Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7962
SECOND DIVISION Docket No. 7835
2-ICG-CM-'79

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

Parties to Dispute: (System Federation No. 99, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Illinois Central Gulf Railroad

Dispute: Claim of Employes:

1. That under the current agreement Car Inspectors Lloyd Coleman and John Ealey, were unjustly suspended from service of the Illinois Central Gulf Railroad on August 7, 1977 and subsequently improperly discharged.

2. That under the provisions of Article V of the National Agreement dated August 21, 1954, the Carrier failed to be complete and concise in their reason for declining the claim in letter from the Master Mechanic Toon addressed to Local Chairman Loebert in letter dated September 21, 1977.

3. That accordingly the Carrier be ordered to restore Car Inspectors Lloyd Coleman and John Ealey to service with seniority and other rights unimpaired with pay for time lost and all other benefits they would be entitled to as a condition of employment, plus six percent (6%) interest on 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.

Two Claimants were charged with attempted theft for allegedly removing without authorization five (5) "Citation" automatic electric skillets and four (4) "Brother" electric typewriters from a box car (N&W 55952), in interstate shipment while in F Yard in Markham. Claimants were adjudged guilty as charged following a formal investigation held on August 18, 1977 and were notified of same and dismissed from service of the Carrier in a letter dated August 24, 1977.

The significant facts associated with the surrounding circumstances on date of August 7, 1977 are in dispute. It has been established however, that the Claimants, both car inspectors, were on duty working the afternoon shift, beginning 3:45 PM and ending 11:45 PM, on date of August 7, 1977. At approximately 5:00 PM, August 7, 1977, special agent G. J. McGee, entered Markham F Yard to check box car N&W 55952. In the course of locating and then approaching said box car by automobile, McGee noticed the presence of a person standing by the doorway on the opposite side of the box car and then observed a person bending over and placing a box on the ground. Concluding that he was viewing a burglary in progress, McGee radioed control and requested assistance. McGee then exited his automobile and according to McGee, as he did so, he observed a person jumping down from the box car onto the ground. McGee testified he then noticed two persons bent down looking under the box car and in his direction. McGee further testified he noted what each of the two persons were wearing and that when the two subjects had looked at him from underneath the box car he was able to see their faces. McGee stated he then announced his office and began moving in the direction of the subjects and as he did, the subjects turned and fled. McGee related he pursued the two subjects and at one time he got within twenty-five (25) feet of them. Shortly thereafter, while in hot pursuit, the two subjects split up, each running in opposite directions. McGee pursued one of the subjects and according to his testimony he was successful in apprehending the subject. About this time, the back-up officer McGee had requested arrived on the scene and McGee directed officer Borrell to pursue the other subject. Borrell however, was unsuccessful in his attempt to locate the other person. McGee then returned to F Yard to view the scene of the burglary and in the course of doing so, McGee testified he spotted the other subject in the company of two other carmen and proceeded to arrest him. The Homewood, Illinois police were notified of the incident and shortly thereafter, an officer of the Homewood police arrived at the Yard and transported the two subjects to the police department. Both subjects were charged by the police with burglary and possession of burglary tools and were held for bond hearing the following morning, August 8, 1977. Carrier's shift commander called in Investigator Weinstock who interrogated the subjects further at the Homewood Police Department.

The two subjects apprehended were identified as Lloyd Coleman and John Ealey, Jr., the two Claimants in the instant case. Subsequently, the legal charges brought against the Claimants were dismissed in Court on the basis that there was insufficient evidence to justify a verdict of guilty.

The Organization contends that neither of the two Claimants are guilty of the burglary in question, though the Organization acknowledges that a burglary indeed did occur. The Organization takes the position that the Claimants in effect were set-up (framed) by Carrier's special agents as retribution for their having written and co-signed a letter along with a third carman, in which the three complained to their local union that the special agents on the property were threatening them with loss of their jobs, harrassing and intimidating them. This letter was dated February 20, 1976, which preceded the Claimants' arrest by approximately six months.

The Organization maintains that under the circumstances, as set forth in the record of testimony, it was not possible for special agent McGee to make a positive identification of either Claimant. This the Organization contends is so for two reasons:

(1) McGee at first was too far away from and on the opposite side of the box car (N&W 55952), to see other than a pair of legs standing by the box car doorway; and

(2) McGee at no time assumed a prone position enabling him to see underneath the box cars situated on the intervening tracks (about five), between himself and the box car in question. Thus casting doubt on his ability to see, as he testified he did, the Claimants' faces.

The Organization further notes, the Claimants have advanced an altogether different version of the surrounding circumstances of August 7, 1977, particularly as they relate to the Claimants' whereabouts during the time of the alleged burglary. Therefore, the Organization maintains, that since McGee was not in a position to make a positive identification of the subjects and since there is testimony by Carman Barnes supporting both Claimants' stories as to their whereabouts, this shows Claimants were victims of a conspiracy perpetrated by the special agents.

