

Award No. 6196
Docket No. 5991-I
2-SOU-I-'71

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Francis X. Quinn when award was rendered.

PARTIES TO DISPUTE:

JOHN J. BLACKMON, Carman
SOUTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF PETITIONER:

1. The employer violated Section 34 of the current contract which states among other things that an employe will not be dismissed without just and sufficient cause.

2. The employe seeks his immediate reinstatement to the position he held on the date of his discharge, as well as back pay for all time loss during the period of his discharge, in addition to all the other benefits to which he would have been entitled had the wrongful discharge not taken place.

EMPLOYEE'S STATEMENT OF FACTS: Mr. John Blackmon is a black male, who had been employed by Southern Railway for three years as of July 7, 1968. Blackmon had worked continuously as a car inspector.

On the early morning of July 7, 1968, Blackmon worked the third shift. After he and two other employes, Jack Slaughter and R. W. Campbell, had worked the cars on Track 7, they all came back to the shack. Campbell and Slaughter went into the shack, while Blackmon walked to his car, got in, and went to sleep. Sometime a little later, Campbell came to his car and woke him up, as there were additional cars on Track 5 to be worked. Campbell walked ahead as Blackmon lingered behind to turn on his light, get his oil bucket, and fill it with oil.

Blackmon joined Campbell and another worker at Track 5, and they worked out the cars on the track. After finishing, they were asked to put air on Track 7 to check for leaks. When they had done this, Blackmon and Campbell discovered a leak on another car. Blackmon then proceeded to his car to get his wrench, leaving Campbell behind. This was the last time he saw Campbell.

Blackmon went to his car, got in it, and drove his car back down alongside the tracks, with his headlamps burning, in the hope of seeing Campbell.

When he came to the place where they had departed, Blackmon stopped his car and walked to the opposite side of the track, to see if Campbell were there. He looked both ways, and then he turned around to go back to his car.

At this precise point, someone jumped from under the wheels of one of the car boxes. Blackmon jumped back and chuckled, as he surmised that Campbell was up to his usual tricks. However, the person turned out not to be Campbell, and he started cursing Blackmon and calling him names. Blackmon then noticed that the person was a special agent. The agent then grabbed Blackmon and told him to get the tires. He then took Blackmon across the road and shined his lights over in a ditch, where four tires were clearly visible. At this point, Blackmon was placed under arrest and searched.

POSITION OF EMPLOYEE: It is Blackmon's position that the alleged grounds for his discharge are wholly unsubstantiated by fact. The gross inconsistencies in the testimony of Agent Babston (compare his testimony concerning his ability to see on the night in question [pp. 5, 9, 13]; also his testimony that Blackmon owned a 1965 green Pontiac [p. 5], when in fact Mr. Blackmon owned and was driving a 1965 gold Cutlass Oldsmobile on the night in question).

Moreover, there was no rational explanation given as to why the special agents did not arrest Blackmon while he was still at the scene with the tires in his hand—if in fact they ever saw him unload the tires. It is undenied that Blackmon had no company property on his person or in his possession at the time of his arrest. Moreover, the agents admitted that they did not find any tools on Blackmon with which he could have opened the door of the car from which the tires came; and, parenthetically, it took two of the special agents to open the car door—which Blackmon alone is alleged to have opened.

CARRIER'S STATEMENT OF FACTS: On the night of July 6, 1968, Carrier's Special Service Patrolmen D. A. Woodard and F. R. Babston were checking freight cars in Carrier's classification yard (Norris Yard), Birmingham, Alabama. While checking cars on classification track No. 55 at approximately 11:25 P. M. that night they detected the odor of tires around certain cars, and in checking them further, discovered that one of the cars although sealed had a door opening of approximately 3 inches, giving sufficient space to see the cargo of tires inside the car. For this reason the two special service patrolmen decided to keep a close check on those particular cars loaded with tires as they moved through the yard that night.

Although the cars were properly sealed, the officers kept them under observation until approximately 2:10 A. M., July 7, when the cars were pulled from classification track No. 55 and placed in track No. 7 of the east departure yard. A period of approximately 30 minutes passed from the time the cars were being moved from the class yard track to track No. 7 in the east departure yard when the patrolmen did not observe the three carloads of tires. At or about 2:40 A. M., July 7, they again checked those particular cars while on track No. 7, and noted that the seals were still intact on all the doors.

At approximately 3:00 A. M. on the morning of July 7, three carmen were inspecting the cars set out on track No. 7. After completing their

