

The Second Division consisted of the regular members and in addition Referee Ralph W. Yarborough when award was rendered.

Parties to Dispute: (System Federation No. 114, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Southern Pacific Transportation Company

Dispute: Claim of Employees:

1. That under the current agreement Carman Joseph Mirrione, herein-after referred to as the Claimant, was unjustly deprived of his service rights and compensation when he was improperly discharged from service under date of April 29, 1976 after thirty five (35) years of service with the Carrier.
2. That the Carrier be ordered to:
 - (a) Restore the aforementioned Claimant to service with all service and seniority rights unimpaired, and be compensated for all time lost retroactive to April 29, 1976 when he was unjustly removed from service.
 - (b) Grant to the Claimant all vacation rights he would have had, had he not been removed from service.
 - (c) Assume and pay all premiums for hospital, surgical and medical benefits, for Claimant and dependants. Including all costs for life insurance.
 - (d) Pay into the Railroad Retirement Fund the maximum amount that is required to be paid for an employe, for all time he is 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.

Carman Joseph Mirrione, hereinafter referred to as "Claimant", was working as a car inspector at Carrier's car receiving and inspection yard at San Jose, California, on February 9, 1976, where the event took place that finally resulted in this case's reaching this Board.

At about 2:10 P.M., that day, Investigator G. S. Biroschik of the Southern Pacific Police Department, stopped Claimant and Southern Pacific employee Laborer J. J. Jarone in the San Jose Yards, while they were driving a white Chevrolet pickup truck in which Officer Biroschik found eight cases of liquor. Claimant contends that said employees found the liquor abandoned in an empty car they were cleaning, and that they were enroute to the Southern Pacific Yard Office to turn it in when they were stopped by Inspector Biroschik. Carrier's Police Department contended that the liquor had been stolen out of a larger shipment in another car, was concealed in the pickup truck under plywood, and that Claimant had driven fast, taken evasive action, and tried to escape when apprehended.

Two days after being stopped by Officer Biroschik, by notice dated February 11, 1976, Claimant was notified to be in the office of the Terminal Superintendent on Friday, February 13, 1976, "For formal hearing in connection with your allegedly having in your possession at approximately 2:10 P.M., February 9, 1976, stolen property which was illegally removed from rail car SSW28603 on that date while you were working assignment numbers 109 and 101 respectively, which may involve a violation of that part of Rule 801 reading: "Employees will not be retained in service who are ... dishonest ..."

Claimant was notified that he was entitled to representation at the hearing and to bring such witnesses as he desired. The hearing was postponed from time to time, until February 26, 1976, at which time a day of hearing was held, when the hearing was recessed because of a hearing to be held in the Courts on charges against Claimant, and the Carrier's hearing was resumed on April 12, 1976. The charge in Court against Claimant was reduced from a felony burglary to a misdemeanor charge but the ultimate outcome of that case does not appear in the record.

At a full and lengthy hearing, conducted by Terminal Superintendent W. B. Blevins, at which Special Agent W. J. Teel, Inspector R. R. Lonning, Patrolman R. R. Wakefield, and Investigator G. Biroschik gave incriminating evidence against the Claimant, the Claimant called as witnesses D. C. Clare - Relief Car Foreman, and F. B. Vaughn - Car Foreman. Claimant's witnesses, the two railway employees, testified to general rules and methods of car inspectors, not directly as to whether he was guilty or not.

Claimant was called as a witness in his own behalf. He refused time after time to testify in his own behalf saying: "Under my attorney's advice."

The testimony had shown that there had been pilferage from liquor shipments at this yard for some time prior to the date in question. When orders came that two carloads of liquor were en route to this Yard, an action which had been in planning stages since August 28, 1975 was implemented, and Carrier had two officers stationed at the east end of the Yard, and Special Agent W. J. Teel and Inspector Lonning were concealed in the FMC Security Station at the West end of Rail 26, on which the liquor car was spotted, and from which station the Officers were using a video camera trained on the area in question. From 10:30 A.M., February 9th, they had the liquor car under video camera surveillance; at 2 P.M., a white pickup truck pulled near the box car, and the two men "Appeared to be removing something from an empty car on the extreme west end of Rail 27 and placed it in the pickup," and then took a large 4 X 8 sheet of plywood and set it in the back of the pickup. At that time Special Agent Teel who was monitoring the video equipment, instructed Officer Biroschik to go to the area and see what was happening. As Biroschik approached the white pickup truck, two men got in it and drove away, driving rapidly, taking evasive action with a number of turns, apparently attempting to shake off Biroschik. They were stopped by Inspector Biroschik who found the eight cases of liquor in the pickup truck. Claimant was one of the two men. When Inspector Biroschik questioned the Claimant Mirrione and the second man, "They both acted very nervous and stated that they were picking up heaters". At no time did they mention any liquor in the vehicle.

There was voluminous evidence from the Officers who were staked out watching the yard that day. Some of the testimony was not as exact as might have been expected from such experienced Officers, but it was sufficient to convince the officials of the Carrier that they had stopped an unlawful pilfering that day of property being shipped over their lines.

On April 29, 1976 Carrier advised Claimant in writing that the evidence adduced at the formal hearing at San Jose, California established Claimant's responsibility in having in his possession stolen property which was illegally removed from Rail Car SSW-28603, and that these actions constituted a violation of that part of Rule 801 of the General Rules and Regulations of the Southern Pacific Transportation Company reading: "Rule 801: Employees will not be retained in the service who are...dishonest...". "For the reasons stated, you are hereby dismissed from the service of the Southern Pacific Transportation Company."

There is substantial evidence of probative value in the record to sustain the finding by the Carrier, and the action taken by it. The criminal law rule requiring a finding "beyond a reasonable doubt" does not apply under the governing rules between the parties. The rule here requires that there be substantial evidence of probative value. That burden has been amply met. Claimant refused to accept the offer to testify to rebut any of it. Consequently there is no basis for the relief requested by the Claimant.

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 8th day of August, 1979.