Notwithstanding the merit of its position however, the Organization argues quite forcefully that the Claimants' dismissal should be overturned solely on the basis of a procedural error committed by the Carrier. It is the Organization's position that the Carrier violated Article V of the National Agreement dated August 21, 1954 as well as the Carrier's own procedural requirements as set forth in Form SC-1 in its handling of the claim on the property. Specifically, the Organization asserts, the Master Mechanic was not a member of the Board of Inquiry which conducted the investigation on August 18, 1977, but rather was merely an observer at the hearing. The Organization supports this position by noting that the Master Mechanic at no time during the hearing participated in any way either by asking questions or making any other utterances. In being merely an observer, the Organization contends that the Master Mechanic was the appropriate Carrier official to handle the appeal at the first stage level. Instead, the Organization contends, the Master Mechanic refused to handle the appeal and advised the Organization to submit the appeal to the next highest Carrier officer.

The Carrier refutes the notion of any conspiratorial action taken against the Claimants and asserts that the evidentiary record is substantial in supporting the finding of guilt on the part of both Claimants. The Carrier notes for the record that the weight of evidence applied in court proceedings and that which is used in investigations conducted by the Carrier is not the same. Thus, even though the legal charges of burglary brought against the Claimants were dismissed by the Court, the Carrier maintains the preponderance of the evidence developed at the formal hearing of August 18, 1977, sufficiently proved the Claimants guilty of attempted theft.

As to the Organization's position alleging a procedural defect, the Carrier contends this position is not only untenable but also without merit. The Carrier argues that it was in complete compliance with the established claim handling procedure as spelled out in the SC-1 Form. In support of this position, the Carrier points to the cover page of the transcript of the August 18, 1977 investigation and notes that the Master Mechanic is clearly listed as a member of the Board of Inquiry.

In addressing the procedural issue first, this Board rules that the Master Mechanic was, in fact, a member of the Board of Inquiry rather than a mere observer. As such, the Master Mechanic's response to the Organization's first level appeal was therefore proper and was neither violative of Article V of the National Agreement of August 21, 1954 nor of Form SC-1.

Having dismissed the procedural issue, the Board shall now consider the case on its merits. Undisputed is the fact that an attempted burglary did occur on August 7, 1977. Though legal charges brought against the Claimants for possession of burglary tools and attempted burglary were subsequently dismissed by the Court, the Board points out the well established principle that the standard of proof required in legal proceedings is of a greater weight than the preponderance of evidence standard applied at investigatory hearings. Notwithstanding the fact that neither of the two Claimants were observed in the actual act of stealing, this Board believes from a thorough review of the record, that more than a reasonable presumption can be drawn that the Claimants are guilty. Notwithstanding too, the seriousness of the crime, this Board does note however the existence of certain mitigating circumstances such as: the alleged harassment of Claimants by the special agents on the property six months prior to their arrest; each Claimant's long tenure of service with the Carrier, twenty-six (26) and twenty-two (22) years respectively; as well as the fact that each Claimant's work record over the years has been good. By taking these mitigating circumstances into account, we feel that even though the record contains substantial enough proof of the Claimants' guilt, dismissal of the Claimants appears to be excessive. Therefore, we rule both Claimants be reinstated without back pay or other benefits.

A W A R D

Claim disposed of as indicated in the Findings.

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 13th day of June, 1979.

DISSENT OF LABOR MEMBERS TO AWARD NO. 7962 - DOCKET NO. 7835

The controlling Agreement provides in pertinent part:

> "In discipline cases, if appeal is to be made, the appeal should be made to the officer shown herein who is immediately superior to the officer who held the investigation - and/or assessed the discipline."

The General Foreman held the investigation and assessed the discipline. It was his decision that was appealed to the Master Mechanic. The Master Mechanic failed to render a decision on the appeal, alleging he was part of the "Board of Inquiry". At the hearing, the Master Mechanic asked no questions, made no comments, nor uttered a single word.

The Majority in defending the Carrier alleges that the Master Mechanic was part of the "Board of Inquiry", which is a phrase not found in the Agreement. But upon what did he inquire? He asked no question, nor did he participate in the investigation in any manner. His subordinate rendered the disciplinary decision.

The Majority, in denying the claim, has added language to the Agreement which is prohibited by the Railway Labor Act, and misinterpreted the language it added. The Carrier should have, under Article V of the National Agreement, dated August 21, 1954, been ordered to allow the claim as presented which would make Claimants whole for the time held out of service.

DISSENT TO AWARD 7962

For the failure of the Majority to so hold, we must dissent.

C. E. Wheeler
Labor Member