

Award No. 2723
Docket No. 2494
2-N&PBL-CM-'57

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee D. Emmett Ferguson when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 39, RAILWAY EMPLOYES'
DEPARTMENT, AFL-CIO (Carmen)**

**NORFOLK AND PORTSMOUTH BELT LINE
RAILROAD COMPANY**

DISPUTE: CLAIM OF EMPLOYEE:

1. That under the controlling agreement, Car Inspector Cola Thomas Barnes was both unjustly suspended on April 23, 1956 and discharged from the service on May 3, 1956.
2. That accordingly, the Carrier be ordered to compensate aforesaid employe for all wages lost as the result of said unjust suspension and discharge.

EMPLOYEES' STATEMENT OF FACTS: Cola Thomas Barnes herein-after referred to as the claimant, has been employed by the carrier as car inspector at Portsmouth, Virginia since December 21, 1946 and his regularly assigned hours were from 7:00 A.M. to 3:00 P.M. Monday through Friday, when he was held out of service on April 18, 1956 when the claimant received formal notice from Superintendent S. G. Burrows that he was being held out of service pending investigation in connection with removing lading from loaded car on company's property while on duty, April 18, 1956. A copy of said notice is submitted and identified as Exhibit A.

On April 23, 1956 the claimant was given an investigation, a copy of which is submitted and identified as Exhibit B.

On May 3, 1956 the claimant received notice of his dismissal from service, a copy of which is submitted and identified as Exhibit C.

It is pointed out that the claimant was available, able and willing to be restored to service since April 23, 1956. This dispute has been handled in accordance with the provisions of the agreement effective September 1, 1949

Awards referred to are as follows:

Second Division

933
1041
1109
1157
1323
1687

On the assumption that, but without conceding the righteousness thereof, that the Board may determine to sustain the claim, respondent carrier respectfully refers to Rule 24, hereinabove quoted, and to that portion reading "compensated for wage loss, if any"—and submits that the only logical and unambiguous interpretation that can be placed on this provision is that it means the difference between the amount that would have been earned had the employe remained in the service and the amount the employe may have actually earned in some other capacity outside of the service of the company during the period involved, and directs attention to the fact that your Board has recognized, in many awards, the equitableness of such interpretation.

In Conclusion, carrier submits that the dismissal of the claimant was not without just cause, and was made only after a fair and impartial hearing, and this action is supported by the facts and the testimony in the case. It urges that the claim is without merit or foundation in fact, and that same should be denied.

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.

The parties to said dispute were given due notice of hearing thereon.

This claim raises the question whether or not Rule No. 24 was violated by the carrier in unjustly suspending and dismissing C. T. Barnes on charges of "removing lading from loaded car on company's property while on duty April 18, 1956."

Firstly, we find that the charge quoted above is precise enough to inform the employe of the matter and his participation in it, which was the subject of the investigation.

Secondly, we find sufficient credible witnesses to prove conclusively that Barnes was on the car of scrap and that he removed some of it, was later seen carrying it past the scrap pile and that it was recovered near the property line where he was seen to take it.

Thirdly, Barnes himself testified that "I was on a scrap car in the shop track April 18th" and later, "I was examining a valve," that "I removed it from someplace in the yard either * * * April 16th or 17th," and "Thrown it

back in the bushes, * * * inspected the load * * * just looking * * * I remember I like to have fell, lost my balance, because I stepped on something that moved," and after getting off the car "To the best of my recollection I walked by and saw this valve that I had previously thrown approximately 5 or 6 feet from the small pile of scrap and picked it up, put it on my shoulder, walked over to within 2 or 3 feet of Mr. Burrows' shack, and let it drop on the ground. I looked at it and then threw it back in the bushes."

The entire record discloses an eminently fair investigation, preponderant proof of the employe's wrongdoing, and a just penalty.

AWARD

The claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 13th day of December, 1957.

DISSENT OF LABOR MEMBERS TO AWARD NO. 2723

The holding of the majority that the record discloses preponderant proof of the employe's wrongdoing is not in accord with the facts. The holding is based not on proof of guilt but assumption of guilt. It is a well established rule that a person is innocent until proven guilty. No amount of suspicion can be substituted for substantial evidence.

The carrier's action in suspending claimant pending investigation was not a "proper case" for the exercise of such right as is contemplated under Rule 24. The alleged offense was not such that continued employment would have affected the service detrimentally or would have endangered the employe or fellow workers so as to justify the exercise of such suspension right. The suspension was arbitrary and unwarranted under the circumstances.

There is no justification for the holding by the majority that the record discloses a just penalty. The record required the Division to find that the claimant had been unjustly suspended and dismissed and, therefore, in accordance with Rule 24 he should have been reinstated with his seniority rights unimpaired, and compensated for the wage loss resulting from said suspension and dismissal.

/s/ R. W. Blake

/s/ C. E. Goodlin

/s/ T. E. Losey

/s/ Edward W. Wiesner

/s/ James B. Zink