

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

Parties to Dispute:

- (Brotherhood Railway Carmen of the United States
and Canada
- (Louisville and Nashville Railroad Company

Dispute: Claim of Employees:

1. That Upgraded Carman Apprentice F. T. Baxter, Jr. was improperly withheld from service from July 18, 1977, until September 16, 1977, when he was dismissed from service in violation of the Current Agreement, and
2. Accordingly, the Louisville and Nashville Railroad should be ordered to
 - (a) Restore him to service with seniority and all employee rights unimpaired.
 - (b) Compensate him for all time lost as a result of his dismissal with interest at the rate of 6% per annum on all money due him, and
 - (c) Pay premiums for his hospital, surgical, medical, group life insurance and supplemental sickness benefits for the entire time he is withheld from 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 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.

Claimant was employed as an upgraded Carman Apprentice with a seniority date of March 21, 1974 at the time of dismissal.

On July 26, 1977, claimant was charged with the unauthorized possession of and removal of two RCA color television sets from the carrier's property at the Radnor Yard at Nashville, Tennessee. The investigation was scheduled for August 4, 1977. After several postponements, the hearing was held on September 1, 1977. As a result of the hearing, the claimant was dismissed via letter on September 16.

The transcript indicates that at approximately 3:00 a.m. on July 18 one of the carrier's Special Agents, W. L. Toney, discovered two RCA color television sets still in their cartons concealed in the brush alongside the side of a dead end service road which parallels the carrier's yard. The special agent then positioned himself in a place where he could observe the road. At approximately 4:45 a.m. an automobile entered the road and at 4:55 a.m. the same automobile began to exit from the road when Special Agent Toney stopped the automobile. The driver of the car was the claimant. Mr. Toney observed two color television sets in the back seat of claimant's car. A third television set, which was black and white, was in the front floor of the car covered with a towel. It was also established that a piggy back trailer carrying various sizes and models of television sets had been broken into that morning. The car and trailer were moving on Waybill number 490790 and was part of train no. 385 which arrived in the carrier's yard approximately 2:15 a.m. The claimant was assigned to work this train after its arrival and worked on it until 4:00 a.m.

The transcript also reveals that the serial numbers on the two color televisions found in the claimant's car matched the serial numbers of TV's found to be missing by the consignee of the car in question upon its arrival at its final destination.

The Board also notes that the claimant was excused from duty approximately 4:30 a.m. the morning of the incident in order to go home and attend his daughter who was sick. A woman had called claimant's foreman approximately 4:20 a.m. and asked him to get a message to the claimant. She asked that the claimant call home. The message was given to the claimant and he asked to be excused minutes later.

The claimant's defense essentially was that he was retrieving the TV's to return to his foreman. Special Agent Toney testified that after he stopped the claimant he asked him what he was doing with the TV's. According to Toney, the claimant said that he picked them up as a matter of curiosity and that his primary intention was to turn them over to the foreman. Mr. Baxter testified during the hearing, that while working train #385 he saw "someone approximately 35 feet from where I was with something large in there (sic) hands. They walked across a path into the brushes. (sic) I started back north to complete the train. When I reached the point where I saw someone I stood and shined my light toward the brush but did not see anyone so I went on and completed the train." He further testified "At that time I reported off and started to go over to the service drive to see if I could see anyone and to find out if someone was doing something. As I went up the service drive is where I saw the two boxes and I then got out and looked to see if I saw anyone. From there I got the two TVs to carry to the foreman."

The crucial issue in determining the claimant's innocence or guilt is the extent to which his story can be determined to be credible. It is well established in the railroad industry that it is not the Board's function to assess the credibility of witnesses, weigh the evidence or to resolve conflicts in testimony. This is the function of the hearing officer. The function of the Board, as an appellate body, is to review the evidence as a whole and to make a determination if there is substantial evidence to support the hearing officer's decision.

The Board has reviewed the entire record and concludes there is substantial evidence to support the carrier hearing officer's conclusion that claimant was guilty of theft. It is not credible to believe that the claimant really intended to return the TV's to his foreman. It is hard to believe that an employee called home to attend a sick child would be so concerned as to take the time to investigate a supposedly suspicious incident, particularly when he failed to do anymore than shine his light in that direction earlier. If Mr. Baxter was genuinely concerned about some potential impropriety against the carrier by this "someone" that was carrying something large and who disappeared into the bushes, he had several opportunities while on duty to do something about it. Mr. Baxter admitted he did not utilize a nearby telephone or his walkie talkie to notify his foreman that something was wrong.

The claimant's credibility was also seriously hurt by his answer to the following question:

"Q. Mr. Baxter, after you got word that your child was sick and was relieved for this purpose, why did you go out of your way to observe if something was going on as you previously stated?

A. Well, I was not for sure if there was something going on and I go home that way."

This explanation is completely frivolous in light of the fact that the service road which the claimant drove down to see if something was "going on" is a dead end. In light of this fact it would be hard for the claimant to "go home that way". The Board is convinced there is substantial evidence to uphold carrier's conclusion that the TV's were placed in the bushes by the claimant with the intent of picking them up later and removing them from the carrier's property and placing them under his control.

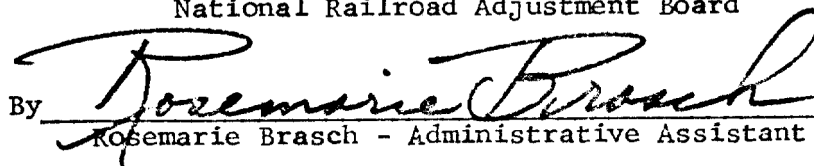
Regarding the question as to whether the punishment fits the crime, we cannot conclude that dismissal is arbitrary or capricious for an offense of this serious magnitude and as such by force of the precedent of this Board are bound to uphold the discharge.

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 7th day of January, 1981.