

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13146
Docket No. 13005
97-2-95-2-33

The Second Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

(International Association of Machinists and
(Aerospace Workers
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

“1. Consolidated Rail Corporation arbitrarily and capriciously suspended and subsequently dismissed Machinist R. E. Seltzer from service following trial held on March 30, 1994.

2. Accordingly, Machinist R. E. Seltzer should be immediately restored to service, paid for all time lost, including overtime, be credited for any and all fringe benefits that would have accrued had not the unjust dismissal occurred and have his record cleared of any reference to the charges.”

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 were given due notice of hearing thereon.

Until his dismissal Claimant was assigned as a Machinist in the Maintenance Department of Carrier's Enola Diesel Terminal. On March 11, 1994, Carrier informed Claimant that he was removed from service and confirmed that fact in a letter dated March 14, 1994. On March 16, 1994, Claimant was instructed to appear for a trial in connection with the following charges:

- "1. Conduct unbecoming a Conrail employee, when on December 21, 1993, while on duty and under pay as a Machinist, tour of duty 7:00 A.M. to 3:30 P.M., Enola Diesel Terminal, Enola, PA, you were observed unloading three (3) 55 gallon drums from your private vehicle and reloading same into a private vehicle owned by L. C. Flail and filled same with diesel fuel for other than company use without verbal and/or written permission from your supervisor or any other person in authority.
2. Conduct unbecoming a Conrail employee, when on December 22, 1993, while on duty and under pay as a Machinist, tour of duty 7:00 A.M. to 3:30 P.M., Enola Diesel Terminal, Enola, PA, you were observed assisting L. C. Flail to fill two (2) 55 gallon drums which were in the rear of a private vehicle owned by L. C. Flail, for other than company use without verbal and/or written permission from your supervisor or any other person in authority.
3. Aiding and abetting on the theft and unauthorized removal of diesel fuel from Lucknow Fuel Facility, Harrisburg, PA, on December 21 and 22, 1993, during your tour of duty and while under pay as a Machinist, tour of duty 7:00 A.M. to 3:00 P.M., Enola Diesel Terminal, Enola, PA, when you assisted L. C. Flail as aforementioned in Charges No. 1 and No. 2 for personal use and failed to report the unauthorized removal of company material and/or property to your supervisor or any other person in authority."

At the outset, the Organization has raised procedural and due process objections to the investigation concerning the incident at issue. After a careful review of the record before the Board we do not find any basis of support for the Organization's contentions.

With respect to the merits of this case, Claimant admitted helping Machinist Flail remove the drums of diesel fuel from Carrier's property, including providing Flail with a ride to his truck, which he left in the parking lot of a shopping center, after filling the drums with fuel. Claimant clearly showed callous disregard for Carrier's prohibition against theft by not reporting Flail's misconduct. However, there is no evidence on this record to suggest that Claimant anticipated or achieved any personal gain from the incident. Therefore, we do not find that Carrier has borne its burden of persuasion with respect to Charge No. 3. That charge, and all references to it shall be expunged from Claimant's personal record. However, the remaining charges are sufficiently serious to justify Carrier's dismissal of Claimant.

AWARD

Claim denied, with the exception that Charge 3 shall be expunged from Claimant's file.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 8th day of September 1997.