inspection and starting back down the road past the two special service patrolmen they were identified by the patrolmen as Carmen John J. Blackmon, R. W. Campbell and Jack Slaughter. About 4:00 A. M., a cut of cars was set out on track No. 5 of east departure yard and the same three men began working that cut of cars. The two special service patrolmen were east of track No. 7 and could hear the men as they worked the cut of cars on track No. 5. They were able to observe the lights of two of the carmen working, but could not determine where the third carman was. At approximately 4:30 A. M., Patrolman Woodard got out of the ditch near the three cars containing the tires, crossed over track No. 7 east and as he looked north, he saw Carman Blackmon tampering with the seal in the fastening. He then moved from his position, crossed over the coupling, and signaled his companion, Patrolman Babston, that someone was tampering with a car. He then moved back to the west side of track No. 7 and in the process heard a door open. Getting down off of the coupler of the car onto the ground, he positioned himself where he could look around the truck of the car, and saw Carman Blackmon carrying two tires and moving toward the ditch. Patrolman Babston on the signal from Patrolman Woodard positioned himself where he could also view the three cars holding the tires. Patrolman Babston saw Carman John Blackmon cross over the coupling of CG 5938 with two tires, which he carried across the road and threw into the ditch about 40 feet from where Patrolman Babston was located. Carman Blackmon then was observed as he returned to CG 5938 and took two more tires from that car, returning to the ditch where he threw the additional two tires. The tower light which was approximately 100 feet high and located only about 200 feet from the cars in question illuminated the area where Carman Blackmon was taking the tires from and carrying them to the ditch, so that there was no question in the minds of the two special service patrolmen that the man they saw taking the tires from the car and carrying them off, then throwing them into the ditch, was Carman John Blackmon.

Carman Blackmon was observed closing the door of CG 5938 from which he had taken the tires. He then returned to track No. 5 east and continued to inspect the train on that track. At approximately 4:45 A. M., Carmen Blackmon, Campbell and Slaughter returned back down the dirt road headed toward the car inspectors' shack.

The two special service patrolmen stationed themselves in such a manner that the tires which laid in the ditch were between them, and then waited and observed. At 5:00 A. M. an automobile traveled down the dirt road next to track No. 7 where car CG 5938 was located. The car drove past where the tires were thrown in the ditch, up the road, then turned around, came back, stopped, and was parked between where the tires were in the ditch and CG 5938. The person getting out of the car was Carman Blackmon. Carman Blackmon walked toward track No. 7, crossing over a car on that track, looked south, and then turned and walked north one car length. When Carman Blackmon was crossing over a car from west to east on track No. 7 he almost stepped on Patrolman Woodard, who was crouched under the coupling of the car. Patrolman Woodard then raised up and advised Carman that he was under arrest for the theft of the four tires from CG 5938. Hearing Patrolman Woodard place Carman Blackmon under arrest, Patrolman Babston, who was positioned in the ditch near where the tires were thrown, proceeded toward the other two men.

The two patrolmen identified themselves to Carman Blackmon and then searched him. In the search of Mr. Blackmon the patrolmen did not find the

missing seal or its wire, nor did they find on Mr. Blackmon's person any tools used in repairing or maintaining freight cars. The Jefferson County Sheriff's Department was called to the scene, made an investigation and placed Carman Blackmon under arrest on the charge of burglary and grand larceny. The Federal Bureau of Investigation was called into the case and, as a result of their conference with the United States Assistant District Attorney, a federal case was initiated against Carman Blackmon, charging him with Title 18, U. S. Code, Section 659, "Theft of interstate shipment."

Carman Blackmon was arraigned before U. S. Commission on July 8, 1968, where he waived preliminary hearing, and was bound over to the Federal Grand Jury for determination.

By certified letter of July 13, 1968, Carman Blackmon was advised by Master Mechanic Jay to present himself together with his witnesses and representatives at 2:00 P. M., July 16, 1968, for an investigation to be held in the Master Mechanic's office regarding charges against Carman Blackmon of theft of interstate property while working as a carman, Norris Yard, July 7, 1968, out of car CG 5938 on train No. 34.

On July 16, 1968, Master Mechanic Jay again wrote Carman Blackmon, confirming a telephone conversation with Mr. Blackmon that by mutual agreement the investigation was to be postponed and would be held at 2:00 P. M., Tuesday, August 6.

By letter of August 6, 1968, Master Mechanic Jay advised Carman Blackmon that again by mutual agreement the investigation would be postponed and rescheduled for 1:00 P. M., Friday, August 16, 1968.

By letter of August 17, Master Mechanic Jay advised that the investigation would be again scheduled for 9:00 A. M., Thursday, August 22, 1968.

At 9:00 A. M. on August 22, 1968, the investigation of Carman Blackmon was held wherein he was charged with theft of interstate property out of CG 5938 on train 34 while working as carman at Norris Yard on July 7, 1968. Carman Blackmon was present with his duly authorized employe representatives. All were given proper opportunity to participate and contribute to the investigation.

By letter of August 27, 1968, Master Mechanic C. A. Jay advised Carman Blackmon that the facts brought out at the investigation proved him guilty as charged, and that he was discharged from the service of Southern Railway Company.

Carman Local Chairman W. H. Higgins wrote to Master Mechanic Jay on September 26, 1968, presenting claim on behalf of Carman Blackmon for reinstatement to service and compensation for all time lost.

By letter of October 4, 1968, Master Mechanic Jay wrote Local Chairman W. H. Higgins advising him that evidence adduced at the investigation proved Carman Blackmon guilty as charged and declined the claim presented.

Local Chairman W. H. Higgins replied on October 17, advising Master Mechanic Jay that his decision in the matter was unacceptable and would be appealed.

