



Award Number 17597

Docket Number CL-18247

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Don Gladden, Referee

PARTIES TO DISPUTE:

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

JACKSONVILLE TERMINAL COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6608) that:

- (a) Carrier violated the agreement when it dismissed T. N. Tankersley from its service effective May 27, 1968.
- (b) T. N. Tankersley shall now be restored to Carrier's service with all seniority rights unimpaired and payment for all wage loss until returned to the service.
- (c) Claim for appropriate payments which should have been made in his behalf for any benefits which would have accrued to him under Group Policy Contract No. GA-23000 with the Travelers Insurance Company, Hartford, Conn.

OPINION OF BOARD: This is a discipline case. Claimant was dismissed for:

"... bringing the Jacksonville Terminal Company into disrepute under Rule H in that you were party to concealing two minors April 25, 1968 and the transporting of the two minors from Jacksonville, Florida April 26, 1968 with knowledge that search was being made for the minors."

Rule H is a unilaterally adopted rule of the Jacksonville Terminal Company purporting to regulate the conduct of its employees. Rule H reads in full as follows:

"H. Disloyalty, dishonesty, desertion, intemperance, immorality, misconduct, loafing, insubordination, incompetency, willful neglect, inexcusable violation of the rules, making false statements, concealing facts concerning matters under investigation, altercation or fighting between employees on the company's property, whether on or off duty, or any act as a citizen which brings the Jacksonville Terminal Company organization into disrepute, will subject the offender to summary dismissal."

It is undisputed that the conduct complained of by the Company took place off the property of the employer, while the employee was off duty and did not grow out of his employment.

This Board said in Award No. 6332 (Smith):

"* * * What an employe does when off duty and not on the property of his employer is no concern of an employer and will not warrant disciplinary action unless such acts impair his ability or render him unfit to perform his duties after reporting for duty. * * *"

Awards 2991 (O'Malley), 3411 (Tipton) and 8689 (Lynch) also support this position. It is contended by the employer that conduct on the part of an employe, though off duty and off company property may be made the basis of disciplinary action if such conduct brings the company into disrepute.

The Company cites Award No. 11052 (Dolnick) in support of this contention. We quote from that Award:

"It is generally recognized rule that an employe may be disciplined for acts done off the property. The test is whether the outside conduct affects the employer-employe relations. What conduct affects such relationship depends upon the situation in each case.

The conduct of Claimant and her conviction on a charge of receiving stolen property was embarrassment to the Carrier. Not only did her conviction adversely affect the employer-employe relationship because Claimant spoke to and met persons who had business with the Carrier, but her criminal act directly involved a valued customer of the Carrier. Retaining Claimant as an employe after her conviction could have had an unfavorable impact on the Carrier's relations with the B. F. Goodrich Tire and Rubber Company. Claimant's conduct brought discredit to the Carrier."

We do not find any evidence tending to bring the Jacksonville Terminal Company into disrepute. In fact, it appears from the evidence that the entire transaction was concluded to the satisfaction of all parties involved except that of the Terminal Company.

As to Paragraph (c) of the claim for "appropriate payments" which should have been made for insurance coverage, we find no basis in the controlling agreement to support the claim.

It is apparent from this record that the decision of the Jacksonville Terminal Company to dismiss Claimant was arbitrary and unreasonable and the claim (except paragraph (c)) must be sustained.

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 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 Agreement was violated in accordance with the Opinion.

A W A R D

Claim sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of November 1969.

CARRIER MEMBERS' DISSENT TO AWARD NO. 17597, DOCKET
NO. CL-18247

(REFEREE DON GLADDEN)

Award No. 17597 is palpably erroneous in sustaining the claim herein. It is inimical to the public interest, and is not supported by the evidence of record.

Carriers have a legal and moral responsibility to the public to discipline and to exclude the unfit from their service. In *M.St.P.&S.S.M. Ry. Co. vs. Rock*, 279 U.S. 410, the Supreme Court of the United States said:

"The carriers owe a duty to their patrons as well as those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service."

In *T.&N.O.R. Co. vs. Ry. Clerks*, 281 U.S. 548, the Supreme Court said:

"The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the Carrier to select its employees or to discharge them."

In Award 4771 this Division held:

"* * * Upon the management rests the obligation of safe operation of the railroad, the courteous treatment of its patrons and the working conditions of its employees. To maintain that obligation it is necessary that Carrier have the right for proper cause to discipline and to discharge. * * *"

There was substantial evidence presented at the investigation, including the Claimant's own statement, to support the charge against him. Nowhere in the investigation was it denied that the Claimant, with full knowledge that the minor girls were being sought by the Police, deliberately participated in their concealment and transportation to Brunswick, Georgia. The Division has consistently held that it will not attempt to pass upon the credibility of witnesses, or to weight the evidence, but if the evidence is such that, if believed, it supports the findings of the Carrier, the Carrier's action will not be disturbed. (Awards 16444, 16074, 15927, 15025, 14003, 12243, among many others.)

To hold that Claimant's actions did not bring the Terminal Company into disrepute is to ignore the obvious. Jacksonville City Police, Seaboard Coast Line Special Agents and Jacksonville Terminal Company Special Agents were making a physical search of Carrier's property for the two minor girls; employees were being questioned; telephone calls were being made; information was being exchanged and all the while the Claimant, who was aware of

the search for the minor girls and knew their exact whereabouts, did not come forward with any information, but continued to conceal the whereabouts of the girls.

The nature of the Claimant's offense was such that it would naturally occur off the property of the employer and while the Claimant was off duty. Many Awards of this Board, a number of which were cited to the Referee, uphold the right of the Carrier to impose discipline for offenses committed off the property and while off duty. As stated in Fourth Division Award 2127 (Referee Weston):

"* * * Generally, it is true that Carrier's rules and discipline cannot properly extend to off-duty misconduct. Where, however, the acts, even though they occur on an employee's rest day and at his home, are of such a character as to destroy confidence in his basic integrity, self-control and judgment, a different rule will obtain. * * *"

The Referee apparently gave no consideration whatsoever to the nature of the offense of the Claimant, or compared it with the offenses involved in Awards 6332, 3411, 2991 and 8689 cited. Incidentally, Award 6332 did not involve an off-duty offense, and the claim therein was denied, as was the claim in Award 3411. The offenses involved in Awards 2991 and 8689 were in no manner comparable to the offense of the Claimant herein. The Awards cited by or in behalf of the Carrier were apparently ignored or simply brushed aside by the Referee in his zeal to sustain the claim.

The conclusion that "* * * it appears from the evidence that the entire transaction was concluded to the satisfaction of all parties involved except that of the Terminal Company" ignores the important fact that the Terminal Company was one of the principal parties. The Referee apparently arrived at this unique conclusion because no criminal action was taken against the Claimant. However, the Board has held on numerous occasions that the fact that criminal action may not be carried through, or even acquittal by a court, is not a bar to disciplinary action by the Carrier. See, for example, Awards 12322, 13116 and 13127, all of which were written by experienced referees.

Under sound and well established principles previously adhered to by the Board, and considering the serious nature of Claimant's offense, the claim should properly have been denied.

For the foregoing reasons, we dissent.

/s/ P. C. CARTER
P. C. Carter

/s/ G. C. WHITE
G. C. White

/s/ R. E. BLACK
R. E. Black

/s/ W. B. Jones
W. B. Jones

/s/ G. L. Naylor
G. L. Naylor