

Award No. 10790

Docket No. CL-12696

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roy R. Ray, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

THE UNION TERMINAL COMPANY — DALLAS

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4974), that:

(a) The Carrier's dismissal of Worth Carter on August 25, 1960, was arbitrary, unjust and in abuse of its discretion.

(b) That Worth Carter be restored to his former position of Red Cap without impairment to his vacation, seniority and other employee rights and that he be paid for all wage losses sustained from August 25, 1960, until restored to position of Red Cap.

OPINION OF BOARD: The Claimant, Worth Carter, was employed as a Red Cap Porter by the Union Terminal Company, Dallas, Texas from July 15, 1946 until August 25, 1960. On the latter date he was dismissed from Carrier's service charged with: handling "a piece of baggage without first strapping it, and with handling two pieces of baggage under strap checks which were not proper to be used". Both violations were alleged to have occurred on August 25, 1960. After a hearing on September 6 the Hearing Officer found that the evidence sustained the charges and upheld the dismissal. An appeal to the Vice President and General Manager was denied on September 14, 1960. After several conferences between the General Chairman and the Carrier's Vice President the latter declined on May 16, 1961 to reinstate Claimant. No contention is made concerning the timely handling of the claim on the property.

Turning first to the charge of using improper strap checks on two bags on the 25th, the Carrier, in its submission charges in effect that Claimant used the two checks on the 25th after having already used them on the 24th and thereby pocketed fifty cents which he collected for the improper use of the checks a second time, thus defrauding the Carrier. Claimant admitted using the checks on the 25th but denied using them on the 24th. Carrier's only evidence in support of this charge is that Claimant was issued a group of checks on the 24th which included the two checks in question and that at the end of the day he turned in checks beginning with a sequence of numbers higher than these two checks. The ticket clerks do not check the numbers on

the individual strap checks turned in by the Red Cap nor do they check the numbers when the checks are reissued to the same Red Cap the next day. Instead they check only the first and last numbers on the checks held together by a rubber band. At best this accounting system leaves much to be desired. The record shows that the rubber bands sometimes break and the checks get out of numerical order. Claimant testified that his did break on the 24th and that the checks may have gotten out of order and that he could have used two other checks and turned in the two checks in question by mistake. Furthermore Carrier's own witness testified that if the strap checks had been securely fastened to the bags by the snap locks on the 24th they could only have been removed by tearing and would not have been usable on the 25th.

This Board does not weigh evidence. But where the record is devoid of any substantial evidence, which if believed, would support the Carrier's finding it cannot be permitted to stand. In this case a careful reading of the record convinces the Board that there is no evidence, which if believed, would support the charge that Claimant used the two checks on both days or that he misappropriated any of the Carrier's funds.

The first charge, that Claimant failed to strap a bag on August 25, 1960 is established by the evidence and frankly admitted by the Claimant, who explains it as an unintentional oversight in the rush of handling a large number of bags. Nevertheless, it is a violation of Carrier's rules set forth in Circulars 10, 25, and 46 with which Claimant was familiar. The Carrier takes the position that this violation alone is sufficient ground for dismissal, and points to serious consequences which it says will follow if such violations are permitted to go without disciplinary action.

The Organization contends that the action of the Carrier is arbitrary and unjust and that the penalty assessed is harsh and excessive and out of all proportion to the offense involved.

The Carrier counters with the argument that where as here the violation is established the Board should not disturb the penalty fixed by the Carrier and in this connection urges that the claim is in reality a plea for leniency. The latter suggestion is refuted by the fact that this case has been handled throughout by the Organization as one of arbitrary action in assessing an excessive penalty.

This Board frequently has distinguished between a plea for leniency which addresses itself to the Carrier, and the correction of an excessive penalty which is a proper function of the Board. It has recognized that the imposition of an excessive penalty is a violation of the Agreement protecting employees from arbitrary and capricious action by the Carrier. Award 6085 (Whiting). In many awards the Board has not hesitated to overturn discipline which it considered arbitrary, excessive or unreasonable.

To determine whether the discipline in the present case was arbitrary and excessive it is appropriate to consider the nature of the violation. All that is established is failure of Claimant to tag one bag. This could well have been the result of a mere oversight by Claimant in the rush of handling bags from two trains at about the same time. The circumstance that Claimant received the bags in the presence of the Carrier's Assistant General Manager, of whose presence he was aware, is more consistent with an unintentional error on his part than it is with a designedly fraudulent act. There is no evidence in the record which, if believed, could support a finding of fraudulent or criminal intent on the part of Claimant.

The Board recognizes the necessity for strict rules by the Carrier concerning handling of baggage and that violations of such rules warrant disciplinary action for the purpose of deterring future violations. While the Board in no way condones the violation by Claimant, and believes the offense sufficiently serious to justify some discipline, under the circumstances here it considers the maximum penalty of dismissal from service as arbitrary and excessive.

Taking into consideration the nature of the offense and Claimant's fourteen year record of service without prior disciplinary action the Board feels that the time Claimant has been out of service constitutes a sufficient discipline. Therefore, it is directed that Claimant be restored to service with all rights unimpaired but without monetary compensation for time lost.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds;

That the parties waived oral hearing;

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as approved June 24, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the discipline assessed was arbitrary and excessive.

AWARD

That Claimant be restored to service with all rights unimpaired but without monetary compensation for time lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of September 1962.