

Claimant was dismissed on August 20, 1975 for allegedly stealing four new automobile tires, while he was employed as a Car Inspector.

Petitioner argues that the investigation never established the fact that Claimant removed the tires from Carrier's property or indeed that he was seen removing the tires from the box car in which they were being shipped. Additionally, it is argued that the dismissal of the criminal action brought against Claimant for "insufficient evidence" further bolsters Claimant's position.

A study of the transcript of the investigation reveals that there was ample evidence to support Carrier's conclusions with respect to Claimant's guilt. The record shows quite clearly that the tires were on the box car early in the morning of July 30th; that they were on Claimant's truck later; that he did not notify any Carrier official of having "found" tires; and finally, that he attempted to conceal the entire truck off Carrier premises. Carrier's conclusion was a reasonable one under the circumstances.

Claimant was dismissed by Carrier for violation of certain Carrier rules, not for any violation of the criminal code. It must be noted that the quantum of evidence required in a criminal case is far greater than that required in a carrier disciplinary proceeding: in criminal trials the case must be proved "beyond a reasonable doubt"; in a disciplinary proceeding "substantial evidence" must be adduced. Further, it is well established that the decision of a court in a criminal proceeding is not dispositive of a Carrier disciplinary proceeding. The jurisdiction vested in a Board such as this cannot be preempted by the courts (see Third Division Award 13127; PLB # 550, Award # 446; and Award # 3 of PLB # 1462 among others).

Based on the entire record, and for the reasons indicated above, the Claim must be denied.

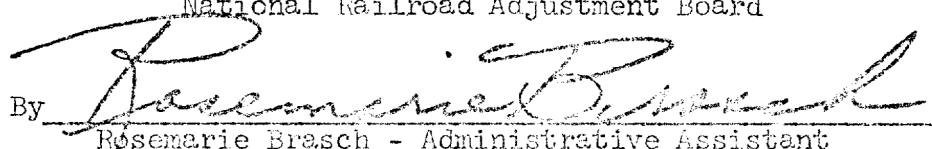
A W A R D

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 1st day of November, 1978.

The Second Division consisted of the regular members and in addition Referee George S. Roukis when award was rendered.

Parties to Dispute: (International Association of Machinists and
(Aerospace Workers
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(Chesapeake and Ohio Railway Company

Dispute: Claim of Employees:

1. That the Chesapeake and Ohio Railway Company arbitrarily and capriciously dismissed Machinist Gary Brown from service with said Company.
2. Accordingly, the name of Gary Brown should be restored to the Grand Rapids Shop seniority roster and Machinist Gary Brown should be permitted to resume service upon meeting the necessary physical qualifications.

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.

Claimant was dismissed on June 18, 1976 for continuing unauthorized absences. Our review of the detailed record indicates that Claimant made no serious attempt to protect his position or secure proper medical certification of his purported physical condition during the period from March 5, 1976 through April 28, 1976. In fact, when requested to submit valid medical verification of his asserted "back" problem, claimant presented documentation to carrier on May 21, 1976, the date of the investigative hearing, which was dated May 11, 1976. We see no reason for the delay.

Moreover, claimant acknowledged that he had not been examined by his personal physician during the critical months of this absence, although he had seen carrier's medical doctor on January 16, February 24, 25 and March 5, 1976. When he was examined again by Carrier's physician on May

10, 1976, the medical examiner concluded in his letter to the Locomotive Department Manager, dated May 14, 1976 that, "I have carefully observed his posture, his gait, his standing and sitting, his entering his automobile, and I am not at all convinced that there is sufficient disease to keep him from working."

Clearly the record shows that claimant didn't take the necessary precautions to insure his employment status.

His demeanor, if anything, was discernably counterproductive. When these nonchalant manifestations are assessed against the undisputed eyewitness recital of his tennis playing activities on May 10, 1976, we have an inexorable compounding effect.

Carrier's eyewitness testified that: "Mr. Brown was playing tennis with intensity. His serves were effortless and stylish, his drives were volleyed both one handed and two handed, both right handed and left handed during the 40 minutes in which we observed him."

This reportage doesn't epitomize a person with a sustained serious back injury. We find no credible evidence to excuse his absence.

Correlatively, we cannot disregard the relevancy and application of our decisional law to the specific facts herein. Claimant was continually absent without permission. In Second Division Award 7348, Referee McBrcarty stated that: "When an employee is so consistently and habitually absent over a long period of time that his employment becomes a serious liability rather than an asset, Carrier is entitled to terminate his services."

We find substantial evidence to support carrier's disposition. 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 - Administrative Assistant

Dated at Chicago, Illinois, this 1st day of November, 1978.