

The Second Division consisted of the regular members and in addition Referee George V. Boyle when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States
and Canada
{ Chesapeake and Ohio Railway Company

Dispute: Claim of Employees:

1. That Warren C. Guinther was unjustly dismissed from all service of the Chesapeake and Ohio Railway Company effective March 1, 1979, as a result of an investigation held at Flint, Michigan, at 10:00 A.M., Friday, February 7, 1979.
2. That accordingly the Chesapeake and Ohio Railway Company compensate Carman Warren C. Guinther his applicable straight time rate of pay from January 26, 1979, (date taken out of service pending an investigation) until restored to service.
3. That accordingly Carman Warren C. Guinther be reinstated to service with seniority rights unimpaired and compensated for wages lost.

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 claimant, a carman of approximately six years service with the carrier, was dismissed from service after a hearing for alleged attempted theft of a car radio while working at the Buick loading area at Flint, Michigan.

The Employes on behalf of the claimant hold that the carrier did not sustain the required burden of proof since hearsay evidence was admitted in the hearing and the charge was not proven. Also the Employes claim that the penalty was discriminatory, arbitrary and capricious in dismissing the Claimant from service.

A review of the transcript shows that the conclusion of the Claimant's guilt in this matter was not based solely upon hearsay evidence. A police seargent Paukstis testified that he had apprehended the other party involved, Lamphear, in the Claimant's car. The radio was on the seat between Lamphear, and the Claimant and wrapped in red coveralls of the type used by the Claimant. Other

testimony was elicited to show that, while the red coveralls could not be positively identified as belonging to the Claimant, coveralls of this type were not the usual clothing worn by either the carrier's employes or Buick employes and the only other red ones about which there was testimony were distinctively unlike the Claimant's which were similar if not identical to those used to wrap the radio.

Evidence in the form of Lamphear's story and signed statement were entered at the hearing in corroboration of the claimant's involvement in the attempted theft. This, then, is classified by the Employes as hearsay evidence and objected to since Lamphear did not testify in person and was unavailable for cross examination.

However, the Board has held that written statements are admissible in investigations even though the writer is absent, (Third Division Awards No. 15981 and 16308). Quoting from Second Division Award No. 6232:

"As was said in Award No. 16308:

'No prohibition is found against the use of written statements nor is there any requirement that a witness who submits a statement must be available for cross examination. Numerous awards of this Board have held that written statements of witnesses not present at an investigation are admissible in the absence of contractual prohibition. Awards 10596, 9624, 9311, 8504 and others.'"

On the contrary where a Referee had rejected hearsay evidence as a basis for overturning a Carrier action the Courts found that the Referee had failed to follow established procedures for conducting hearings before the Board "which have been almost universally followed."

Thus on the basis of direct unrefuted testimony that placed the radio in the Claimant's car wrapped in red coveralls, the circumstantial evidence linking the coveralls to the Claimant and the implacating statement of the Claimant's co-worker, Lamphear, the Carrier's conclusion that the claimant was a party to the attempted theft is a reasonable one. The Employes charge that the Carrier "did not present substantial evidence upon which to base its conclusion of guilt" is, in fact, baseless.

With respect to the penalty of dismissal for dishonesty, there have been numerous awards which have upheld the seriousness of the offense of theft. Second Division Awards No. 1776, 5043, 6862, 7570 and 8159 are examples. Quoting from Second Division Award No. 8159:

"That theft is a serious charge for which dismissal is an appropriate penalty is axiomatic."

In the instant case there was nothing discriminatory, arbitrary or capricious in the Carrier's decision to terminate the Claimant. The decision was warranted by the facts and entirely appropriate.

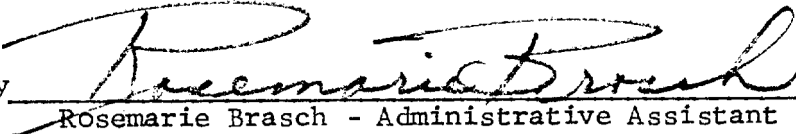
A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By



Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 22nd day of July, 1982.