By letter of November 4, 1968, General Chairman W. O. Hearn appealed claim on behalf of Mr. Blackmon to Mr. L. S. Presson, Jr., Superintendent Motive Power.

Superintendent Motive Power L. S. Presson, Jr. replied on December 30, 1968 to General Chairman Hearn's appeal by advising him that he had not assembled all the facts to make a decision relative to Mr. Hearn's appeal and would advise the General Chairman when such facts had been assembled and reviewed.

On January 8, 1969, General Chairman replied to Mr. Presson that under the circumstances he was agreeable to an extension of sixty additional days, beginning January 4, 1969 in which Mr. Presson might render a decision in the matter.

By letter of March 4, 1969, Superintendent Motive Power L. S. Presson, Jr. advised General Chairman Hearn that after reviewing the facts he was in accord with the Master Mechanic's decision to discharge Carman Blackmon from service, as the testimony in the investigation clearly proved his guilt.

On March 10, 1969, General Chairman Hearn notified Mr. Presson that his decision in the matter was unacceptable and would be appealed.

By letter of March 11, 1969, General Chairman Hearn appealed claim to Mr. M. G. Stevens, Jr., Director of Labor Relations, and the highest officer to receive such appeal.

On April 7, 1969, Mr. J. J. Blackmon entered a plea of guilty in court to the offense of stealing, taking, and carrying away certain goods and chattels which were moving as interstate shipment of freight or express, said goods having a value in excess of \$100.00 with intent to convert same to his own use, Count 1.

By letter of April 28, 1969, Director of Labor Relations M. G. Stevens, Jr., wrote General Chairman W. O. Hearn, declining claim in behalf of Mr. Blackmon, and advising General Chairman that Mr. Blackmon had entered a plea of guilty to theft of interstate shipment under Title 18, U. S. Code, Section 659, on April 7, 1969 and that claim being without basis and unsupported by the agreement was respectfully declined.

Conference between Mr. Stevens and General Chairman Hearn concerning Mr. Blackmon's claim took place on June 5, 1969, and by letter of June 6, 1969, Mr. Stevens affirmed the decision he had given to General Chairman Hearn in conference, to wit:

"You were advised that claim was without basis and unsupported by the agreement for reasons heretofore given you. This will confirm my previous declination of the same."

The case involving the dismissal of Mr. Blackmon was subsequently submitted to your Honorable Board for adjustment by Mr. Blackmon on January 21, 1970.

POSITION OF CARRIER:

**EVIDENCE ADDUCED AT A FAIR AND IMPARTIAL
INVESTIGATION PROVED THE CLAIMANT
GUILTY AS CHARGED.**

Substantial and probative evidence adduced at the investigation proved conclusively that claimant was guilty of theft of interstate property out of car CG 5938 while working as carman at Norris Yard on July 7, 1968. In part 1 of Mr. Blackmon's claim submitted to the Board he notes that among other things Section 34 of the current agreement provides "that an employe will not be dismissed without just and sufficient cause." The evidence of record is replete with testimony giving Carrier just and sufficient cause for the dismissal of claimant. Carrier respectfully addresses the Board's attention to the following excerpts from the record of investigation proving that Carrier's special service agents knew and were familiar with the identity of the claimant and observed him taking and carrying off tires from Central of Georgia car 5938. At the top of page 33, Carrier's Exhibit A, Claimant Blackmon is questioning Special Service Agent Woodard:

"Q. You knew my name.

A. That is right.

Q. Why would have reason to know one man and not know anybody else?

A. Well, as I have told you before, and you know yourself that you have seen me check Central of Georgia 34 outbound trains numerous times since January. Now, isn't that right?

Q. Well, you say you were out there checking. You don't know where I saw you or not.

A. I have spoke to you on —

Q. No. You have never spoke to me.

A. Oh, yes, I have spoke to you.

Q. What you are saying is that you know everybody on the third shift?

A. No.

Q. That works in the outbound yard?

A. No.

Q. But you knew me?

A. I knew you. I knew Campbell, and I knew Jack Slaughter.

Q. OK"

Page 4 of the record of investigation where Master Mechanic Jay is questioning Special Agent Babston concerning the events that occurred on the night of July 6 and the morning of July 7:

"We observed these cars until about 3:00 A.M., at which time we noted the carmen started working the cars on the north end of the yard, and were working to the south. About 3:30 A.M., they finished working these cars, and started back down the road, which is located on the east side of Track No. 7. We observed these men as they passed by us at this time to make an identification. We identified these men as John J. Blackmon, R. W. Campbell and Jack Slaughter."

Prior to the act of theft, both Special Agents Babston and Woodard had seen and identified Mr. Blackmon as one of the three carmen working in and around car CG 5938.

The positive eye-witness identification of Mr. Blackmon as the individual taking tires from CG 5938 is further conclusive as the area where the theft occurred was well lighted.

Page 5 of the record of investigation Special Agent Babston testified:

"The Yard was well lighted at this location. There was the Tower Light, located about 200 feet southwest from where this car was located, the Tower being approximately 100 feet high, and I could definitely identify this man as John Blackmon that I saw."

