

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

Parties to Dispute: { System Federation No. 1, Railway Employees'
{ Department, A. F. of L. - C. I. O.
{ (Electrical Workers)
{ Consolidated Rail Corporation

Dispute: Claim of Employees:

1. That under the terms of the controlling agreement, Electrician Walter Kowalski was unjustly dismissed from service on September 2, 1976.
2. That, accordingly, the Carrier be ordered to restore him to service with all seniority rights unimpaired, vacation rights, sick leave benefits and all other benefits that are a condition of employment unimpaired and compensated for all loss time plus 6% annual interest on all such lost wages, also reimbursed for all losses sustained account loss of coverage of health and welfare and life insurance agreements 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 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 was hired by the Carrier in 1960, became an Electrician in 1963, and was discharged, following investigative hearings, in September, 1976. He was discharged on the grounds of his involvement, together with the employe who was his working partner at the time in question, in the theft of several Carrier-owned coils of copper wire. The charge which led to the investigative hearings and the discharge is contained in a letter dated July 26, 1976:

"At approximately 7:45 p.m., Monday, July 19, 1976, you were arrested for having stolen six coils of

"copper insulated 00 gauge wire weighing approximately 1,213 lbs. and disposing of this material for \$545.85 to T. A. Predel Company, Inc., Schenectady, New York. This wire was taken from a cement block building at CP-14, Town of Mohawk, on the Mohawk-Hudson Division of the Consolidated Rail Corporation at approximately 2 p.m., on Thursday, July 8 and Friday, July 9, 1976."

It is an unquestioned fact that the coils were reported as missing to the Carrier's Police Department; that the Police Department's investigation showed the coils to have been sold to a junk yard (the Predel Company mentioned in the quoted charge); and that the claimant's co-worker (together with a friend of the co-worker) took the coils to the junk yard and sold them for the particular sum of money.

The co-worker pleaded guilty, first in court and subsequently with the Carrier in seeking reinstatement on the basis of leniency. His reinstatement effort failed (see Second Division Award No. 7746), and his plea in court resulted in conviction on a reduced charge and the payment of a fine (without serving a jail sentence).

The co-worker's confession statement implicates the claimant, asserting joint planning and the collection by the claimant of half the money (the other half assertedly having been shared by the co-worker and his friend, who assertedly led the co-worker to the purchaser of the coils). The claimant's arrest and discharge were substantially based on the co-worker's confession statement.

The claimant denies involvement in the theft, and the Organization's position is that adequate proof against the claimant is lacking. Our review of the record leads to the contrary conclusion:

- We do not understand how the co-worker derived gain from implicating the claimant. His statement does not seek to shift the blame. It merely shows the co-worker and the claimant as having jointly undertaken the theft.

- The statement made by the co-worker's friend tracks the co-worker's statement in every significant respect. Part of the friend's statement is: "Patrick did tell me that he had gotten the copper wire with a friend of his named Walt (the claimant's first name) who works with Patrick on the railroad." Once more, we do not see how the mention of the claimant's name, given the confessional nature of the statement, yielded a gain to the accuser.

- Both the co-worker and the friend identify the truck which the claimant was in charge of as the vehicle which was used to transport the coils away from the Control Point. The claimant admits to having let the co-worker take off with the truck on various occasions, for various private (i.e., non-work) purposes, and for various durations. One is to infer that the co-worker was

on one of such missions on the two days in question. But there is no firm testimony from the claimant as to whether, why, or for how long the co-worker was gone with the truck on the two days. The claimant's responses on this point seem weak and evasive and to have the earmarks of a cover as to the whereabouts of the truck on the two days.

- Though the record firmly establishes both that the claimant and the co-worker were jointly assigned on the two days in question (working on Snow Melters at the Control Point) and that the co-worker was at work on the day before no less than the claimant, the claimant sought to create doubts on these scores. We think that this has to be viewed as an effort at obfuscation and thus as being of tell-tale character.

- Though the co-worker was produced as a witness at one of the claimant's investigative hearings, the claimant and his representative declined to subject him (the co-worker) to cross-examination. The stated reason was that the claimant's attorney had advised to refrain from asking the co-worker any questions while the claimant's court trial was pending. The claimant had every right so to proceed. But he cannot have it both ways. The meaning of the silent posture is that, except for the blanket denial by the claimant that no dividing of the money representing the proceeds from the sale of the coils took place, the co-worker's statement has been left undisturbed and thus has not been rendered doubtful. The statement incorporates a series of particulars. If lacking in veracity, they could readily have been exposed as such through scrutinizing questions.

- The Carrier's submission includes the following footnote: "Claimant appeared in County Court on June 3, 1977 and pled guilty to a reduced charge of Criminal Solicitation, Section 100.00, New York Penal Law, and was fined \$200.00." It is true, as the Organization contends, that this information was not available either at the time of the claimant's investigative hearings or when the case left the property. But the Organization neither challenges the accuracy of the information nor submits anything by way of arguing that the claimant made a mere practical decision which should be viewed as being without bearing on the question of his guilt or innocence when it comes to his dismissal from service with the Carrier. And though we are obviously aware of the rule that Adjustment Board determinations are to be made on the basis of the record developed at the property, we think it is proper to view the particular piece of information in this instance as the mere completion of the at-the-property record and thus as something properly to be considered by us. For the foundation for the piece of information is solidly in the at-the-property record: 1) the charge leading to the claimant's dismissal refers to his arrest, and 2) the police report (which is part of the at-the-property record) includes the statement: "The criminal case against (the claimant) remains pending upon establishment of a date for a Preliminary Hearing."

It is our considered opinion that these various clues, taken together, add up to the conclusion that the claimant is guilty as charged. We so hold.

On this holding, we see no proper choice but to uphold the discharge action against the claimant. We are mindful of the claimant's substantial length of service. But we think it is overridden by the gravity of the offense. We are in agreement with the following observation made in the Decision which upheld the co-worker's discharge:

"In this case, the matter is exacerbated by considerations that the theft was deliberately planned, substantial in nature, and was used to enrich directly the employe and his collaborators."

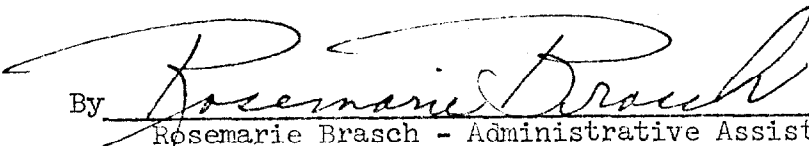
A W A R D

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 16th day of May, 1979.