one testified that the merchandise found in his pickup camper did not come from the cars. Innuendoes were cast at Carrier's witnesses, but affirmative evidence for Employee to refute Carrier's charges was lacking.

Procedural defects were complained of by Employee, but in our opinion they were not fatal to the hearing and on a careful review of all the facts in the case and all the contentions made by both parties, we are of the opinion that the charges by Carrier are sustained. Though the Board has sympathy with the Employee for his long record of service, we cannot in good conscience sweep under the rug the strong case made by the Carrier. There was too much supporting evidence of goods that came from cars on the tracks that night found in the Employee's pickup camper. There were too many witnesses watching, too many special agents covering the ground. The amazing thing is, that with all those agents decoyed, watching at such a close distance as 80 feet and moving about, with radio communication with each other that the Employee failed to suspicion this surveillance. Of course the testimony shows that the accused, together with an associate, moved rapidly, and did not spend many minutes at opening cars and taking objects out. The transactions, which took place in a few minutes, seemed to have been done with skillfulness. We find no discrepancy in the record of such magnitude as would authorize us to overturn the findings by the Carrier with reference to McVay.

Finding that the record affirmatively sustains the action and that there is no course open to the Board except to affirm the action taken, we decline to disturb that action.

This is not a criminal trial seeking to confine a man in prison or deprive him of his citizenship, this is a hearing by Employer as to whether or not the conduct of an employee under the rules of the contract between the Employee Union and the Carrier are sufficient to justify the Carrier to separate the employee from service with the Carrier.

We are of the opinion that the record strongly supports the separation. The Carrier has borne the burden of proof required to sustain a drastic action, but it still is not the burden of proof required in a criminal case for the loss of a man's liberty or a confinement in a penitentiary.

The Carrier has met the burden, and the action is sustained.

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Award No. 7637
Docket No. 7500
2-SPT-CM-'78

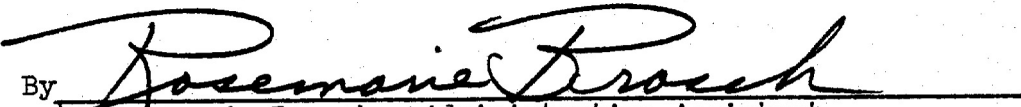
A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 31st day of July, 1978.