Page 6, record of investigation, Master Mechanic Jay questioning Special Agent Babston:

"Q. Then the lights on the Light Tower, which you stated were approximately 100 feet high, would afford enough light for you to positively identify J. J. Blackmon throwing the tires?

A. Yes, sir."

Page 11, record of investigation, Local Chairman Higgins questioning Special Agent Babston:

"Q. Mr. Babston, on the side where you were at—was there adequate light for you to definitely identify who had the tires?

A. Yes, sir. There were no shadows at all on this side. The light shone down over the car, and I was across the road, which was approximately 20 feet from the car. I was lying in the ditch.

Q. Mr. Babston, did you previously know Carman Blackmon?

A. Do you mean personally?

Q. Did you know him? When you saw him, did you know him?

A. I knew Mr. John Blackmon as an employe."

Page 34, record of investigation, Local Chairman Higgins questioning Special Agent Woodard:

"Q. Mr. Woodard, I would like to ask you one other question, relevant to — reference to the light tower — there being other cuts of cars between No. 7 and the light tower, wouldn't that definitely be a shadow thrown on No. 7?

A. It would be, to some degree, but on this incident, when Mr. Blackmon crossed over No. 7 East with the tires, he was just as plain as day, because he had gone beyond a shadow there. These lights are approximately 100 feet high, and they make a good light, as you well know.

Q. That is all."

Positive eye-witness identification proves Mr. Blackmon the person who illegally entered car CG 5938 and took four tires from same.

While the carrier's two special agents were observing the three carloads of tires on track 7, Special Service Agent Woodard spotted Mr. Blackmon tampering with the seal on the car door of CG 5938. On page 16 of the record of investigation Master Mechanic Jay questions Mr. Woodard:

"Q. In your first observation, from your first observation point after you checked the seals on the car, where were you?

A. Patrolman Babston and I, starting there, we were in the ditch adjacent to or to the side of No. 7 East, and at approximately 4:00 A. M., there was a cut shoved into No. 5 East, and we observed two men working this cut in No. 5. One on the west side working boxes, and one man coupling air hoses. And we know that there was no third man. After a few minutes lapsed, we noticed that a third man had started working the journals on the east side of No. 5 East. A few minutes passed by, and we noticed that the lids were not being closed. At this time, I moved from the ditch, over the road, crossed over No. 7 East, and looked north and saw Blackmon tampering with the seal and fastenings. At this time, I moved from the west side of No. 7 to the east side, crossing over the coupling, to notify Mr. Babston that someone was in the car. I signalled to him in this manner.

Q. Mr. Woodard, say what manner you signalled.

A. Signalling with my hand — pointing toward the car that was being tampered with. After signalling Mr. Babston, I then moved from the east side of No. 7 to the west side, and in the process of doing this, I heard a car door open. I then got down off the knuckle, onto the ground, and on the rail, and looked around the truck of the car which I was under there. And at this time, I saw Blackmon coming with two tires. I followed his movements over the coupling, which I was two car lengths away at this time. I saw him go over the coupling, throw these two tires into the ditch by No. 7 East. I then observed Blackmon come back, get two more tires out of the car and go back and throw them in the

same position. Blackmon came back and closed the door of this Central of Georgia 5938, and then he continued — crossed over No. 6 East Departure Yard, and continued to inspect his train in No. 5.

Q. Mr. Woodard, according to your testimony, you saw Blackmon tampering with the seals, and did identify him as Blackmon. Is that correct?

A. That is correct.

Q. Is the yard well lighted in this area?

A. Yes, sir. It is."

Page 25, record of investigation, Master Mechanic Jay questioning Special Agent Woodard:

"Q. To clear the record up one more time — you caught and positively identified Blackmon with tampering with the seals and fastenings?

A. That is correct.

* * * * *

Q. But you actually saw him reach into the car and get these two tires and take them and throw them down the bank on the east side of Track No. 7?

A. That is correct.

* * * * *

Q. Mr. Woodard, again reiterating, you saw him with two tires, throw them down the bank, and you definitely saw him stand from the ground, get two more out of this Central of Georgia 5938 and throw them down the bank. Did you positively identify these tires as coming out of this car?

A. That is correct."

Page 27, record of investigation, employes' Committeeman Ross questioning Special Agent Woodard:

"Q. And you did not see him open the door and you did not see him close the door. Is that correct?

A. I saw him close the door.

Q. You saw him close the door?

A. Yes."

Page 30, record of investigation, Mr. Blackmon questioning Special Service Agent Woodard:

"Q. And you said that you saw me tampering with the wire and the seal on the train. On the car. Right?

A. Mr. Blackmon, I saw you tampering with the seal and the fastening on the door.

Q. On the door?

A. That is correct."

Record of investigation, page 32, Mr. Blackmon questioning Special Agent Woodard:

"Q. Anyway, when I saw you — when you said I saw you, you knew that I recognized you?

A. Yes. You saw me.

Q. You asked me, when you saw me. You asked me, did I know you.

A. No. I didn't ask you that. No. Mr. Babston might have asked you, but I didn't, because you knew me.

Q. How do you know I knew you.

A. I have worked around you since January, Blackmon.

Q. Well, there are lots of people that work around me that I don't know.

A. You knew who I was.

Q. You know me definitely?

A. Yes, I know you."

Then again on page 41 of the record of investigation Special Service Agent Woodard positively states he identified Mr. Blackmon as the person taking the tires from car CG 5938.

