

The Second Division consisted of the regular members and in addition Referee Irwin M. Lieberman when award was rendered.

Parties to Dispute: ( International Association of Machinists  
( and Aerospace Workers, AFL-CIO  
( Penn Central Transportation Company  
( (formerly New York Central Railroad)

Dispute: Claim of Employees:

1. That Machinist P. Ceroala was improperly dismissed from service following investigation held on July 12, 1971.
2. That the investigation was held in violation of Rule 36.
3. That accordingly, Carrier be ordered to restore Machinist P. Ceroala to service with all rights unimpaired, with pay for 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 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.

The dispute in this matter involves the discharge of Claimant for allegedly stealing seven gallons of gasoline on May 10, 1971, from Carrier. Claimant was also tried in local court, charged with a misdemeanor for this act and the case was dismissed following the trial; subsequently, after investigation, Claimant was found guilty by Carrier and dismissed.

The two critical questions raised by this dispute are: (1) was Claimant afforded a fair hearing and (2) was there substantial evidence to support Carrier's conclusion that he was guilty. We do not quarrel with the concept that if an employee is found guilty of stealing dismissal is an appropriate penalty.

Although we recognize full well that Carrier is not bound by a decision reached in criminal proceedings in its disciplinary process (Awards 13116 and 6155 among others), it is certainly clear in this case that the sworn testimony in the criminal trial was given by the same Carrier police officers who testified in this investigation. Further since the criminal proceeding was initiated by Carrier's charges it is impossible and inappropriate to totally divorce the two proceedings as the hearing officer attempted to do. In our judgement, even though we affirm the principle of independence of Carrier in meting out penalties without reference to the conclusions reached in the related criminal trial, the testimony and record of the criminal proceeding may have relevance to the investigation and should not be barred. In this case it was clearly an error on the part of the hearing officer to preclude any reference to the criminal trial and to prohibit cross examination of Carrier witnesses on important elements of testimony which may have been in conflict with their earlier criminal trial testimony. A company disciplinary hearing must be far more flexible than a criminal trial and the hearing officer should lean over backwards to include all pertinent information and evidence; to do less would be to remove all vestige of investigative equity and deprive employes of due process. The importance of the right to cross examine witnesses in disciplinary investigations has been the subject of a number of our Awards and is particularly well stated in Award 5336 and Third Divisions Awards 3288 and 12812.

With respect to the second issue, a study of the transcript reveals the following:

1. Seven gallons of gas were missing according to the gauge on the pump.
2. No one actually saw Claimant steal the gas and there was no evidence that he had the key to the pump which was essential in order to remove gas. There was no evidence that the gas was found in his possession.
3. Three Carrier police officers testified that Claimant had confessed to the crime when apprehended. He did not dispute their testimony.
4. Claimant denied the theft at both the criminal proceeding and at the investigation.
5. Evidence was introduced that Claimant had bought almost a full tank of gas the same day and it would not have been possible to put seven more gallons into the tank of his small car.

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Without considering the question of credibility, which is not within our province, it is clear that there is not sufficient substantial evidence to support Carrier's finding of Claimant's guilt.

Based on the conclusions indicated above with respect to both questions, we find that Claimant was improperly dismissed from service and should be restored to service and made whole in accordance with Rule 36.

A W A R D

Claim sustained.

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 17th day of April, 1974.