



Award No. 5934

Docket No. 5748

2-MP-CM-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 2,
RAILWAY EMPLOYES' DEPARTMENT, A.F.L.-C.I.O.
(CARMEN)**

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. Missouri Pacific Railroad Company violated the controlling agreement when Car Inspector H. P. Allen was removed from this carrier's service on November 9, 1967, pending the investigation, and subsequently dismissed under date of December 19, 1967.
2. That, accordingly, the Missouri Pacific Railroad be ordered to reinstate Car Inspector H. P. Allen and pay him eight (8) hours for November 10th, and eight (8) hours per day, five (5) days per week thereafter until he returns to service, including earned vacation and fringe benefits, as though he was in the carrier's service.

EMPLOYEES' STATEMENT OF FACTS: The Missouri Pacific Railroad maintains a diesel shop, a spot repair shop, and a rip track, including a large transportation yard at Houston, Texas. This is all located on the property of the Houston Belt & Terminal Railroad. The claimant is employed as a car inspector on the Missouri Pacific Railroad. He was cited for an investigation on November 14, 1967. The investigation was postponed—see Mr. B. W. Wiggins' letter of November 20, 1967.

The claimant was accused of removal of revenue merchandise from the Missouri Pacific property car C&O 26483, without permission on or about November 4, 1967. The matter has been handled up to and including the highest designated officer of the carrier, who has failed to adjust this matter. The claimant was dismissed from the services of the carrier under date of December 19, 1967.

The investigation was first set for November 4, 1967, but it was postponed and was held on Friday, December 8, 1967, and the claimant was dismissed from service on December 19, 1967.

Your will note that the claimant was charged with removing merchandise from car C&O 26483 on or about November 4, 1967. During the investigation particularly in our exceptions contained in the investigation, the carrier did not stay with the caption of the investigation, and of course, this was an un-

Possession of stolen cases of tea admittedly taken from a car in carrier's yard when considered with the shortage of tea in car C&O 26483 likewise creates an inference the 17 cases of tea were taken from C&O 26483.

Claimant's admission that he took the tea considered with a corresponding shortage in car C&O 26483 is convincing evidence that the tea was taken from that particular car.

The employes apparently are under the false impression that carrier must have an eye witness to thefts before the claimant could be found guilty of taking the tea from the car.

As stated in Third Division Award 10440, Rose:

"Circumstantial evidence is valid and sufficient to support a charge of wrongdoing. See Award 7657."

The Third Division in Award 12491, Ives, held:

"The mere fact that the evidence is circumstantial, makes it no less convincing and the Board cannot say as a matter of law that the Carrier was not justified in reaching its conclusion following the trial. (Awards 4808, 6546 and 7657.)"

Also see Third Division Award 14066, Rohman; and Award 15025, Mesigh.

Taking 17 cases of tea from carrier's car is a flagrant display of dishonesty clearly supporting dismissal. Your board has repeatedly upheld the dismissal of employes found guilty of dishonesty, including thefts. See Second Division Awards 3537, Stone; 3590, Carey; 3734, Doyle; 4401, 4407, Williams; 4744, Johnson; 4925, Hall.

There is not a scintilla of evidence that claimant was prejudiced in any way or deprived of a fair and impartial investigation.

Your board has consistently refused to weigh evidence, determine the credibility of witnesses or substitute its judgment for that of the carrier unless its action was clearly arbitrary and capricious.

Carrier's action in this case was fair and impartial and certainly reasonable under the circumstances prevailing.

The claim is without merit and your board is respectfully requested to render a denial award.

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.

Under date of November 14, 1967, Claimant was served with the following charges:

"Arrange to report to Office of Master Mechanic, Settegast Diesel Shop, Houston, Texas, Friday, November 17, 1967 at 10:00 A.M. for formal in-

vestigation to develop the facts and place responsibility, if any, in connection with your alleged removal of revenue merchandise from Missouri Pacific Property car C&O 26483 without permission on or about November 4th 1967.

Arrange for representative of your choice permitted by the Current Agreement and any witnesses you may desire."

Hearing on the charge was duly held on December 8, 1967.

On December 19, 1967, Claimant was found guilty as charged:

"You are hereby advised that your record has this date been assessed with Dismissed for your responsibility in connection with removal of revenue merchandise from Missouri Pacific property, car C&O 26483, without permission on or about November 4, 1967.

your record now stands DISMISSED"

From our review of the record we find and hold that: (1) Claimant was afforded due process; (2) the finding that Claimant was guilty as charged is supported by substantial evidence; and, (3) the discipline imposed was reasonable. We, therefore, are compelled to deny the Claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 7th day of May, 1970.