

The Second Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

Parties to Dispute: ( System Federation No. 16, Railway Employees'  
( Department, A. F. of L. - C. I. O.  
( (Carmen)  
( Norfolk and Western Railway Company

Dispute: Claim of Employee:

1. That the Carrier violated the Agreement of September 1, 1949, as subsequently amended, when on July 25, 1974 Carman Alfred Daniels, Jr., Norfolk, Virginia was given a formal investigation for charges that were not specific, resulting in being unjustly dealt with when he was dismissed from the service of the Norfolk and Western Railroad Company effective September 9, 1974.
2. That the Current Agreement was violated, particularly Rule No. 35, and Article V of the 1954 Agreement, when Mr. J. R. Neikirk, Vice President, Administrations of Labor Relations Department failed to reply to claim appealed to his office under date of September 9, 1975.
3. That accordingly, the Norfolk and Western Railroad Company be ordered to reinstate Carman Alfred Daniels, Jr., to service with all seniority rights unimpaired, pay him for all time lost in the amount of eight (8) hours per day, five (5) days per week, until returned to service and that he be afforded all benefits that normally flow to an employe in active service.
4. That accordingly, for failure to reply to claim appealed to the Administrations of Labor Relations, the Norfolk and Western Railroad Company be ordered to allow the claim as presented in Local Chairman H. M. Conn's letter dated November 1, 1974.

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.

The Claimant, Mr. Alfred Daniels, Jr., was employed at the Carrier's Portlock Yard in Norfolk, Virginia. Claimant was cited for formal investigation to determine his responsibility, if any, in connection with theft of merchandise from freight car FC363686 arriving at Portlock Yard June 22, 1974. The formal investigation was held on July 25, 1974. By letter dated September 9, 1974, the Claimant was dismissed from the service of the Carrier.

The Organization contends that the charge against the Claimant was not in accordance with Rule 37 of the Agreement. We disagree. The notice to appear for the formal investigation contained all the necessary elements of a precise charge.

The Organization contends that a "prompt" investigation was not held as required by Rule 37. We disagree. Rule 37 does not set forth specific time limits, but rather requires that the hearing be "prompt". The theft allegedly occurred on June 22, 1974. The Carrier's first knowledge of the alleged event was on June 27, 1974. The citation for the formal investigation was dated July 8, 1974, with the hearing date initially set for July 16, 1974. Due to two reasonable postponements requested by the Organization, the hearing was held on July 25, 1974. We find that the hearing held on July 25, 1974, was reasonably prompt under the circumstances, which required investigation time as well as preparation time.

We have reviewed the record and find that the investigation was conducted in a fair manner. The record reveals that the Claimant was very ably represented by the Local Chairman, along with the Assistant Local Chairman and the Claimant's Committeeman. The Claimant was allowed to call all witnesses he desired, and to present his case as he and his representatives saw fit. He and his representatives were given full opportunity to cross examine all witnesses.

There is substantial evidence in the record before the Board to support the Carrier's findings in the instant case. The totality of the testimony of Gang Leader Smelser, Gang Leader Thomas, Captain of Police Benton, Sergeant Edwards and Mr. B. R. Hill support the Carrier's finding that the Claimant was issued a walkie talkie radio to use during his tour of duty on June 22, 1974; that it was not turned in by the Claimant during or at the end of his tour. Further, the testimony of the above named witnesses support a finding that the Claimant was one of the Carmen assigned to inspect Train No. 84 and freight car FC363686 on June 22, 1974; that the seal on the right side of freight car FC363686 was missing when the car was delivered to the Beltline Interchange on June 23, 1974; and that, on June 27, 1977, the consignee of the freight car in question, Colonial Stores, found the radio inside the freight car and also discovered that certain merchandise was missing from the car. The Claimant denied taking any merchandise and stated he turned the radio in before working train 84. Carmen Jacobs testified that the Claimant did not have a radio when working train 84, that he was with Claimant all night, and that the Claimant did not enter the

box car in question. Carman Ingram testified that he rode home with the Claimant and that there was no merchandise in the Claimant's car. The scope of review of this Board is to assess whether or not the Carrier has met its burden of proof of presenting substantial evidence of probative value which supports its action. The scope of this Board's review does not include resolving conflicts in testimony or evidence. The finding of the Carrier that the Claimant was responsible for the theft of the merchandise in question, since it is supported by substantial evidence of record, must stand.

The theft of merchandise is a most serious matter, and we cannot find that the discipline of dismissal was arbitrary, capricious or excessive. We shall deny this Claim.

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 30th day of September, 1977.