

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(The Washington Terminal Company, Washington, D.C.

Dispute: Claim of Employees:

1. That the Washington Terminal Company violated the controlling Agreement when they unjustly and improperly dismissed Car Cleaner Linder Bush from the service as a result of an investigation held on December 13, 1979.
2. That accordingly the Washington Terminal Company be ordered to restore Mr. Bush to service of the Company with all rights unimpaired and compensated for his net wage loss due to this capricious action of the Carrier in line with rule 29.

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.

The facts of the instant dispute are generally uncontested.

At approximately 9 A.M. on November 27, 1979, Claimant, a Car Washer at Carrier's Union Station, Washington, D.C., was observed by Carrier's Security Officer "...emerging from the east side of Platform #13 and #14 at the north end of the platform carrying a ladies (sic) beige shoulder bag on his shoulder." Claimant proceeded to the employes' locker room, which is located on the second floor of the Transportation Building, and was followed there by said officer. Upon emerging from the locker room, Claimant, who did not have the hand bag in his possession at that time, was confronted by the Security Officer who requested that Claimant return to his locker and open it for inspection. Claimant complied and, with his Union representative present, the locker was opened and the subject hand bag was found therein.

As a result of said incident, Claimant was charged with "stealing" of the "...shoulder bag which had been reported lost by a passenger (on) November 25, 1979". Pursuant to a hearing, which was conducted on December 13, 1979, Claimant was adjudged guilty as charged and was terminated from Carrier's service. Said termination is now the basis of these proceedings.

So that the background portion of this award may be complete, the record further shows that in 1977 Claimant was discharged by Carrier for violation of Rules O, K and N; it being charged, in major part, that Claimant was "...absent from duty without permission". Subsequently, however, following the appeal of this matter to the National Railroad Adjustment Board, Claimant was reinstated to service in September of 1979 without back pay by order of Second Division Award 8117.

Organization's basic position in this matter is that Claimant's hearing was conducted unfairly and thus was in violation of Rule 29 of the parties' controlling collective bargaining agreement; and that "...Carrier failed to prove its allegations that (Claimant) stole or intended to steal the lost/found bag" (Second Division Awards 1198, 3869, 4046, 4338, 6713, 6957, 7172, 7465, 7606, 7634, 7663, 7784, 7974, 8082 and 8197).

Organization specifically contends that Carrier's Hearing Officer was not impartial in the conducting of the investigation hearing because he "...persisted in asking Claimant leading questions" which "...were phrased...in such a manner as to assure Claimant's conviction and the resulting discipline". Additionally, Organization asserts that Claimant intended to turn the hand bag into Carrier's Lost and Found Department but, because he had been disciplined previously for leaving his work assignment without permission, Claimant merely placed said bag into his locker for safe keeping until his 4 P.M. quitting time. In support of the latter proposition Organization further posits that Claimant: (1) "...made no attempt to hide the bag..." when he was carrying it to his locker; (2) "... that he willingly opened his locker and gave the bag to the Security Officer"; and (3) that he immediately explained the incident to the Officer and his testimony has been consistent throughout this matter.

Stated simply, Carrier denies that Claimant's hearing was conducted unfairly or improperly, and further implies that Organization's contention in this regard is very weak and "evasive".

As for the merits portion of this dispute, Carrier asserts that Claimant, without question, was guilty of stealing ("When the Claimant placed this passenger's shoulder bag in his locker, he was guilty of theft"); that Claimant's defense for his actions is "hard to believe" and "lacks credibility"; that dishonesty is a dismissable offense (Third Division Award 22791); that Carrier's action herein was neither arbitrary, capricious or an abuse of discretion; and that, because of the substantial evidence which has been presented to support Claimant's guilt, Carrier's discipline should not be disturbed by the Board.

From the outset, a careful and thorough examination of the complete record which has been presented in this matter convinces the Board that Organization's procedural objection to the conduct of Claimant's hearing is without merit and that while Claimant's actions herein can indeed be characterized as being the "epitome of exceedingly poor judgment", by the same token, however, the Board is similarly convinced that Carrier has failed to sustain its burden of proof with the requisite quantum of clear and convincing evidence, and thus has failed to prove that Claimant "stole" the passenger's lost hand bag or "intended to steal" same. The totality of Carrier's adduced evidence merely shows that Claimant had the disputed hand bag in his possession and that said item did not belong to him. While there assuredly

were any number of reasonable, alternate courses of action which Claimant could have pursued and which, undoubtedly, would have readily resolved the dilemma which he was confronted by on the morning of November 27, 1979, Claimant's previous two years suspension without pay, which was effectuated because of a somewhat related situation, was a most powerful influencing factor which might well have operated to distort Claimant's otherwise normally functioning judgmental faculties. Though Claimant must ultimately bear the major burden of the responsibility for the unfortunate situation which has arisen, Carrier's failure to take into consideration the aforesaid two years suspension when attempting to ascertain Claimant's guilt in this matter is itself evidence of arbitrariness and impropriety on Carrier's part, and warrants a reconsideration and recession of the discharge penalty which has been assessed.

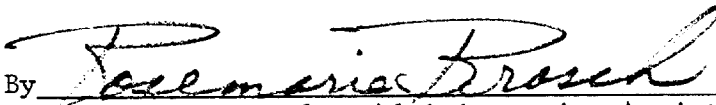
For the reasons posited above, Claimant shall be returned to service with all normally accrued rights and benefits restored, but without back pay.

A W A R D

Claim sustained in accordance with findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 22nd day of July, 1982.