

The Second Division consisted of the regular members and in addition Referee David Dolnick when award was rendered.

Parties to Dispute: (System Federation No. 100, Railway Employees'
(Department, A. F. of L. - C. I. O..
((Carmen)
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(Erie Lackawanna Railway Company.

Dispute: Claim of Employees:

That the Erie Lackawanna Railway Company compensate Mr. Michael Cordish and Mr. Edward Kral, Carmen, East 55th Street Car Shop, Cleveland, Ohio, for sixty (60) days pay at the pro rata rate for being unjustly suspended from service for the period between March 18, 1972 until May 17, 1972.

That accordingly, Mr. M. Cordish and Mr. E. Kral be made whole for all vacation rights, health and welfare and insurance benefits, Railroad Retirement and Unemployment Insurance, plus any other benefits that they would have earned during the time they were held out of 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 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.

Claimants were notified on February 9, 1972 to appear at an investigation on February 17, 1972, the time and place being noted. They were advised that the investigation was "in connection with the alleged unauthorized removal of certain merchandise from the private property of the Lederer Terminals, Inc., a consignee of the Erie Lackawanna Railway Company, at Cleveland, Ohio, Friday, January 28th, 1972." A hearing was held on February 17, 1972, after which they were suspended for sixty (60) days without pay.

Employes contend that the claim should be sustained because (1) the letter of February 9, 1972 fails to state the precise charge by not identifying the kind and amount of merchandise removed, (2) that the Carrier's representative should have granted the request to postpone the investigation, and (3) that the Carrier did not sustain the burden of proving that the Claimants intended to steal or appropriate the merchandise to their own use.

The letter of February 9, 1972 is clear and precise. It informs the Claimants about the unauthorized removal of merchandise, the date of such removal and the owner of that merchandise. It is not necessary to identify the merchandise by a precise description nor to state the weight, size or amount. Claimants were adequately advised of the nature of the charge to properly prepare a defense; if they had any.

At the outset of the investigation, the General Chairman representing the Claimants made a request to postpone the investigation "until the civil action against these men is concluded in the criminal courts as scheduled for date of March 28th, 1972." At no time between February 9, 1972 and February 17, 1972 did the Employees or the Claimants request a postponement of the investigation. They certainly knew long before the hearing date that the criminal charges were pending and would be heard on March 28, 1972.

Furthermore, the investigation is a civil proceeding while the criminal charge is an offense against society as prescribed by statute or ordinance. A determination of one does not necessarily offset the other. An investigation is a proceeding prescribed by contract. It has nothing whatsoever to do with a violation of a criminal code. The question to be determined at the investigation was whether or not the Claimants violated a contract or operating rule in connection with their employment. Carrier was not obliged, under the circumstances revealed in the record, to grant the request for a postponement.

Had the Claimants testified, had they denied the removal of the merchandise had they adequately explained how they came into possession of the merchandise, what they intended to do with it, and otherwise supported their innocence of any wrong doing, the issue of adequate proof would have had to be determined on such a record. But the Claimants refused to give testimony. Each of them repeatedly asserted their right to remain silent.

Whether or not the Claimants testified, the Carrier has the burden of proof to support the charge by substantial evidence. That evidence exists in the record. The admission of evidence in an investigation is not governed by the strict rules of legal evidence acceptable in courts. There is sufficient and substantial evidence to justify a finding that the Claimants removed property of Carrier's consignee without authorization.

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
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 15th day of January, 1974.