

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: { System Federation No. 7, Railway Employees'
 { Department, A. F. of L. - C. I. O.
 { (Firemen & Oilers)
 { Burlington Northern Inc.

Dispute: Claim of Employees:

1. Under the current controlling Agreement, Ms. Kirsten M. Schwartz, Laborer, Livingston, Montana, was unfairly dealt with when removed from service on February 24, 1978 and later dismissed from employment of the Burlington Northern, Inc. on March 27, 1978.
2. That, accordingly, the Burlington Northern, Inc. be ordered to reinstate Ms. Kirsten M. Schwartz to service with full seniority rights, compensate for all time lost including fringe benefits and remove the mark from her personal file.

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.

Between December 2 and 5, 1977, a welding machine was noted as missing and presumed to be stolen from the Carrier's Livingston, Montana diesel maintenance facility. The machine was large enough to be mounted on a trailer.

On February 22, 1978 -- more than two months later -- the welder was found by police and identified as Carrier property in a garage attached to a house leased to Kirsten M. Schwartz, a Laborer employed at the Carrier's Livingston's facilities. On February 24, 1978, the Claimant was notified that she was being withheld from service pending a formal investigation in connection with her responsibility as to the stolen welder. Following such investigative hearing, she was dismissed from service by letter dated March 23, 1978.

The Claimant did not appear at the hearing, but a statement prepared with the assistance of an attorney signed by her was entered into the record.

As to procedural objections raised by the Organization, the Board finds that the Carrier was within its rights to withhold the Claimant from service, pending investigation. Rule 28 (b) states as follows:

"(b) In the case of an employee who may be held out of service in cases involving serious infraction of rules pending investigation, the investigation shall be held within ten (10) days after date withheld from service. He will be notified at time held out of service of the reason therefor."

With the possible involvement of theft of property, a finding that there may be a "serious infraction of the rules" is apparent, and the Carrier's action was not improper.

As to the investigation itself, the Board finds that it was held in a fair and proper manner. A request that an attorney for the Claimant be present, apparently made prior to the hearing, was not improperly denied. Rules governing investigative hearings do not require the Carrier to agree to the presence of an outside attorney as an observer.

The record shows that the Claimant, employed by the Carrier since October 20, 1976, was the tenant of record at the premises involved. The house which she rented included an attached garage, where the missing welder was found. According to the statement submitted by the Claimant, she and others had possessions stored in this garage. Claimant, through her statement, denied any knowledge that the welder was in the garage until its presence was made known by police on February 22, 1978. The Organization argues that the garage was open and was used by others than the Claimant; that no connection has been made between the Claimant and the disappearance of the welder two months earlier; and that there is no evidence that the Claimant either stole the welder or knew of its presence in the garage attached to her leased house.

As justification for not appearing at the hearing, the Claimant argued in her written statement that she was being simultaneously charged in criminal court and that it would be prejudicial for her to appear at the hearing. The charges against the Claimant in criminal court did not, however, involve the question of the welder, nor does the record show that any postponement of the investigative hearing was requested by her or on her behalf. In view of this, it was in order for the hearing to go forward, and the hearing officer properly based his findings on the evidence produced on behalf of the Carrier.

Claimant absented herself from the hearing at her own risk. While the Carrier has the initial burden of proof in disciplinary matters, the Claimant by her own actions deprived the hearing officer of any explanation she might offer in contradiction to such evidence. In a case where an employee was present at a hearing but refused to answer questions concerning theft allegations, the Board found in Award No. 7142 (Sickles):

"... Such a failure to respond does raise certain inferences in a fact-finding investigation, inasmuch as accused employees are expected to answer questions in disciplinary investigations. See Second Division Award 4749 and Third Division Award 19558."

Cited Third Division Award No. 19558 (Lieberman) states:

"... We have stated in a number of similar cases that the rules of evidence in criminal proceedings are not applicable to disciplinary investigations. In Award 4749 we said:

'Employees charged with rule violations who avoid answers to questions touching upon the claimed offense, subject themselves to inferences that the replies if made would have been favourable to the Carrier'. At a hearing of this kind the Carrier may properly examine the accused concerning every point bearing upon his innocence or guilt, whether or not he testifies in his own behalf. (Award 2945)."

Based on these circumstances, the Carrier was faced with a decision concerning the Claimant when the missing welder, bearing a Carrier identification, was found in the Claimant's garage which she used for storage purposes. The Carrier, in judging the implications of such discovery, may draw reasonable and logical conclusions, especially since, as here, the Claimant presented no evidence which might give substance to her plea of innocence in her written statement. In previous awards (for example, Award No. 3834, Doyle), the Board has upheld the principle that "unexplained recent possession of stolen property creates an inference that the person in possession stole the property". If there was a contrary inference to be drawn, the Claimant offered no help in that direction. Even knowledge of the location of a readily identifiable piece of Carrier equipment, would require the employee to report the matter to the Carrier, if for no other reason than to clear herself of a possible charge of theft.

The Carrier, after investigation, did not act in an arbitrary or unreasonable fashion. The Board finds no basis to disturb its disciplinary action against the Claimant.

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 April, 1980.