On page 5 of the record of investigation Master Mechanic Jay questioned Special Agent Babston, and Mr. Babston in making a statement describing the happenings of the night of July 6 and morning of July 7, averred:

"I then saw Mr. John Blackmon cross over the coupling of Central of Georgia car 5938 with two tires which he carried across the road and threwed in the ditch about 40 feet from where I was located. * * * I could definitely identify this man as John Blackmon that I saw. * * * He then returned with two more tires in the same manner which he threwed in the ditch. * * * The yard was well lighted at this location."

Page 6, record of the investigation, Master Mechanic Jay questioning Mr. Babston:

"Q. Then the lights on the Light Tower, which you stated were approximately 100 feet high, would afford enough light for you to positively identify J. J. Blackmon throwing the tires?

A. Yes, sir."

Page 12, record of investigation, Mr. Jay to Mr. Babston:

"Q. How long was it after that that Mr. Blackmon crossed over with the first two tires?

A. Approximately two to three minutes.

Q. And you have already stated that there was no one else that you could see at the time?

A. No, I did not.

Q. And at the time you stated that you could positively identify Blackmon throwing the tires down the bank?

A. Yes, sir."

Page 44, record of investigation, Local Chairman Higgins questioning Special Agent Babston:

"Q. Mr. Babston, where, at the time the tires were assumed — were carried over the track — the cut of cars — where were you at?

A. I was located across the road from the Central of Georgia car, approximately 60 feet southeast of the car.

Q. Were you in a ditch at that time? The ditch that you all speak of?

A. Well, I was not down in the ditch. I was laying up on the side of the ditch so that I could see.

Q. You were on the far side of the road?

A. Yes, sir. I was on the east side. See the ditch only has one bank down to the AGS main line.

Q. That is right. And, did you see someone come over the cut of cars with tires in their hand?

A. Yes, sir. I saw Mr. Blackmon cross over with two tires and throw them in the ditch. Go back across and return with two more tires and throw them in the ditch.

Q. From where the person crossed over the cut of cars to the ditch, approximately how far is it — approximately?

A. I would say approximately 20 feet from the car to the point where the tires were thrown. At the point where they came to rest.

Q. You misunderstood, I believe. I am talking about from where the person crossed over the coupling to the ditch —

A. To the ditch?

Q. On the side where he threw the tires. In the ditch where he threw the tires.

A. Well, I would say approximately 15 feet. And the tires were about five feet down the bank.

Q. And you saw this same person make two trips, each time carrying two tires?

A. I saw him come across with two tires the first time and then make one other trip to return with two other tires."

The record of testimony adduced at the investigation conclusively proves that Mr. Blackmon was the man who illegally took tires from Central of Georgia car CG 5938. Further testimony confirmed Mr. Blackmon's guilt, revealing that shortly after Mr. Blackmon had taken the tires from CG 5938 and threw them in the ditch nearby, he returned in his automobile to the place where the tires had been thrown. He stated in the investigation that there was an air leak in one of the cars near the Central of Georgia car and he had returned to locate and meet Carman Campbell to repair the alleged leak. The 47 pages of testimony of the investigation are conspicuously absent of any witnesses on behalf of Mr. Blackmon, particularly Carman Campbell or any verified testimony by anyone save Mr. Blackmon that in fact there was an air leak in one of the cars. More doubt to the veracity of Mr. Blackmon's reason for returning to the site where the tires were thrown is added by the testimony of the special service agents after arresting and searching Mr. Blackmon. No tools were found on Mr. Blackmon's person of any kind, yet Mr. Blackmon stated in the investigation that he returned to the car inspectors' shack to get needed tools to repair the alleged leak. From the testimony of both carrier's witnesses and Mr. Blackmon himself there can be no doubt that Mr. Blackmon did not have any intention to repair an alleged leak when he parked his automobile near the place where the stolen tires were thrown. There was only one reason that Mr. Blackmon was wandering around the track nearby the tires, and that was to assure himself that no one was in the vicinity to see him load the tires in his car.

Special service agents, although they did not need to do so, staked out near where the tires were thrown in order to make an arrest when Mr. Blackmon loaded the tires into his car. Undoubtedly this would have been consummated had Mr. Blackmon not inadvertently come upon the place where Special Service Agent Woodard was hidden and discover his presence, thus causing Agent Woodard to make the arrest at that point.

The evidence adduced at the investigation is most substantial and probative in proving Mr. Blackmon's guilt to the charge of theft of interstate property while working as a carman at Norris Yard July 7, 1968 out of Central of Georgia car CG 5938.

