

The Second Division consisted of the regular members and in addition Referee Louis Norris when award was rendered.

Parties to Dispute: { System Federation No. 99, Railway Employees'
 { Department, A. F. of L. - C. I. O.
 { Carman
 { The Illinois Central Gulf Railroad Company

Dispute: Claim of Employees:

1. That under the current Agreement, Carman Welder H. E. Smith and Carman R. A. Nash were unjustly suspended from the service of the Illinois Central Gulf Railroad for sixty (60) working days beginning November 26, 1974, and ending February 12, 1975.
2. That accordingly the Illinois Central Gulf Railroad be ordered to compensate Carman Welder H. E. Smith and Carman R. A. Nash for all time lost account of the aforesaid unjust suspension.

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 waived right of appearance at hearing thereon.

On the date in question, November 9, 1974, Claimants were assigned to work as carmen on the morning shift. About noon, General Car Foreman Velhuizen was leaving the yard for home when he noticed Claimants riding together on a shop tractor during their assigned lunch period. He gave it no thought at the time and proceeded on his way. Shortly thereafter, having forgotten something, he returned to the yard. He noticed movement in a garage, known as the "dope house", which is adjacent to the employees parking lot. Upon entering the "dope house" he discovered Claimant Smith hiding behind an industrial buggy. He also noticed a foot protruding from the buggy. This foot turned out to belong to Claimant Nash who was also hiding. Velhuizen noticed also that Smith's shop tractor was inside the "dope house".

His suspicions having been aroused, Velhuizen proceeded to search the tractor and discovered 16 brass (pipe) in the tool box, which was covered by burlap, and two brass hidden next to the operator's seat. Thirty-eight more brass were found in the "dope house" concealed under rags beneath an open window facing the parking lot.

According to Velhuizen, Smith confessed that he intended to steal the brass and sell it. This is denied by Smith. In any event, Claimants were suspended pending formal investigation, which was held on November 19, 1974. The charge was "attempted theft of Company material". Claimants were found guilty as charged and each was suspended from service for 60 working days.

Petitioner contends that Claimants were not proven guilty of removing Carrier's property; that there was no proof that the brass was placed in the buggy by Claimants or that Claimants were observed removing the brass for the purpose of stealing. Additionally, Petitioner contends that a fair and impartial investigation was not held and that the discipline assessed was unreasonable and arbitrary.

At the outset, Carrier raises the procedural objection that certain Exhibits attached to Petitioner's rebuttal to this Board constitute "new matter", not having been submitted during the handling of this dispute on the property. These Exhibits consist of a reward bulletin, copy of a newspaper article on a Supreme Court decision, and copies of waiver forms to be signed by employees prior to interrogation.

We sustain Carrier's objections on this issue. This Division and all other Divisions of the Board have consistently held in innumerable prior Awards that issues and evidentiary matter presented for the first time at this stage of the appellate process constitute "new matter" and as such are inadmissible for consideration.

See Award 2374 (Carter) as well as Awards 3551, 4011, 4249 and 4926. See also Rules of Procedure, Circular No. 1, National Railroad Adjustment Board, adopted 10/10/34, and additionally, 3rd Division Awards, 18656, 19101, 20064, 20121, 20255 and 20468, among many others.

Petitioner on its part contends that Carrier violated Rule 39 of the Agreement in that no Organization representative was present during the informal meeting held between Carrier officials and Claimants on November 11, 1974. Rule 39, covering discipline and investigations, provides for representation of the Organization at the formal hearing, but does not provide for such representation at informal meetings held with company officials.

Accordingly, no rule in violation having been cited by Petitioner, we do not sustain the objection raised on the latter issue.

We have carefully reviewed and analyzed the transcript of the testimony and the entire conduct of the Investigation. We find that the Investigation was in all respects fairly and impartially conducted, with representation of Claimants by their authorized representatives, with full opportunity for cross-examination of witnesses, and with ample opportunity to Claimants to testify fully as to their version of the facts.

The entire series of events that occurred on the day in question, particularly the observations of the Foreman as to the conduct of Claimants, the fact of Claimants' hiding for no credible reason, the finding of the concealed brass on the vehicle in the possession of Claimants that entire morning, and the additional concealed brass found at the same site, are fraught with suspicion as to the conduct of Claimants and their motives. The absence of proof that Claimants "removed the material from the property", as contended by Petitioner, is of no relevance since Claimants are not charged with "theft" but "attempted theft".

We have held repeatedly that in discipline cases the burden of proof is upon the Carrier to establish by substantial probative evidence that Claimants are guilty as charged. Prior Awards are legion on this established principle and need hardly be cited.

On the entire record, particularly the testimony adduced at the Investigation, we find that such substantial probative evidence is present in this case and that Carrier did in fact sustain its burden or proof. Nor does the fact that certain of the evidence was circumstantial in nature militate against such finding.

See Award 5934 (Dorsey). See also Award 10440 (3rd Div. - Rose), in which the Board held:

"Circumstantial evidence is valid and sufficient to support a charge of wrongdoing. See Award 7657."

In Award 12491 (3rd Div. - Ives), the Board stated:

"The mere fact that the evidence is circumstantial, makes it no less convincing and the Board cannot say as a matter of law that the Carrier was not justified in reaching its conclusion following the trial. (Awards 4808, 6546 and 7657)."

See also Third Division Awards 14066 (Rohman) and 15025 (Mesigh).

In respect to the testimony of Foreman Velduizen, the principle is well established that Carrier has the right to rely on the testimony and observations of its supervisory employees.

See Awards 4981 (Weston), 6281 (McGovern), 6327 (Harr) and 6408 (Lieberman), among others.

The following language from Award 1809 (Carter) is particularly apropos and directly applicable to the facts of this dispute:

"There was direct conflict in the evidence. The board is in no position to resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony is for the trier of the facts to determine. If there is evidence of a substantial character in the record which supports the action of the carrier, and it appears that a fair hearing has been accorded the employe charged, a finding of guilt will not be disturbed by this Board, unless some arbitrary action can be established. None is here shown. Reasonable grounds exist to sustain the determination of guilt made by the carrier."

See also Awards 3266 (Hornbeck), 4744 (Johnson), 6456 (Bergman) and 6525 (Franden). To the same effect, see Third Division Awards 17914 (Quinn), 18550 (O'Brien), 19487 (Brent), and 20769 (Norris).

Additionally, we see no basis upon which to conclude that the discipline here imposed, 60 days suspension, is unreasonable, arbitrary or capricious, or in violation of due process.

See Awards 6392 (Shapiro), 6824 (Eischen) and Third Division Awards 15574 (Ives) and 18550 (O'Brien).

Accordingly, based on the entire record, the foregoing established principles and controlling authority, we will deny the claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 26th day of March, 1976.