

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award **Number** 22839
Docket Number **MW-22987**

Rodney E. Dennis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(St. **Louis** Southwestern Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the **Maintenance** of Way Agreement, especially but not limited to **Rule 6 - Discipline and Grievances**, when on February 9, 1978, **Extra Gang Laborer Frank R. Zimmerman** was unjustly dismissed (System File **MW-78-6-CB**).

(2) **Extra Gang Laborer Frank R. Zimmerman** be reinstated to his **former** position, with pay **for** all time lost and with vacation, seniority and' all other rights unimpaired. Also the **charge** shall be stricken from his record."

OPINION OF BOARD: Claimant, a laborer, had been in the carrier's service **for** about three and one-half years. At the **time** of his dismissal on February 9, 1978, he was assigned to carrier's Extra Gang 11, working under **the** supervision of **Foreman Bennett**. Extra Gang 11 was billeted in company-owned trailers in a company -d-trailer park, at **Benton, Louisiana**.

Claimant was dismissed from Carrier's service for an alleged violation of Rule. "**N**" of the Uniform Code of **Operating Rules** and Rule **MS01** of the Rules and Regulations for the **Maintenance** of Way and Structures. Pertinent to this case are the parts of those rules stating that employes who are dishonest will not be continued in service.

On or about February 7, 1978, claimant and a fellow employe rammed a television **antenna** from a house trailer occupied by **Foreman Bennett**. They **hooked the antenna up** to a television set in **the** trailer they occupied together. On February 8, 1978, **Foreman Bennett** found out that the antenna had been **removed from** his trailer by the two men. **He spoke to them** about it and they admitted that they had taken it. They said that they would return it.

When **Foreman Bennett** went back to his trailer at the end of the day on February 8, 1978, the antenna was in place. But upon attempting to enter, he discovered **that the** door had been **jimmied** and his trailer had been broken into. **He** reported this incident to carrier officials, who investigated the case.

On February 9, 1978, **Roadmaster** Jackson spoke to **claimant** about the **antenna** incident and the break in of the trailer. Claimant was discharged on February 9, 1978. A hearing was held to investigate the matter. Carrier **concluded** as a result of this hearing that claimant had violated Rule "N" and Rule **MS01**, as charged; his dismissal from service was upheld.

A copy of the transcript of the investigation has been **made** a part of the record. This transcript clearly reveals, by claimant's **own testimony**, that he did remove the **antenna** from the foreman's trailer. **It** also shows, by the foreman's testimony, that the foreman **spoke** to the claimant **about** the antenna, that claimant admitted that he took it, and that the antenna was returned and put in place on **the** foreman's trailer by the end of the day. The record indicates that the **claimant was** not charged with breaking **into** the foreman's trailer, and that the carrier did not attempt to connect **claimant with** this break in at the **investigation**. The question before this Board, therefore, is did the **claimant commit** the act with which he is charged and, if so, is the penalty of dismissal from service appropriate?

The Board has carefully reviewed the entire record **and** finds that the **claimant was** guilty as charged. There **are, however, numerous** circumstances **and** facts in this record that mitigate against discharge from service. At the outset of a discussion of these facts, it **must be** clearly pointed out that the claimant's hands were not clean in this instance and that he is deserving of discipline for his actions.

Throughout all of its Divisions, the Board has stated in numerous decisions that dishonesty is a dischargeable offense. This principle is clearly understood by all railroad employes and need not be justified by documentation in this award. Despite this universally accepted tenet, there have been a few occasions when an **employee found** guilty of a dishonest act has not been discharged from service.

In the instant case, it is clear from the record that the claimant was under the impression that the foreman no longer occupied the trailer from which the antenna was taken. When it was brought to his attention that he was **mistaken** about this, he immediately returned **the** antenna. His actions cannot be **compared** to an overt act of theft **in which someone** intends to deprive his victim of his property permanently. The **antenna** was returned.

This Board is also mindful of the fact that the **claimant** was told that if he stole anything again, he would be discharged. It was not until **it was** learned that the trailer had been broken into that **the claimant was** discharged. The carrier, however, did not charge the claimant with breaking

into the **trailer**, but only with removing the antenna. These charges are somewhat limited and given the confusion about the foremen's occupancy of the trailer and the claimant's ready admission, as well as his **return of the** antenna, there does not appear to be sufficient grounds **on** which **to** discharge **the** claimant.

This is not to say, however, that this Board does not think **that** claimant acted improperly in this instance, or that it views him as a model employe who is not deserving of **some** form of discipline **for** his actions. But given the facts of this case, it cannot justify his discharge from **service**. **The penalty** of discharge **just does** not fit the **crime**.

On **numerous** occasions in the **past**, this Board **has** taken the position that discipline received by an employe from the time of his separation from service to the time a decision is rendered by the Board has served its purpose--it has been sufficiently **severe** to impress the employe that his action should not be repeated again. This Board has also characterized **its** reinstatement of an employe in such situations as a "last chance" decision. The Board, in this **instance**, thinks it appropriate to reinstate **claimant** on this basis. It would also point out to claimant that, given his record to date, he **must mend** his ways **and** refrain completely from rule violations in the future in order to continue his employment with the railroad.

In light of claimant's past record **and** his admitted culpability in this case, no back pay or payment for other lost benefits, other than **seniority**, is warranted.

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 discipline was excessive.

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Claim sustained to the extent and in the **manner set forth in this Opinion.**

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A.W. Paulos*
Executive Secretary

Dated at Chicago, Illinois, this 16th day of May **1980.**