**MR. BLACKMON CONFESSES HIS GUILT IN HIS PLEA
OF GUILTY IN FEDERAL COURT ON APRIL 7, 1969.**

Mr. Blackmon was indicted by a Federal Grand Jury charging him with Title 18, U. S. Code Section 659, Interstate or foreign baggage, express or freight; state prosecutions. It is a matter of public record that on the 7th day of April, 1969, Mr. Blackmon entered a plea of guilty of the offense of stealing, taking, and carrying away certain goods and chattels which were moving as interstate shipment of freight or express, said goods having a value in excess of \$100.00, with intent to convert same to his own use. The maximum penalty for such crime being not more than \$5,000.00 fine or imprisonment of not more than ten years, or both. The Court adjudged Mr. Blackmon as being guilty as charged and convicted. It was also adjudged that "imposition of sentence is suspended and defendant is hereby placed on probation for the period of three (3) years, subject to the general terms and conditions of probation of record in this court; or until otherwise discharged as provided by law."

Carrier submits that Mr. Blackmon's plea of guilty is a judicial confession, and he cannot now come to your Honorable Board professing clean hands. Carrier directs the Board's attention to Second Division Award 2590, Referee Ferguson, where it was held:

"A plea of guilty is a judicial confession, and as long as it stands is conclusive of the facts. In general, after a plea of guilty, an appellate court is not permitted to review the record in search of error that may have been committed by the trial court. The claimant has confessed a felony. The employer has investigated and has considered the court transcript wherein the claimant admitted his wrongdoing. It would be unwise for this Division to upset those well reasoned awards of this Board holding that we are not to be triers of the facts."

Attention is also directed to Second Division Award 2787, Referee D. Emmett Ferguson, where, similarly as here, claimant pleaded guilty to a criminal charge and was paroled. In that case the Board held:

"Lawson, having pled guilty in criminal court, thereafter confirmed his alleged 'dishonesty' when he admitted the court conviction at the carrier's investigative hearing. Courts of law have described a plea of guilty as a judicial confession, which admits all the facts constituting the offense with which a defendant stands charged. Generally speaking, no appeal from a guilty plea is permitted, on the theory that no error could have been committed in a case where the accused has, in effect, convicted himself.

This Division, reviewing the instant case, is in like position. Many awards have established that we are not triers of the facts; that our duty is to establish only that the fair hearing required by the rules has been given, and not to substitute our judgment for those who have had the direct and immediate opportunity to evaluate the witnesses and their evidence. Thus, leniency is a prerogative which is not available to this Division, much as we might desire to recognize the personal qualities, family problems, veteran status, or union affiliations of any grievant."

**CARRIER COMPLIED WITH THE AGREEMENT AND
CONDUCTED A FAIR AND IMPARTIAL INVESTIGATION.**

Mr. Blackmon's procedural rights were fully observed and he was accorded the fundamental rights of due process. He was given ample opportunity to not only present witnesses on his own behalf, but did in fact cross-examine carrier's witnesses freely and to the complete extent of satisfying himself. At the conclusion of the investigation, Master Mechanic Jay questioned Messrs. Higgins, Ross and Blackmon as follows:

"MR. JAY TO MESSRS. HIGGINS, ROSS AND BLACKMON:

Q. Mr. Higgins, Mr. Ross and Mr. Blackmon, has this investigation been held in a fair and impartial manner and in accordance with your working agreement?

MR. HIGGINS:

A. I would say it has been held in accordance with the working agreement.

MR. JAY TO MR. ROSS:

Q. Mr. Ross?

A. I agree with Mr. Higgins.

MR. JAY TO MR. BLACKMON:

Q. Mr. Blackmon?

A. I agree with Mr. Higgins.

MR. JAY TO MR. HIGGINS:

Q. One question, Mr. Higgins—has anything transpired in this investigation that would cause you to believe that it was not held in a fair and impartial manner?

A. Mr. Jay, I would like to say this. Well, you wait until after you have read the transcript to pass your judgment on the case. I had rather wait until I have read the transcript before I pass judgment on it as to fair and impartial.

Q. All right. This investigation is closed."

Carrier points out that during the entire handling on the property of this dispute there was never an exception taken by claimant nor the Brotherhood as to the conduct of the investigation.

**CARRIER HAS CONDUCTED ITSELF IN COMPLETE
ACCORDANCE WITH THE CURRENT AGREEMENT.**

Carrier re-addresses the Board's attention to the Part 1 of statement of claim by Mr. Blackmon, "The employer violated Section 34 of the current

contract which states, among other things, that an employe will not be dismissed without just and sufficient cause." Carrier submits that it has properly within the confines of the working agreement proven conclusively by the evidence adduced at a fair and impartial investigation that Mr. Blackmon is guilty as charged and thus properly dismissed with just and sufficient cause. It is evident from the handling on the property that the employes recognize that the carrier did not violate the agreement. It took issue only with carrier's decision based on its assessment of the evidence adduced at the investigation.

**CARRIER HAS NOT BEEN ARBITRARY OR CAPRICIOUS
IN ITS ASSESSMENT OF DISCIPLINE.**

It is axiomatic that in accepting employment the individual also accepts the responsibility to conduct himself in a manner of a prudent and honest person. 18 Ruling Case Law 518, 520, in part, states:

"An employer properly may refuse to continue in his employ any person who has shown himself to be dishonest, incompetent, inefficient, negligent, unfaithful to the employer's interests, or otherwise unfit for service."

