



Award No. 5855

Docket No. 5738

2-WM-FO- '70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Arthur Stark when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 30, RAILWAY EMPLOYEES'
DEPARTMENT, AFL — CIO
(Firemen & Oilers)**

WESTERN MARYLAND RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement, Locomotive Serviceman R. L. Thomas was unjustly dismissed from the service of the carrier, effective May 1, 1968.
2. That accordingly the carrier be ordered to reinstate this employee with all seniority and employee rights unimpaired and pay for all time lost retroactive to May 1, 1968.

EMPLOYEES' STATEMENT OF FACTS: On August 14, 1957, the carrier employed R. L. Thomas, hereinafter referred to as the claimant, as a firemen & oiler employee at Hagerstown, Md.

Under date of April 11, 1968 General Foreman W. M. Brewbaker, Jr. charged the claimant as set forth in letter of that date and requested him to attend an investigation set down for hearing at 1:30 P.M. on Friday, April 19, 1968.

The investigation was held on April 19, 1968 as scheduled.

On May 1, 1968 Mr. W. M. Brewbaker, Jr., advised the claimant that he was dismissed from the service of the carrier.

This dispute has been handled with the carrier up to and including the highest officer so designated by the carrier, with the result that such officers have declined to adjust the dispute.

The agreement effective August 1, 1966 is controlling.

POSITION OF EMPLOYEES: Rule 32 of the current firemen and oilers agreement with the Western Maryland Railway Company states in part: "No employee shall be disciplined without a fair hearing by designated officers of the Carrier."

In the instant case Mr. W. M. Brewbaker, Jr., general foreman, charged the claimant. He conducted the investigation, and he discharged the claimant from the service of the carrier. In fact, he acted as accuser, trier of the facts

manner, this Board should not substitute its judgment for that of the one regularly charged with the responsibility of maintaining order and enforcing reasonable regulations. We see no adequate reason for sustaining this claim."

Award 13674: "Under the circumstances of this case we will not disturb Carrier's findings, supported as they are by substantial credible, though controverted, evidence, or substitute our judgment for that of Carrier as to the measure of discipline that is appropriate. See Award 13130, 10938, 10429 and 9422. The claim will be denied."

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 employees 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.

The Facts

March 19, 1968. Carrier's Police Department receives information that a Company employee has been selling Company property to employees of Gray Concrete Pipe Company, Hagerstown, Maryland. Carrier Police Lieutenant T. F. Barron interviews Gray Concrete Superintendent W. Warrenfeltz. Learns that Mr. R. L. Thomas is in the scrap business. Lt. Barron checks records, finds that Thomas is a 38 year old male, lives in Hagerstown, was hired as a Laborer in Carrier's Mechanical Department in 1957, is currently assigned to servicing engines on the Ready Track from 11 P.M. to 7 A.M., Friday through Tuesday.

March 20—April 8. Investigation is widened. Lt. Barron learns subject Thomas drives a late model pick-up truck to work. Also learns Thomas is a friend of Richard "Blackdiamond" Smith, convicted scrap thief, and both men do business with Carl Snyders' Junk Yard, Hagerstown.

April 9. 9 P.M. Lt. Barron sets up surveillance in Carriers' shop area. Patrolman G. E. Brant is assigned to WM Coach 200, about 100 feet from parking area, and equipped with binoculars and radio packset. Patrolman H. S. Carter is instructed to make his regular shop tours and is also equipped with radio packset. Lt. Barron stations himself in Police Car PO3, east of the parking area. His car is equipped with two-way radio.

10:30 P.M. Officer Brant observes subject Thomas arrive in an automobile and proceed toward Roundhouse. Reports to Lt. Barron. Thomas parks car near a grove of trees, facing shop area.

While making his rounds Officer Carter records license number (CS 7991) of Thomas' car, a late model green Mercury. Reports to Lt Barron. Police Box 1 at Baltimore is contacted. Suspect car is listed under name of Robert Lee Thomas, Hagerstown.

12:05 A.M. Officer Brant observes Thomas approach parking area. Subject is apparently holding something beneath his jacket or sweater, supporting it with his arms. The weight appears to impair subject's normal

gait. Brant reports to Barron and Carter. Thomas enters parking area, walks around to left of his car, places something on ground, takes out car keys, opens trunk, places object or objects in the trunk on left side, closes lid, returns to shop area. Officer Brant reports observations to Barron and Carter.

Officer Carter leaves yard office. As he approaches southwest corner of Roundhouse, observes Thomas carrying a green bag. Thomas lays bag down, enters rest room. Carter places his hand inside bag, feels smooth, flat object which shines like brass. Carter leaves bag and proceeds to Foreman's office. Checks marked objects left there earlier in evening. Finds two cans of motor oil and six boxes of tape missing. Reports to Lt. Barron. Then joins Lt. Barron at parking lot.

4 A.M. Officer Carter requests Thomas to accompany him to parking area. At Thomas' car he is questioned by Barron. Is informed of what has been observed and what is suspected. Denies any knowledge of the subject. On request unlocks and opens trunk of car which contains, in left corner, a green sack with two freight car journal brass. Officer Brant is contacted by radio, asked to identify Thomas. Using binoculars, Brant positively identifies Thomas as man observed earlier. Brant then joins group at Thomas' car.

