

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 Employees  
(  
(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 owned-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 M801 of the Rules and Regulations for the Maintenance of Way and Structures. Pertinent to this case are the parts of those rules stating that employees who are dishonest will not be continued in service.

On or about February 7, 1978, claimant and a fellow employe removed 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 M801, 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 employees 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 foreman'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 employee 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 employee 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 employee that his action should not be repeated again. This Board has also characterized its reinstatement of an employee 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 Employees involved in this dispute are respectively Carrier and Employees 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.