Award No. 13130
Docket No. CL-14805

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Daniel Kornblum, Referee

PARTIES TO DISPUTE:

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

JACKSONVILLE TERMINAL COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5503) that:

(a) The Carrier violated the Agreement when it dismissed Marion Crawford from its service on charges not proven.

(b) Marion Crawford shall now be restored to Carrier's service with seniority and all other rights unimpaired and shall be compensated for all losses sustained as a result of his wrongful dismissal.

OPINION OF BOARD: This is a discipline case. On June 7, 1963, Claimant was notified in writing that he was charged:

> ". . . with dishonesty in violation of that portion of Rule H of General Rules pertaining thereto, upon the allegations that you did while on duty in the baggage room at approximately 11:50 o'clock p.m. on June 5, 1963, take and drink two ½ pints of milk from the Atlantic Coast Line Railroad's Dining Car Department cold drink box."

There followed an investigation on the property at which Claimant admitted on the record that he had been given "every opportunity" both to present any witnesses he desired as well as to examine those produced by the Carrier. In consequence of the investigation the Claimant, a Baggage and Mail Loader, was found guilty as charged and by letter of June 24, 1963 was notified of his dismissal from service.

The essential facts developed by the Carrier's witnesses at the investigation are concise and clear. It seems that for sometime prior to June 5, 1963, there had been pilferage of both baggage and food supplies left at the Jacksonville Terminal where Claimant was assigned. The latter items came from the Dining Cars of two Atlantic Coast Line trains which completed their runs at this Terminal; the food, representing unused items, would be left at the Terminal overnight to be picked up the next morning when the trains would resume their runs. Persistent complaints from the Atlantic Coast Line Dining Car Department led the Terminal's Assistant Agent, Baggage and Mail Department to activate the Special Agents of the Carrier to "make special effort to observe the baggage room operation at every opportunity."

On the evening of June 5, 1963, the Chief Special Agent and his Assistant stationed themselves at a surveillance point about 400 feet distant from the baggage room where they could observe what went on in and around those premises. They were equipped with powerful field glasses. At about 11:50 P. M. they both observed the Claimant reach his arm into a cold drink box which had been left in the baggage room for overnight safekeeping from ACL train #17; remove two ½ pint cartons of milk from the box; consume the same on the premises and then deposit the two empty cartons in a box or chute atop an air compressor in the baggage room. The Special Agents did not proceed to apprehend the Claimant in the act. Instead they immediately called the Assistant Agent in charge of the Baggage and Mail Department and within about five minutes all three went to the baggage room where they picked up the two empty milk cartons which the Special Agents said Claimant had just discarded. All three reported that the cartons were still damp and cool and carried the same dairy brand name as the milk left in the cold box. The two cartons were returned by the Special Agents and produced at the investigation. There was also confirmatory testimony from the Dining Car Porter that the next morning, when checking the contents of the cold box, he found that it was missing two cartons of milk of the whole number left there on the night before.

The only testimony to challenge that of the Carrier's witnesses came from the Claimant himself. He heatedly denied that he had taken and consumed the milk in question. By innuendo he suggested that since there were other employes then working in the baggage room it could have been a case of mistaken identity. He sought support for this innuendo in the conceded fact that the Special Agents did not see fit to apprehend him in the act, although admittedly they were near enough to the scene to have done so.

The two Special Agents had no misgivings about their identification of the Claimant. In their reports made soon after the episode, as well as later on the stand, they were both "positive" it was Claimant they saw. Indeed, assisted as they were by field glasses, one of the Agents testified that when the Claimant "looked up he could count his teeth."

It should be noted that at the time of his dismissal Claimant was then Local Chairman of the Brotherhood. On argument of this appeal it was strongly suggested by the Brotherhood's representative that Claimant's prominence in Union activity was a factor which motivated the Carrier in its dismissal of the Claimant, an employe with eleven years of prior service with it. However, there is not a scintilla of evidence in the record which shows that the Carrier was in any way influenced by this factor in meting out the penalty it imposed.

As to the impartiality and fairness of the investigation, the Brotherhood stresses in particular two points which it suggests render the Carrier's evidence deficient and defective. The one is that the Carrier's Hearing Officer at the investigation himself read into the record the separate reports of the three principal witnesses who testified for the Carrier. Not only does the Brotherhood feel that this was an "irregularity" which reflects on the propriety of the conduct of the hearing, but also renders the evidence entirely documentary and circumstantial in character so as to permit this Board to reject it **in toto** (citing Awards 10791 and 5277). Neither as a matter of law or fact is this point well taken. The witnesses' reports were produced at the investigation and indeed copies of each were given to the Claimant. More importantly, their respective authors were each present at the hearing, each acknowledged their authorship, attested as to their truth and accuracy, and submitted themselves to cross-examination thereon. The mere fact that the reports were read into the record by the Hearing Officer rather than simply received and marked as

exhibits impairs neither their efficacy or authenticity. Nor does it change what they represent from direct to circumstantial evidence.

The Brotherhood's suspicions as to the fairness of the hearing are also aroused by the fact that each of five documents received at the investigation as exhibits and allegedly authored by different persons "have an introductory paragraph which is in fact a sentence fragment, etc.". The implication seems to be that this common "peculiarity" means that the documents were in fact written by the same person and not by their several putative authors. This is speculation, pure and simple. The mere fact that the contents of each of these documents may begin with a dangling participle, followed by an incomplete sentence, only reflects a common failing of many correspondents in their knowledge of grammar. Certainly it has nothing to do with the authenticity of the documents or the weight to be ascribed to them.

One other point is worthy of mention. While the Employes acknowledge that they "do not condone thievery", they stress the fact that on the basis of the evidence here a duly elected representative of the Brotherhood was discharged "on Carrier's contention he took 2 half pints of milk—a retail cost of about 15¢!!!" Unhappily in a charge of this serious kind the worth of the items in question is not the bellwether of the import of the offense. As has been observed (Award 2646, Shake): "The comparitively small value of the articles involved is not a mitigating circumstance" (See also, Award 2696, Carter; Award 8715, Weston; Awards 9214-9215, Schedler; Award 10900, Boyd). And here it must be remembered that the subject charge arises in the context of a series of pilferage incidents involving the same baggage room.

On the basis of the entire record we find that (1) the findings of guilt as charged are supported by substantial evidence, (2) the investigation was impartially and fairly conducted, and (3) the disciplinary action meted out was not excessive.

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;

The the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

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

That the Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of December, 1964.