All four divisions of the National Railroad Adjustment Board have consistently held that unless carrier has shown itself to be arbitrary or capricious in its actions the Board must affirm Carrier's decision in cases involving discipline. Carrier cites the following as only a sample of the Board's rulings in this matter.

Second Division Award 4407, P. M. Williams, Referee. In a case similar to the one we have here at bar before the Board in Award 4407 held, in part:

"On December 11, 1961, Carman John S. Radich pleaded guilty in the United States District Court for the Northern District of California, Southern Division, to the offense — theft from Foreign shipment — a violation of Title 18, United States Code, Section 659. The shipment involved was from Carrier's property, and the event had occurred in the early morning hours of May 16, 1961.

* * * * *

The record in this case does not disclose or give to us any indication that the Carrier was discriminatory in its action against Claimant Radich, or that he was treated in an arbitrary or capricious manner. In the absence of discrimination, capriciousness or arbitrary action, this division has no power to substitute its judgment for that of the Carrier, nor can we reweigh the facts to develop equities upon which to have a rescissory award.

For the reasons given above the claimant's request for reinstatement and compensation must be denied."

Second Division Award 4401, P. M. Williams, Referee. In this case the claimant had been charged with the illegal removal of scrap brass from the company's property. The Board held:

" * * * therefore the admission of the wrongdoing, when examined in the light of the experience of Carman Hough, leads us to the conclusion that no adequate defense exists to the charges that claimant improperly removed and disposed of scrap brass from carrier's property.

Award 4282, and many others, state that this division is without power to substitute its judgment for that of the carrier unless the action taken was arbitrary, or unreasonable, or not supported by the record. Such conditions do not exist here; therefore, the claim should be denied."

Second Division Award 1776, Adolph E. Wenke, Referee. Claimant in this case was discharged from carrier's service for conversion and possession of company property. The Board held:

"The discipline given Mr. Jackson was assessed in good faith by this carrier. The whole record would indicate that there has been no abuse of discretion.

* * * * *

Suggestion is made that dismissal is too severe a penalty and unreasonable under all the circumstances. The charges are of a serious nature, and fully established. Carrier should not be required to be burdened with an employe who has such tendencies."

In Texas and New Orleans Railroad Company v. The Brotherhood of Railway 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 carrier to select its employes or discharge them."

Second Division Award 1851, Lloyd H. Bailer, Referee. This was a case involving a coach cleaner who was discharged from the carrier's service for pilfering. The Board held:

" * * * Carrier is entitled to expect its employes will remain honest in all matters of this kind, not solely where substantial value is involved.

In conclusion, we are of the opinion and find that carrier was neither arbitrary, discriminatory or capricious in dismissing claimant from its service, and that the claim must therefore be denied."

Second Division Award 1323, J. Glenn Donaldson, Referee, held:

" * * * it has become axiomatic that it is not the function of the National Railroad Adjustment Board to substitute its judgment for that of the carrier's in disciplinary matters, unless the carrier's action be so arbitrary, capricious, or fraught with bad faith as to amount to an abuse of discretion. Such a case for intervention is not presently before us. The record is adequate to support the penalty assessed."

Second Division Award 4744, Howard A. Johnson, Referee. This case involves a laborer who was dismissed from carrier's service for theft of grain from carrier's yards. In denying the claim, the Board held:

"Thus Claimant was positively identified by the special agent, who was fully cross-examined by both of Claimant's representatives. Claimant's evidence consisted of his own denial, an alibi furnished by his wife, and his statement that his truck had been stolen in the night with the keys in it.

The charge against the Claimant is supported by positive and substantial evidence. Even if it were this Board's duty to decide the weight of the evidence, it could not hold that the statements of Claimant and his wife outweighed the other evidence."

Second Division Award 3590, James P. Carey, Jr., Referee, another case involving the dismissal of an employe because of theft. The Board held:

"The evidence is not in conflict, and the basic question presented is whether the carrier's interpretation of it was reasonable or arbitrary. The claimant admitted that he was about to remove the saw and coat hangers from the company's premises when he was interrupted by a special agent. We think admission of an intent to appropriate these articles to his own use, which he would have carried out but for the interference of the special agent, was sufficient to support the charge of wrongful taking.

* * * * *

The evidence presented at the investigation and the proper inference to be drawn therefrom do not justify a finding that the carrier acted arbitrarily or capriciously in this instance."

Second Division Award 3626, James P. Carey, Jr., Referee, is a case where carrier disciplined a car inspector for leaving his post without permission, turning in a false time card, and placing his pool mark on eleven cars which had not been serviced. In that case the Board held:

"The transcript of the investigation has been carefully reviewed. In a proceeding such as in this case it is necessary that there be substantial evidence to support the charge and that the carrier's action was not arbitrary or capricious. We think the evidence adduced at the investigation was adequate to support all of the charges made against claimant in this case, and we find no reasonable grounds for disturbing the decision reached on the property."

ADDITIONAL SECOND DIVISION AWARDS

Award 1041, Referee Rudolph:

"It is well established that the action of the Carrier will not be disturbed unless the Carrier has acted arbitrarily or in bad faith. * * * Generally, the Board will not substitute its judgment for that of the Carrier on the question of the amount of discipline imposed by the management."

