

The Second Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States
and Canada
{ Southern Pacific Transportation Company

Dispute: Claim of Employees:

1. That the Southern Pacific Transportation Company (Texas and Louisiana Lines) violated the controlling agreement, particularly Rule 34, when they suspended Carman N. W. Lantz from service March 24, 1978, pending investigation which was held on May 1, 1978, and dismissed him from service on May 10, 1978.
2. That accordingly, the Southern Pacific Transportation Company, (Texas and Louisiana Lines) be ordered to compensate Carman N. W. Lantz as follows:
 - (a) Restore Carman Lantz to service with pay for all time lost beginning March 24, 1978, when he was unjustly suspended from service without proper cause and controlling until he is returned service;
 - (b) Make him whole for any and all damages suffered;
 - (c) Restore all his seniority rights and contractual rights;
 - (d) Restore all his health and welfare rights.

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.

Claimant, a carman in San Antonio, Texas was dismissed from service on May 10, 1978 as the result of a hearing held on May 1, 2, and 3, 1978. He was charged with three serious offenses: 1.) falsifying his personal record (his initial employment application); 2.) theft of eight fellow worker's payroll checks; and, 3.) for working under the influence of narcotics on March 23, 1978 in violation of Rule G.

The hearing was postponed twice due to the claimant's inability to appear. On May 1, 1978, over the organization's objections, the hearing commenced even though the claimant could not attend the investigation. On May 1, 1978, the claimant was imprisoned in the county jail. The organization contends the carrier violated Rule 34 by conducting the May hearing in claimant's absence. Under normal circumstances, the claimant has a fundamental right to be present at the Rule 34 hearing to confront witnesses testifying against his interest. However, in the instant case, the claimant was under the exclusive control of government authorities, and thus, neither the carrier nor the organization could arrange for the claimant to appear. If there was evidence that the claimant would have been imminently released from imprisonment another postponement would have been advisable. The claimant's incarceration was more permanent in nature, and even another postponement would not have guaranteed his appearance. After granting two previous delays, it was reasonable for the carrier to proceed with the investigation on May 1, 1978. The Local Chairman ably represented the claimant at the hearing and he was given ample opportunity to cross examine all witnesses, so, in spite of the claimant's absence, the claimant suffered no actual prejudice in presenting a defense.

The organization also objected to the purported vagueness of the notice of charges and the multiple roles of the carrier officer who cited the claimant with the offenses, assessed the penalty and declined the claimant's first appeal. We overrule both objections. The notice need not set out each charge with absolute precision. Here, the charges sufficiently described the alleged offenses. Indeed, at the organization's request, on April 10, 1978, the carrier provided the organization with particular facts underlying the charges. As to the multiple roles, after reviewing the record, we find that the Superintendent's performance of multiple functions did not cause any defect in the hearing process or adversely affect the organization's defense.

Addressing the merits of the charges, we find substantial evidence to support a finding that the claimant falsified his personal record and committed theft. In completing his employment application in 1974, the claimant stated he had never been arrested when public records submitted as evidence at the hearing conclusively demonstrate that the claimant had been previously arrested and he had pleaded guilty to a criminal offense. The reliable testimony of the stenographic clerk who was present when claimant signed his employment application authenticated claimant's signature on the application form. The organization argues that Rule 40, concerning carrier approval of employment after a probationary period, prevents the carrier from later prosecuting the claimant for providing false information on his employment application. However, Rule 40 is not applicable to this case. The employment form, signed by the claimant expressly warned the claimant that giving untruthful statements would be grounds for discharge regardless when the carrier discovers the misrepresentations. Thus, the carrier proved the first charge.

By the claimant's own written declaration, dated March 30, 1978, he admitted stealing eight payroll checks from the carrier and his fellow employees. In addition, a special carrier police officer assigned to investigate the disappearance of the payroll checks found claimant's fingerprints on one of the stolen checks. The organization's primary contention is that the claimant's March 30, 1978

statement was given without his constitutional right to legal counsel. However, we are not concerned with whether or not the claimant's statement is admissible evidence in criminal prosecution. The statement is proper probative evidence in a Rule 34 hearing since such hearings are civil rather than criminal in nature. In any even, the surrounding circumstances indicate the claimant voluntarily gave the statement containing his admission of theft. We conclude that there is substantial evidence to support the theft charge.

Theft and falsification of records are serious offenses constituting a violation of Rule 801 which prohibits dishonesty by employees. The claimant's violations are so egregious that discharge is warranted. While we sustain the carrier's discharge of the claimant, we will address the alleged violation of Rule G. The carrier relies primarily on the Special Officer's hearsay testimony that the claimant orally conceded that he regularly took narcotics. In his March 30, 1978 statement, the claimant also alluded to his use of narcotics. However, there was no direct evidence to prove the claimant actually was under the influence of narcotics on March 23, 1978 (the date specified in the charge). On the contrary, the claimant's immediate supervisor testified that the claimant behaved in a normal fashion and capably performed his duties on March 23, 1978. The claimant did leave work early on March 23, 1978 but the record is not clear as to whether the claimant's premature departure was due to genuine illness or the effects of narcotics. Therefore, we do not find substantial evidence showing the claimant committed a Rule G violation on March 23, 1978.

Nonetheless, the carrier did proffer overwhelming evidence that the claimant was guilty of falsification of his personal record and theft of company payroll checks. As we ruled above, the penalty of discharge for these offenses is appropriate.

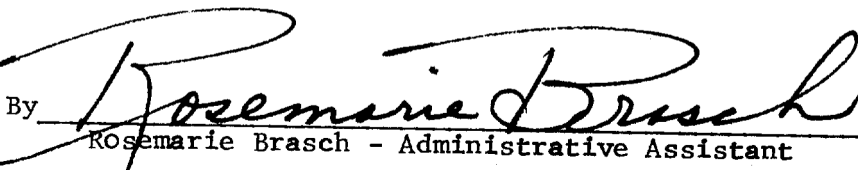
A W A R D

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 4th day of March, 1981.