Thomas denies knowing how journal brass got into his car. Suggests someone else put it there. Cannot recall whether he went to car earlier that morning, (2) whether he was in Foreman's office, (3) a "bag" incident involving Carter, (4) whether he had sold any supplies to Warrenfeltz. Also denies knowledge of missing supplies in office.

officers search for a bag. In Thomas' locker find a can of motor oil which he claims is kept there in case it is needed for use in the generator. (Later, Officers find two empty green bags similar to one found in Thomas' car.) Thomas released to return to work. Barron sequesters journal brass and bag.

April 10. Lt. Barron questions junk yard operator Carl Snyder and searches yard. Finds no railroad property. Snyder acknowledges doing considerable brass business with Thomas. Believes Thomas found the material. Refuses to say whether he has seen any journal brass.

April 11. Thomas formally notified by General Foreman W. M. Brewbaker, Jr. to report on April 19 for hearing and investigation on the matter of "allegedly removing company property from location at which same was stored and placing said company property in your privately owned automobile, which was parked on company parking lot during your regular tour of duty beginning 11:00 P.M., April 9, 1968, ending 7:00 A.M., April 10, 1968".

April 19. At hearings, Lt. Barron and Officers Brant and Carter testify as to their investigation of Thomas and observations on April 10. Thomas denies any improprieties in connection with selling material to Warrenfeltz or Snyder or in relation to "Blackdiamond" Smith. He denies ever previously removing any company property without proper authority. He admits to certain actions on the night of April 10:

Question 21. Sometime after 12:05 A.M. . . . did you leave your work area and go to your car on this parking lot?

Answer. Yes.

Q 22. . . . please state . . . for what purposes you went to your car?

A. To put two pieces of journal brass in my car.

Q 23. Did you have any thing else with you . . . ?

A. Journal brass is all, in a green bag.

Q 24. Where did you obtain this brass at ?

A. At the Welding Shanty.

Q 25. Is this located in the Hagerstown Roundhouse ?

A. Yes.

Q 26. After you got to your car, what did you do with the brass ?

A. I put it in the car in the trunk.

Q 27. Did you place the brass in the car trunk on the left side and lock the trunk

A. Yes.

Q 32. Whose property was this brass so far as you know ?

A. Western Maryland Railway Company.

Q 33. Did you then deny to Lt. Barron and his patrolmen, that you knew nothing of the brass in your car ?

A. I denied it.

Q 34. What made you change your mind ?

A. At the present, I wanted to see what action they would take.

Q 38. Mr. Thomas, do you admit taking brass from the shop and placing it in your car ?

A. I do.

Q 40. Mr. Thomas, the two bags that were introduced into evidence by Lt. Barron, how do you account for them being on the property, if you can ?

A. I brought them onto the property.

Q 41. Did you intend to use them for the same purpose you used the other one for ?

A. Yes.

Mr. Thomas then explains his motivation:

Q 55. Whoever told you that you could remove brass, of the type shown here, from the company property, without proper authority ?

A. No one.

Q 56. Have you ever removed any company property from the property without proper authority ?

A. I have not, this is the first time I have tried this. I was figuring on getting a load of brass and turning it into the Baltimore office. The reason was, I do not think the railroad police are doing their job. It is unfortunate that I got caught trying this. This is one reason why I did it. I would like these charges dropped from me if possible. I did this for the company's benefit.

Mr. Thomas then offers his revised appraisal of the police:

Q 57. Mr. Thomas, how do you feel about the Western Maryland Police Department today?

A. Pretty good.

May 1, 1968. Thomas discharged by General Foreman W. M. Brewbaker, Jr.

March-April 1969. Following processing of grievance on property, Petitioner submits dispute to Second Division, N.R.A.B. Contends that (1) Thomas was denied a "fair hearing" under Rule 32 because the General Foreman instituted the charges, conducted the investigation, and rendered the verdict; (2) Even assuming the hearing was fair, Carrier's decision was unfair, arbitrary and capricious since no evidence was produced that Thomas actually stole anything or that he was going to use the journal brass for his own personal benefit. Carrier affirms hearing was fair, evidence conclusive that Thomas stole journal brass and discharge was justified. Also asserts that Petitioner's "fair hearing" complaint is a new issue, raised for first time in Petitioner's submission to Board.

Conclusions

1. The record does not contain documentary evidence concerning pre-submission discussions on the property. Consequently, there is no basis for sustaining Carrier's contention that Petitioner's "fair hearing" claim constitutes a new issue.

2. The record does not sustain Petitioner's claim that a "fair hearing" is denied merely because the same individual prefers charges, conducts the hearing and renders the decision. In fact, there are many Board decisions to the contrary, including Second Division Awards 1795, 4001, 4211, Third Division Awards 4840, 5701 and 6103, Fourth Division Award 1734 as well as First Division Awards 14 965 and 18 119.

3. The evidence establishes and Thomas admits that he brought bags to work on April 9 for the purpose of secretly removing Company property and placing it in his private car. He did, in fact, carry out his project, although not unobserved. If his purpose was as stated at the hearing, why did he deny everything when confronted with the evidence that night? Could it have been because he required some time to conjure up such an ingenious story?

If his explanation is to be credited, then he must be deemed to have been working in a job classification not covered by the agreement; i.e., tester of company security. In that capacity, however, he was on his own, unprotected, and assuming all consequent risks. As it turned out, the police passed Mr. Thomas' test with flying colors and he forfeited his job. It was an expensive lesson. As he so aptly noted, "It is unfortunate that I got caught trying this." It is to be hoped that no other employe will voluntarily assume this kind of unrewarding responsibility or engage in such perilous ventures.

A W A R D

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 18th day of February, 1970.