

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(Consolidated Rail Corporation

Dispute: Claim of Employees:

1. That under date of July 27, 1979, Electrician G. J. Clark was unjustly withheld from service by the Consolidated Rail Corporation (ConRail) in violation of the current agreement.
2. That under the current agreement Electrician G. J. Clark was unjustly dismissed from service effective August 31, 1979.
3. That accordingly, the Consolidated Rail Corporation (ConRail) be ordered to restore Electrician G. J. Clark to service with all seniority rights unimpaired and compensated for all wages lost during the time held out of service.

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.

At the time of dismissal, Claimant was employed as a Communication Maintainer with approximately 4 and one-half years seniority.

Under date of July 27, 1979, the Claimant was notified that he was being held out of service in connection with "the unauthorized possession or removal or disposal of any material from railroad property or property served by the railroad". Under date of August 8, 1979, the Claimant was notified to appear at a disciplinary trial. The notice was issued in connection the following charge:

"That on July 27, 1979, you were in violation of Rule L, Para. 3 which states 'The unauthorized possession of, removal or disposal of, any material from railroad property or property served by the railroad is prohibited', in having nine new railroad ties and twelve communication pole crossarms in the foundation of the house trailer at Birchwood Trailer Park, Route

"9, Fishkill, N.Y., house trailer owned and occupies (sic) by yourself."

The trial was held as scheduled and Claimant was dismissed as a result effective August 31, 1979, by letter that date.

During the trial, in their submission and before the Board, the Organization makes the following arguments in the Claimant's defense:

1. That Claimant was improperly withheld from service pending trial
2. That the Claimant was discriminately discharged because another employee involved in the incident was not discharged
3. that in light of the Claimant's personal problems, the discharge was excessive
4. The ties and crossarms were of no value, and
5. A statement taken before the trial, signed by the Claimant and entered into evidence at the hearing, should not be considered as evidence because it was taken without a union representative present.

The carrier argues simply and straightforward that the evidence establishes without doubt that the Claimant was guilty of a Rule L, Paragraph 3 violation in connection with the unauthorized possession of company property. In support of their position, they direct the Board's attention to 1) the aforementioned statement in which the Claimant admits he did not have permission to appropriate the materials in question, 2) the Claimant's admissions during the trial and 3) the fact that Claimant appeared before a local judge and pled guilty to a charge of Petty Larceny. In court, he was sentenced to a conditional discharge and was ordered to make restitution in the amount of \$735.00. The Carrier further argues that in no way can dismissal be considered excessive in light of the extreme seriousness of the charges against the Claimant.

In reviewing the record, it is the Board's conclusion that none of the arguments made by the Organization are sufficient to overcome the prima facie case established by the Carrier.

In regard to the argument that the Claimant was improperly withheld from service pending the trial, we find no foundation. Rule 6-A-1(b) reads as follows:

"When a major offense has been committed, an employee suspected by the Company to be guilty thereof may be held out of service pending trial and decision only if their retention in service could be detrimental to themselves, another person or the Company."

The Organization argues that on July 27, 1979, the Claimant was not "detrimental" to the Carrier, himself or any other employee. However, there is no doubt in the Board's mind that theft is a major offense and further that the retention of an

employee suspected of theft pending trial would be "detrimental" to the Carrier's interests. There is no reason to believe that Rule 6-A-1(b) would require the Carrier to risk its property to further and potential theft when they have probable cause to believe theft has previously occurred.

The Organization also asserts that the discharge is discriminatory because another employee was involved but was not charged or disciplined. They argue the Carrier was engaged in a "vendetta" against the Claimant. The Board finds no support for this assertion. The only evidence that another employee was involved was an assertion to that effect by the Claimant in his testimony. This is wholly insufficient to support the Organization's charge of discriminatory treatment against the Claimant. To support such an assertion the other employee's guilt would have to be clearly established. Even then it would not alter the Claimant's responsibility. The defense could only go to the issue of disparate treatment under similar circumstances such as similarities in responsibility, guilt and past record. However, there is no such evidence presented in any of these respects.

The Organization argued that the seriousness of the charge should be mitigated because the items in question were essentially valueless. They contend, "The ties and crossarms were of no value and the Carrier normally gives them away or will burn them on the right of way." This contention, in the opinion of the Board, is contrary to the facts contained in the record. Captain Esposito testified that the ties were new and valued at \$15.00 per piece and that the crossarms were valued at \$50 per piece, a total of \$735.00. This also happened to be the same amount for which the Claimant was ordered to make restitution in court.

Of the Organization's arguments, the most compelling was that the evidence contained in the Claimant's written statement should be held inadmissible because it was taken without a union representative present. However, in reviewing the circumstances surrounding the taking of the statement we find the Claimant's right to due process was sufficiently respected. There is no evidence that he requested that a union representative be present and further, without going into all the details, the Claimant, in the signing of the statement, acknowledged effectively that his rights to legal representation had been voluntarily waived.

The Board also wishes to note that even if the statement was held inadmissible, there is sufficient evidence in the trial transcript other than the statement to uphold the Carrier's finding of guilt. In addition to the clear and unarguable admissions of guilt in the statement, the Board observes the following testimony elicited during the trial:

Trial Officer to Mr. Clark

"Q Mr. Clark since you have already looked at the Railroad Exhibit 1 and you have admitted that the signatures on these sheets are yours, I will give you an opportunity at this time to make a statement with regard to these charges if they are true or they are false.

I think at this time you should try to explain the statement.

A The crossarms during my daily work chores, if I have to climb a pole and take down, to repair the top arm, my orders were to take down the two remaining arms that were on the pole and usually two -- there may have been one or two, depending on which pole you went up and these poles were of little value and these crossarms were of little value and they are no good to use again.

So, those are the crossarms that I had taken.

Q Did you receive permission from anyone to take these crossarms?

A No.

Q Go on.

A The railroad ties were sort of a temporary, borrowed. After I had put them underneath the house during the summer-time, they had swollen and the creosol that came out of them made the house a little unbearable.

I was going to take them out and have the house set up permanently whenever I got a chance and then my wife got pregnant and money was tight and I couldn't have it done right away.

At the time that I took this material, I needed to put a skirting on the trailer so as not to get evicted from the trailer park.

I had just come off two and a half months sick leave with an operation on my left knee and I just didn't have the money at the time to purchase the material.

Q In connection with the ties themselves, did you ever receive permission to take the ties?

A No.
(Emphasis Added)

The above testimony leaves no doubt in the Board's mind as to the Claimant's guilt. As for the Organization's argument that when the Claimant's personal problems are taken into account, dismissal is excessive, we also must reject it. In doing so we are mindful of the Board's comments in Award 7570 when Referee Wallace stated:

"After a careful review of this record, the Board finds no basis for overturning Carrier's actions. It is a universally accepted tenet in this industry that dishonesty is a dismissable offense. Carrier has the right to expect

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"honest employees, and has no obligation to retain in its
service those, who by their own admission, are not."

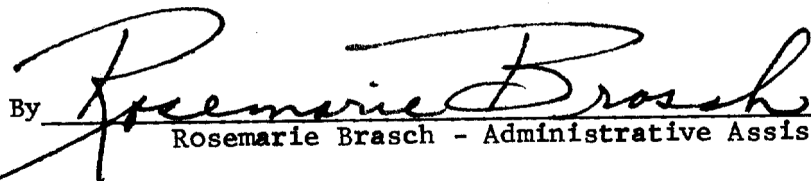
A W A R D

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 6th day of May, 1981.