

Award No. 3266

Docket No. 3090

2-NP-CM-'59

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Roscoe G. Hornbeck when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 7, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L.—C. I. O. (Carmen)**

AND

NORTHERN PACIFIC RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement the Carrier unjustly dismissed Carman R. L. Flansburg from the service on April 5, 1958.

2. That accordingly the Carrier be ordered to restore him to service with all rights unimpaired and compensate him for all time lost retroactive to the aforementioned date.

EMPLOYES' STATEMENT OF FACTS: Prior to April 5, 1958, R. L. Flansburg was employed as a carman at Brainerd Shops (Brainerd, Minnesota) having established a seniority date as such as of April 28, 1945. He started his employment with the carrier May 17, 1937.

On February 21, 1958, Shop Superintendent J. E. Vanni addressed the following letter to Mr. Flansburg:

“Brainerd, Minnesota
February 21, 1958

Mr. R. L. Flansburg,
Carman,
1201 Beech Street,
Brainerd, Minnesota

Dear Sir:

“You are hereby notified, in accordance with the rules of the Agreement between the Northern Pacific Railway Company and

Rule 39 of the July 1, 1955 Shop Crafts Agreement relating to discipline reads:

"Rule 39. An employe who has been in the service more than sixty (60) calendar days will not be disciplined or discharged without first being given a hearing by a designated officer of the Railway Company. Suspension pending a hearing which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing the employe will be apprised of the purpose for which the hearing is to be held, and shall have a reasonable opportunity to secure the presence of necessary witnesses. The employe, or his duly authorized committee, shall, if the employe is disciplined or dismissed, be furnished a copy of the transcript of the investigation. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired and shall be compensated for wage loss, if any, resulting from said suspension or dismissal. The provisions of Rule 38 shall be applicable in connection with appeals and time within which appeals shall be made in cases involving discipline or discharge, and cases not presented and appealed within the time limits specified in Rule 38 shall not be considered."

Particular attention is directed to that provision in Rule 39 which states that if it is found that an employe has been unjustly dismissed from the service he will be reinstated with seniority rights unimpaired and compensated for wage loss, if any, resulting from said dismissal. Based on the evidence developed at the investigation, Mr. Flansburg cannot be found to have been unjustly dismissed from the service. Therefore, Mr. Flansburg is not entitled to reinstatement under the plain provisions of Rule 39.

The carrier has shown that Mr. Flansburg removed property of the railway company from its premises on February 14, 1958 without authority. The discipline administered to Mr. Flansburg measured up to this man's dereliction. Rule 39 of the shop crafts agreement effective July 1, 1955 was complied with in meting out the discipline to Mr. Flansburg. This Division in awards without number has consistently adhered to the principle that it will not interfere in disciplinary matters unless the carrier's action was arbitrary and the employe failed to secure a fair and impartial investigation. The record in this docket makes it abundantly clear that Mr. Flansburg was accorded a fair and impartial investigation; that the rules of the applicable agreement were complied with in discharging this man; that the evidence sustained the charges; and that the discipline administered was rendered in good faith and was not tainted with bias. Consequently this Division should not superimpose its judgment upon that of the management and order the reinstatement of Mr. Flansburg. The claim covered by this docket should be denied in its entirety.

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.

Awards of this and other Divisions of this Board are definite and uniform as to the prerogative of the carrier and degree of proof required to support a finding against an employe who has been charged with an infraction of rules of his company or of a controlling agreement.

Typical of these awards is No. 2207, Referee Carter sitting with the Second Division:

"It is not the function of this Board to weigh the evidence as in an original hearing."

"If the evidence is sufficient, if believed, to sustain the carrier's findings, the carrier's action must be sustained."

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.

Proof beyond a reasonable doubt, as required to convict in criminal prosecutions in Courts of Law, does not apply.

It is admitted that Mr. Flansburg took two pieces of quarter inch chain, one 25 feet 4 inches long, the other 13 feet 5 inches long, from the property of the company on the evening of February 14, 1958. It is probable that he also took the chain into the property when he went to work on the morning of that day. He was apprehended as he left the company property and concealed under his coat were the chains.

The company claims that the chain removed was its property. This Mr. Flansburg denies and offers proof that the chain was owned by a Mr. Thomas, who had given it to him for the purpose of welding and putting a hook and ring on either end.

The material and determinative issue, as developed, was the ownership of the chain.

Some of the expert evidence tended to support the contention of Mr. Flansburg.

That of the company to establish that all of the chain produced at the hearing was manufactured by the same company.

It was inferable that all of the chain had come from the carrier's stock, although no issue was made as to any of it except that found in the possession of Mr. Flansburg.

In this rather uncertain state of expert evidence as to the identity of the chains, the charge had to be resolved, largely, on other developments.

Some of these, which the trier of the facts had the right to believe and which were harmful to Mr. Flansburg's theory of the matter, were the concealment of the chain, his failure when apprehended to assert his right to have its possession, as he did at the hearing; his offer, according to the statement of the officer who apprehended him, to take the chain back as no one seen him take it, if the officer would let him go. The strong inference that the chain

found on Mr. Flansburg was not purchased from the firm as claimed by him; that a receipt purporting to cover the purchase price of the disputed chain had been fabricated and that Mr. Flansburg was a party to this deception.

Upon the whole record, it does not appear that the finding and action of the carrier in discharging Mr. Flansburg was unjustified.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 24th day of June 1959.