

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 7220
Docket No. 7069
2-L&N-FO-'77

The Second Division consisted of the regular members and in addition Referee Gene T. Ritter when award was rendered.

Parties to Dispute: (System Federation No. 91, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Firemen & Oilers)
(
(Louisville and Nashville Railroad Company

Dispute: Claim of Employees:

- (A) That under the current and controlling agreement, as amended, Service Attendant Miles P. Williams was unjustly dismissed from service of the Louisville and Nashville Railroad Company on December 13, 1974, at Etowah, Tennessee after a summary investigation on October 30, 1974.
- (B) That accordingly, Service Attendant Miles P. Williams be restored to service with his seniority rights unimpaired, vacation, Health and Welfare, Hospital and Life Insurance rights, in addition, be compensated for all time lost, effective December 13, 1974.

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 employees 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.

Claimant entered service of Carrier on March 6, 1946 and held seniority as service attendant Rank No. 12, roster 13, on the January 1, 1974 roster. On October 22, 1974, Claimant gave permission to Carrier's Inspector Special Services and an F.B.I. agent to look around his property while investigating the theft of four air conditioners from an interstate shipment at Etowah, Tennessee. These officers went to the home of Claimant and discovered one sledge hammer, two ballpeen hand hammers, one pipe wrench - E 24, two pipe wrenches - E 14, one 12 inch crescent wrench, one chisel and a caboose hammer. Claimant was charged with unauthorized possession of company property and an investigation was scheduled for October 30, 1974. This investigation was continued until November 11, 1974. Additional charges were filed, charging Claimant with unauthorized possession of five new cross ties, one gallon of black car paint, one 70 pound can of stencil paint, approximately one hundred deck boards, one ballpeen hammer, one caboose lamp and one kerosene

flagman's hand lantern. The investigation was held on November 11, 1974, and as a result of the investigation, Claimant was found guilty and was dismissed from service of Carrier effective 7:00 o'clock a.m., Friday, December 13, 1974. The Organization contends that Claimant was not proven guilty of the charge and was dismissed from service without just and sufficient cause.

In a discipline case, the burden of proof is on the Carrier. Proof of an allegation can not be made by surmise or innuendo. In the instant dispute, Carrier presented a prima facie case for the reason that the items Claimant was charged with taking were found either on claimant's own vehicle or were found on Claimant's home property. The burden then shifted to Claimant to satisfactorily explain why he was in possession of the L & N Railroad Company property.

The transcript of the Investigation has been carefully and thoroughly reviewed by this Neutral. This Neutral finds that the investigation reveals a satisfactory explanation for the possession of most all of the items Claimant is being charged with having in his possession without authority. There is certainly a question as to whether or not the two ball penn hand hammers, the 12 inch crescent wrench and the caboose hammer were taken without authority, however, the 12 inch crescent wrench and the caboose hammer was not produced at the investigation. There is an explanation, of sorts, concerning the two ball peen hand hammers found in possession of Claimant; said explanation being that the hammers were in debris that he took from his truck when hauling the old Electric Shop away. The record reveals that the five new cross ties were obtained from the clean-out track and that all bracing material obtained from the clean-out track are customarily taken by either employees or persons who live in the adjacent area; the one gallon black car paint was a replacement for car paint that Claimant furnished Carrier; the one 70 pound can of stencil paint represented a discontinued type of paint that was cleaned out and thrown away; the one hundred deck boards were discarded by Carrier and was usually bulldozed away or given away; the ball peen hammer; sledge hammer, two ball peen hand hammers, pipe wrenches and other tools were either borrowed from Carrier with permission of the foreman or could have very possibly been used by Claimant in the performance of his overtime work. The hand lantern was not produced at the investigation and the caboose lamp was explained as being bought from an antique shop. None of the testimony concerning the explanation for possession of the items Claimant was charged with, was rebutted.

This Neutral agrees that taking property without permission is a serious offense. However, in this instance, Carrier must be charged with part of the blame for this Claimant having any property at all, belonging to this Carrier, in his possession. The Record reflects that it not only permitted certain property to be carried away, such as damaged deck boards, unused stencil paint, cross ties, etc., but must also assume the loose practice of loaning employees certain tools for their personal use. This Carrier evidently had no system for checking out tools to be carried in employees' personal vehicle for overtime use when called.

The record reveals that General Foreman D. L. Jones testified that Claimant used his own pick up for company business; that unusable material, such as lumber, taken out of clean-out track was given to employees and citizens of Etowah, including plywood boards; and that it was the custom for employees to take these items. W. E. Watsons, service attendant, testified that even outsiders pick up "stuff"; that employees usually take a bulldozer and clean off track of scrap and unusable material; and that when cross ties go to clean-out track, they are done away with. The witness W. A. White, testified that old bracing and lumber removed from cars were thrown away as scrap.

Therefore, there strongly appears from the record in this case, that there were extenuating circumstances caused by Carrier which would lead employees to believe that they could borrow tools and take for their personal use permanent possession of salvage. This Neutral does, however, believe that this Employee abused the careless and prevailing custom of Carrier in some instances. Therefore, this Claimant should not be allowed to go unpunished, even though, in this instance, the punishment of absolute dismissal from service was excessive.

It is therefore, the opinion of this Board that Carrier should take immediate steps to establish Company rules as to the loaning of tools; checking out and accounting of tools to employees using the same in private vehicles for company business on overtime; and for the disposal of scrap material and usable or unusable damaged material. It is also the Opinion of this Board that the dismissal of Claimant from service was excessive punishment because of the circumstances revealed in the record in this case. It is, therefore, the Opinion of the Board that the punishment of Claimant in this instance shall be reduced to six (6) months without pay and that, at the expiration of said six (6) months, this Claimant be restored to all rights held immediately prior to the investigation in this case.

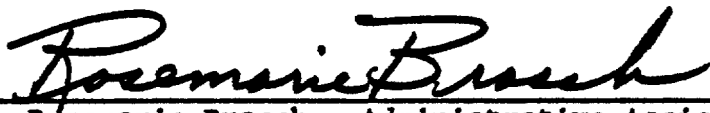
A W A R D

Discipline modified in accordance with findings.

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 25th day of January, 1977.