Award 1089, Referee Mitchell:

"It is not the function of this Board to substitute its judgment for that of the Carrier in matters of discipline."

Award 1109, Referee Thaxter:

"This Board is loath to interfere in cases of discipline if there is any reasonable grounds upon which it can be justified."

Award 1157, Referee Thaxter:

"The general rule is that the imposition of discipline is the prerogative of management, and this Division will not review a decision for which there is a reasonable basis."

Award 1548, Referee Wenke:

"There was evidence adduced at the hearing which supports the company's finding of guilt and, in view thereof, the company was not capricious, arbitrary, or unjust in making its decision."

Award 2996, Referee Whiting:

"While there was conflicting testimony adduced at the investigation of the charges against the claimant, there was substantial evidence to reasonably support the decision of the carrier. Under such circumstances, we may not substitute our judgment for that of the carrier."

Award 3092, Referee Burke:

"Was the penalty of dismissal justified? We think the language contained in Award 1692 of this Division is persuasive. The question then remains, was the penalty imposed excessive? This and other Divisions of the Board have often said that they would not substitute their judgment for that of the carrier unless its action in that respect can be said to be arbitrary, unreasonable, or unjust. The claim must be denied."

Award 3266, Referee Hornbeck:

"It is within the province of the representative of the Carrier who presides at the hearing to determine the credibility of those who testify and to weigh and evaluate their testimony. If upon so doing, it is probable that the charge is proven and the representative so finds, this Board may not disturb that finding unless it is manifestly unsupported by the evidence."

Award 3430, Referee Murphy:

"We do not feel that this Board should substitute its judgment for that of the carrier unless the evidence proves that the carrier assessed an unjust or discriminatory penalty. The carrier has a right to expect its employees to observe the rules and perform their

work. . . . This discretion is vested in them, and we may not set aside their judgment unless the evidence proves that they have abused this right."

Also see the following additional awards of the Second Division:

993	1548	2118	3081
1178	1575	2125	3151
1253	1767	2207	3267
1323	1768	2925	3313
1509	1786	2963	3676
1544	1812	2996	

First, Third and Fourth Divisions of the National Railroad Adjustment Board have held similarly with reference to Carrier's right to assess discipline.

Carrier has not been arbitrary, capricious, nor has it acted in bad faith. The facts reveal that the investigation conducted on carrier's property, together with the admission of guilt to the same charges in criminal court which constituted a judicial confession and the awards cited hereinabove provide overwhelming probative documentation that carrier acted appropriately when dismissing Mr. Blackmon from service.

CONCLUSION

- (1) Carrier has proven conclusively and probatively that Mr. Blackmon was guilty as charged on the basis of testimony adduced at a fair and impartial investigation and by the evidence of public record.
- (2) Carrier accorded the claimant his fundamental rights of due process and all of the procedural rights to which he is entitled under the current agreement.
- (3) Carrier has acted with reason and responsibility in assessing discipline considering the seriousness of the offense involving a relationship of trust between employer and employe.
- (4) Carrier has demonstrated that Second Division of the National Railroad Adjustment Board as well as other divisions overwhelmingly support carrier's prerogatives to assess discipline.

Claimant brings before the Board a claim and demand that is without merit. The evidence presented by the carrier is more than substantial to convince even the most casual observer that carrier's dismissal of Mr. Blackmon for his actions on the morning of July 7, 1968, when illegally taking from Central of Georgia car 5938 four tires not belonging to him was with just and sufficient cause.

Carrier respectfully requests that the Board render a denial award in this case.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This Board does not presume to substitute its judgment for that of a Carrier and reverse or modify Carrier's disciplinary decision unless the Carrier is shown to have acted in an unreasonable, arbitrary, capricious, or discriminatory manner, amounting to abuse of discretion. A Carrier's disciplinary decision is unreasonable, arbitrary, capricious or discriminatory when the Carrier does not apply and enforce the rules with reasonable uniformity for all employes; when rule violation by an accused employe is not established by substantial evidence; when a timely hearing after notice on specific charges is not held in accordance with the provisions of the parties' agreement; when the accused is not allowed to have representation, to testify, and, if he wishes, to have other witnesses in his behalf; when the Carrier's managerial representative acts as chief witness as well as interrogator and judge (obviously it is permissible for said representative to act as interrogator and judge); or when the degree of discipline is not reasonably related to the seriousness of the proven offense.

In judging the above, mindful that the Carrier has the burden of proving its charge and of showing its conduct and decision were not unreasonable, the Board will not go beyond the record developed at the Carrier's investigation.

The precedent is well established that this Board should not substitute its judgment for that of the Carrier in discipline cases where it has produced substantial evidence that the offense charged was committed. While the administration of disciplinary action should not seem haphazard or capricious, it is clear that the imposition of discipline is within managerial discretion.

We cannot find anything in the record which would enable us to sustain the Claimant's position as to his guilt or as to the discipline imposed. We conclude that such discipline was commensurate with the offense, and will deny the claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 11th day of November, 1971.

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