

The Second Division consisted of the regular members and in addition Referee Rodney E. Dennis when award was rendered.

Parties to Dispute: { System Federation No. 16, Railway Employees'
Department, A. F. of L. - C. I. O.
(Carmen)
Norfolk and Western Railway Company

Dispute: Claim of Employees:

1. That the Norfolk and Western Railway Company unjustly dismissed Carman M. J. Nestor on March 1, 1978, as a result of investigation held January 19, 1978, at Buffalo, New York.
2. That the Norfolk and Western Railway Company be ordered to restore Carman M. J. Nestor to service with all seniority unimpaired, make him whole for all wages lost, all vacation rights, and all other rights and benefits due him by contract as an employee of the carrier had he not been unjustly dismissed.

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.

M. J. Nestor, the claimant, a carman at carrier's Bison Yard in Buffalo, New York, was dismissed from service for theft of property entrusted to the carrier for interstate shipment. The property consisted of two batteries that were removed from automobiles being shipped by the carrier. These batteries were found in the claimant's private car. An investigatory hearing into the matter was held on January 19, 1978; it resulted in the claimant's discharge.

The organization contests this discharge and argues that the claimant was not observed taking the batteries from the car in transport, nor was he identified placing the batteries in his car. The organization also argues that the reasons contained in carrier's correspondence for claiming dismissal is not consistent with the charges for which an investigation was held. It finally argues that the January 19th hearing was not impartial.

Carrier refutes the organization's charges on all counts and rests on the record, stating that it conclusively shows that the claimant is guilty as charged and dismissal from service is appropriate.

The case before this Board is an unfortunate one; it involves the dismissal of an employee with 28 years of service. This Board has had similar cases in the past and has consistently upheld the discharge of long-term employees when theft of carrier property or theft of property entrusted to carrier has been proven. It is a universally understood principle among railroad employees that if you are caught stealing, you will be fired. Board decisions on this issue are legend in the industry.

The record before us clearly establishes that claimant, with two fellow employees, was involved in the theft of car batteries from new cars being transported over carrier's road. The testimony of two police officers that the two batteries were found in claimant's car as he drove away from the property went unrefuted. The claimant when stopped by the police, when making his statement after being arrested on the night in question, he had no logical explanation for why he had two new batteries in his car. Thus, he was clearly implicated in the theft of these batteries. As a result of a Public Law Board hearing (Public Law Board No. 2141), the other employees involved in the same incident were found guilty and discharged from service. The hearing officer in this instance pursued to no avail the only plausible avenue of inquiry that may have vindicated the claimant. He asked the claimant if he thought that he had been set up, that is, someone had planted the two batteries in his car to get him in trouble. The claimant, by his own testimony, did not see how this was possible or why it would have been done.

The organization pursued this case in a dogged and persistent manner. The General Chairman raised every possible objection at every step of the hearing and made every possible defense of the claimant. His case presentation bordered on obstructionism. Despite the General Chairman's diligent defense of the claimant, however, the organization's procedural arguments cannot prevail.

A review of the record before us supports the board's decision on the procedural issues. We see no reason to conclude that the charges against the claimant were not clear to him and that he was not aware of what he was being charged with. He had ample opportunity to develop a defense. He was accused of stealing and possessing stolen property. This was clear to him as well as to the organization. These charges arose from the arrest of the claimant by carrier's police officers. The company official who took the claimant out of service and wrote the charges did so as a result of the police report, not as a result of being an eye witness to the event. This board sees no procedural defect in this procedure.

The fact that the hearing officer would not allow the claimant to have a lawyer present at the investigation is not improper. The agreement does not allow for a private attorney at such hearings. Past practice and decisions of this board on this issue clearly support the hearing officer's position on this point.

The organization's complaints about hearsay evidence, inadequate stenographic notes, not allowing witnesses to be at the hearing, and not allowing the General Chairman to confer during the hearing with the claimant are also without foundation. The record before us cannot support the procedural objections raised by the organization. The transcript of the hearing clearly demonstrates that the hearing officer was very patient throughout the long and at times very tedious hearing. It must be pointed out that hearings on the property are carried out by railroad employees, not by trained lawyers or by men experienced as legal judges. Despite this, however, most hearings of this type are carried on in a fair and impartial manner, with the rights of the accused given every consideration.

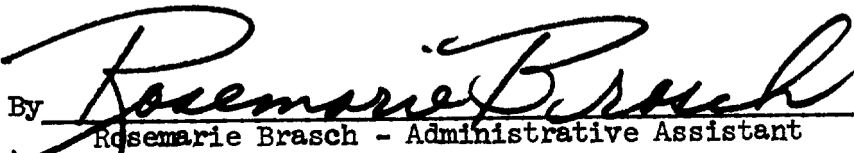
After a careful review of the record of this case and an extensive discussion of each point raised by the organization, this Board must conclude that the organization's claim must be denied.

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 16th day of April, 1980.