Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7574
SECOND DIVISION Docket No. 7462
2-SLSW-CM-'78

The Second Division consisted of the regular members and in addition Referee Walter C. Wallace when award was rendered.

Parties to Dispute: (System Federation No. 45, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(St. Louis Southwestern Railway Company

Dispute: Claim of Employes:

1. That Carmen Melvin Geiggar and E. L. Cook were unjustly withheld from service beginning October 6, 1975, and were subsequently unjustly dismissed from service without a fair and impartial hearing by the St. Louis Southwestern Railway Company on January 14, 1976, in violation of rules of the controlling agreement.

2. That the St. Louis Southwestern Railway Company be ordered to restore Carmen Melvin Geiggar and E. L. Cook to service, made whole in every respect, including seniority and vacation rights unimpaired, all health and welfare and insurance benefits, pension benefits, including Railroad Retirement and unemployment and sickness insurance, and all lost wages.

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 both Carmen of the St. Louis Southwestern Railway at Pine Bluff, Arkansas prior to their discharge. The events giving rise to this dispute commenced on or about October 6, 1975, when Claimants were both removed from service pending a hearing because of their alleged involvement in the theft of tires from a freight car in transit at Pine Bluff on October 5, 1975. Carrier scheduled the hearing for November 12, 1975 by letter dated October 22, 1975. On November 10, 1975, the General Chairman, at the request of one of the Claimants, asked for postponement of the hearing to a mutually agreeable date because of the fact that the Claimant was scheduled to appear in criminal court for the same matter on

November 12, 1975. Carrier agreed to this postponement. Thereafter, by letter dated December 29, 1975, Carrier rescheduled the hearing for January 7, 1976 and, after the conclusion of the hearing, by letter dated January 14, 1976, Carrier's officer notified Claimants of their dismissal from service as a result of the evidence developed during the hearing.

Procedurally, the employes contend that Carrier violated the provisions of the controlling agreement, and particularly Rule 24 - 1, when it removed the claimants from service and thereafter failed to promptly hold a hearing as the rule so stipulates. Award 6541, between the same parties, is cited for support. Carrier defends its position regarding this issue on the basis that the hearing was not scheduled until November 12, 1975 because both of Claimants' accusers, the Railway's Special Agents, could not be present until that date, and that this was the basis for the further postponement until January 7, 1976. Carrier further points to the facts that the hearing originally was scheduled for November 12, and postponed at the Claimant's request so that it would not conflict with his court appearance on the same offense.

In discussing this procedural issue, we first of all highlight that the charges against both employes were serious. Under a host of previous decisions from this Board recognizing the difference between criminal proceedings and internal, railroad disciplinary proceedings, the two matters here were separate proceedings and the outcome of one may not necessarily affect the outcome of the other. Nevertheless, Carrier favored Claimant's request for a postponement of the disciplinary hearing so that he could appear at the court to defend himself against criminal charges. Carrier certainly cannot be faulted for this favor it extended to Claimant.

Secondly, we have reviewed the findings of Award 6541, cited by the Organization for support of their position. There, we found that a delay of 16 days to the date of hearing and a delay of an additional 13 days for rendering the decision was, under the circumstances, excessive. In that case, however, Carrier merely assessed the employe 45 demerits as a result of its conclusions following the hearing and permitted him to return to work as soon as it rendered its decision. As we said, we found there that "under all the circumstances of this case, (underscoring ours) ... the 29 days suspension in fact ... exceeded the limits of promptness ..."

We do not quarrel with the findings of that decision as it applied to the facts and circumstances therein. Here, however, the Claimants were charged with one of the most serious, if not the most serious, offense - an offense, which, if proven, normally results in discharge. Thus, it was imperative that they have the right to face both of their accusers, the Railway's Special Agents, at the same time, to preserve every possible right of due process which they might have under the agreement.

We also find that Rule 24-4 of the agreement between the parties protects Claimants' right thoroughly in the event their suspension or discharge is found to be unjust:

> "If it is found that an employee has been unjustly suspended or dismissed from the service such employee shall be reinstated with his seniority right unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal." (Underscoring ours)

We conclude that these two factors discussed, supra, preserved Claimants' procedural and substantive rights under the contract and insured that they received a fair and impartial hearing. Claimant, himself, consented to the postponement by requesting that the hearing be rescheduled to a mutually agreeable date so that he could appear in Court to answer to criminal charges. In Third Division Award 17167, this Board held:

> "Therefore, the question to be resolved is whether Claimant and Carrier mutually agreed to the postponement of the investigation thereby waiving the ten (10) day requirement of Rule 63(a).
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> We find that the two parties did mutually agree to waive Rule 63(a). In Carrier's letter of July 19, Claimant was apprised of the postponement and the reason therefore. Claimant is presumed to know the provisions of the Agreement as well as the Carrier. If postponement of the investigation would have been prejudicial to Claimant or unduly penalized him, Claimant had ample time to object to the postponement. If he had objected, then obviously there would have been no mutual agreement to waive Rule 63(a) as it pertains to the ten (10) day requirement.
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> However, Claimant's failure to object to the postponement would lead a reasonable man to believe that Claimant agreed to the postponement. Therefore, the provisions of Rule 63(a) as regards the ten (10) day limit are waived.
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> Furthermore, we can find no arbitrary or capricious action by the Carrier with respect to the investigation that would warrant this Board to overturn the findings of the investigation nor the penalties imposed against Claimant."

These findings were followed by Third Division Award 18523.

In Third Division Award 18536, we held:

"Carrier, furthermore, had the right to hold Claimant out of service pending completion of the investigation, since the alleged offense was an act of grossest disloyalty, which, if proven, would justify Claimant's dismissal, as well as being a Federal crime. Claimant was protected in this regard by Rule 31, which allowed for his reinstatement with pay for time lost, if he was later exonerated of the charges. Consequently, Claimant was not deprived of any rights guaranteed him by the Agreement."

In First Division Award 20 163, we held:

"The carrier had unquestioned authority to take an employe out of service in a serious offense when a prima facie case of wrongdoing had been established, pending the final determination of the charges. The record indicates this was the clear intention of the carrier. It appears to the Division to be ill advised to allow the loose and inept use of the word 'suspended' to taint the whole investigatory proceedings, especially when there is contractual protection to make whole an employee wrongly taken out of service."

We thus conclude that, under the facts and circumstances of this case, the hearing was held as promptly as possible following the time Claimants were withheld from service and that the Claimants were otherwise sufficiently apprised of the charge against them and received a fair and impartial hearing.

Turning to the merits, we find more than substantial evidence establishing Claimants' guilt. Testimony of Carrier's two special agents was clear and convincing that they observed the Claimants in a truck driving to the location of the freight car containing the tires, place the tires in the rear bed of the truck, and then begin to drive off the property. It was at this point that both of them were apprehended, and we find that Carrier has made a prima facie showing that Claimants were guilty as charged.

There remains for us to discuss the appropriateness of the discharge penalty. We have consistently held that an act of theft, in any form, if proven, justifies the discharge penalty, and we adhere to that principle here.

A W A R D

Claims denied.

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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 23rd day of June, 1978.