

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 8665
Docket No. 8602
2-N&W-CM-'81

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
(
(Norfolk and Western Railway Company

Dispute: Claim of Employees:

1. That in violation of the current agreement, Carman M. R. Jefferson was unjustly suspended and dismissed from service of the carrier following hearing held on March 15, 1978 and recessed until April 12, 1978.
2. That accordingly the carrier be ordered to make the aforementioned M. R. Jefferson whole by restoring him to carrier's service with seniority rights unimpaired and compensated for all lost wages.

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 with five years of service, was discharged on May 3, 1978 for his alleged unauthorized acquisition and sale of a steam jenny belonging to the carrier. A plenary hearing was held on April 12, 1978 after numerous postponements. The claimant had previously been suspended from service on November 29, 1977 pending the outcome of the hearing.

The organization raised several procedural objections during the investigation which, according to the organization, undermined the impartiality and integrity of the hearing process. Also, the organization urges us to reverse the assessed discipline because the record lacks any evidence to support the charge. The carrier argues that the hearing was fair because the claimant had ample opportunity to prepare a defense and to call witnesses of his choice.

We turn first to the organization's objections concerning the purported bias of the hearing officer and the admission of hearsay evidence. First, the hearing officer did not prejudge the claimant. He did ask penetrating questions which were designed to develop the facts. Such questioning is not only permissible. but also the hearing officer has an affirmative duty to pose questions which will induce witnesses (including the claimant) to testify about all facts within their knowledge which are related to the charges. Second the organization contends

the record is replete with hearsay evidence. However, a Rule 37 hearing is not conducted according to the rules of evidence applied in a court of law. Any oral or documentary evidence (even though it may be technically characterized as hearsay) which is material to the charge may be admitted into evidence. Third Division Award 16308 (Ives). Thus, the patrolman's report detailing his extensive investigation into the disappearance of company property is proper evidence. Indeed, the report constitutes reliable, probative evidence since it is an ordinary record kept in the normal course of business. The claimant and his representatives had an opportunity to cross examine the patrolman on both the authenticity and accuracy of his report. The statement of Mr. Jackson, the alleged purchaser of the steam jenny presents a different problem. Here, the author of the statement was not a witness of the hearing and there was no showing that he was unable to testify at the hearing. Thus, we must balance competing policies, that is, the need for the hearing to develop all the facts with the claimant's right to defend himself. It is impossible for the organization to cross examine a piece of paper. But as we stated above, a Rule 37 hearing does not follow the rigid rules of a courtroom. Because the claimant could not cross examine the author and because the carrier failed to show that the author was unavailable to testify, we cannot rely exclusively on this statement to prove the charges. However, the statement was material to the charges since the signator stated he purchased the steam jenny from the claimant. The evidence is certainly not prejudicial since the claimant could and did deny the fact set forth in the statement. Therefore, Mr. Jackson's statement is admissible evidence. The claimant was given a fair and impartial hearing.

Addressing the merits of the claim, we find substantial evidence supporting the charge that the claimant converted company property to his own use. The carrier discovered a steam jenny was missing in November, 1977. The Assistant Engineer of Roadway Equipment fortuitously observed the machine at a local service station. Carrier police and public authorities traced the machine to Mr. Jackson who produced a bill of sale signed by the claimant. In addition, Mr. Jackson had a cancelled check in the amount of \$200.00 made payable to the claimant. Even if we completely disregarded Mr. Jackson's hearsay statement, the above independent evidence supports a finding that claimant committed theft. Also, the claimant conceded that he took the steam jenny but characterized it as "borrowing". His testimony is patently speculative when viewed against the facts. If he borrowed it in September, 1977, why had he still failed to return it by November, 1977? If he borrowed it, why was the equipment no longer in his possession or under his control when the carrier found it at a local service station? These facts clearly demonstrate the inherent inconsistencies in claimant's defense that he merely borrowed the steam jenny.

Lastly, theft is a serious offense which justifies a heavy penalty. The carrier's decision to dismiss the claimant is not arbitrary or excessive. Employees are protectors of company property. Instead, the claimant converted carrier property for his personal benefit.

A W A R D

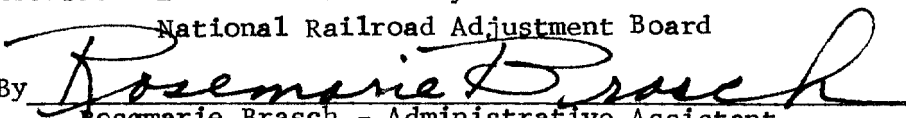
Claim denied.

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