

The Second Division consisted of the regular members and in addition Referee Robert M. O'Brien when award was rendered.

Parties to Dispute: (System Federation No. 121, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Texas and Pacific Railway Company

Dispute: Claim of Employees:

1. That under the controlling agreement, Car Inspector, H. E. Rankey, was unjustly dismissed from the service of Carrier on May 19, 1973.
2. That accordingly, Carrier be ordered to restore Mr. Rankey to service with all seniority rights unimpaired with pay for all time lost - 5 days per week, 8 hours per day; make him whole for all vacation rights; make him whole for all health and welfare insurance benefits; and make him whole for pension benefits including Railroad Retirement and Unemployment Insurance.

Findings:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 May 19, 1973, claimant was dismissed from service due to his alleged possession of company property without proper authority at Carrier's Centennial Yard, Fort Worth, Texas, while off duty at about 9:00 P.M., Friday, April 20, 1973.

The Organization maintains that claimant was not accorded a fair and impartial hearing prior to his dismissal, and further that Carrier has failed to prove the charges preferred against him. Initially, they argue that claimant was not advised of the precise charge against him as required by Rule 24(a) inasmuch as the items alleged to be in his possession were not listed in the notice of charge. It is axiomatic that in discipline claims such as the one at hand, the Carrier is required to frame the charges against an employee in such a manner that he is able to prepare an adequate

defense thereto. It is readily apparent to this Board that the notice of charge given claimant conformed with that criterion. It is obvious that claimant was not surprised by the charge since he secured the presence of witnesses who testified on his behalf at the hearing relative to the matter under investigation.

The Organization also contends that claimant was denied due process when Leo Stinchfield, an individual who was allegedly with claimant on the night in question, was not present at the hearing. Mr. Stinchfield, however, is not an employee of the Carrier and Carrier was thus without authority to compel his attendance at the hearing. Moreover, his testimony would only serve to corroborate the testimony of Messrs. Ray and Hafner who did, in fact, testify at the hearing. The transcript reveals that claimant and his representative were given full opportunity to proffer evidence on claimant's behalf, and the allegation that he was not accorded a fair and impartial hearing has certainly not been established. It should be noted, however, that in reaching its conclusions herein, the Board has not considered the evidence marked Carrier's Exhibit "A". No where on the property was this evidence ever discussed or alluded to and this Board, therefore, feels compelled to disregard such evidence. It has no place in this forum and it has been given no weight by this Board.

Although the evidence was somewhat conflicting, nonetheless a thorough review of said evidence compels the conclusion that the charge preferred against claimant has been supported by substantive evidence. At the hearing, Special Agent Ray testified that he had observed claimant placing a sack, later found to contain grain, on the coupler of a freight car. Mr. J. Hafner, a non-Carrier employee, confirmed that he, the claimant and Leo Stinchfield had misappropriated grain belonging to the Carrier on the night in question. And while claimant denied being present at Centennial Yard on the night in question, which testimony was corroborated by claimant's brother-in-law, it is certainly not the province of this Board to resolve conflicts in the testimony. Rather, such is the function of the hearing officer. In the instant case, the hearing officer cannot be said to have abused the discretion vested in him.

When one considers the serious nature of the proven offense at hand, as well as the fact that claimant had been restored to service four months prior to this incident, having been discharged in July, 1972 for a separate offense, we thus do not consider dismissal to be arbitrary, capricious or excessive. This Board finds that claimant has been accorded a fair and impartial hearing; the charge of misappropriation of company property without authority has been supported by substantive evidence; and the discipline meted out has not been arbitrary, capricious or excessive. We are loath, therefore, to substitute our judgment for Carrier's and the claim cannot be sustained as a result.

Form 1
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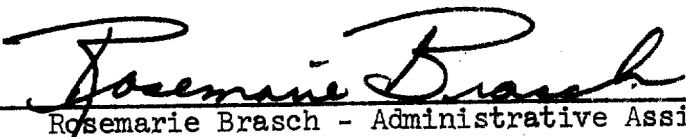
Award No. 7103
Docket No. 6770
2-T&P-CM-'76

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 - Administrative Assistant

Dated at Chicago, Illinois, this 23rd day of July, 1976.