

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

Parties to Dispute: { International Association of Machinists
 { and Aerospace Workers
 {
 { Illinois Central Gulf Railroad

Dispute: Claim of Employees:

1. That the Illinois Central Gulf Railroad violated Rule 39 of the schedule "A" agreement made between the Illinois Central Gulf Railroad and the International Association of Machinists, AFL-CIO, when on August 10, 1978 machinist R. L. Cork was removed from service and subsequently discharged August 24, 1978.
2. That accordingly the Carrier be ordered to reinstate machinist Cork to service, seniority rights unimpaired and pay him for all wages lost as a result of the carrier's violation of the controlling agreement.
3. Compensate the claimant for all overtime losses.
4. Make claimant whole for all holiday and vacation rights.
5. Pay premiums on Travelers Policy GA-23000, Illinois Central Gulf Hospital Association, Provident Insurance Policy R-5000, Aetna Policy GD-12000.
6. Pay interest of six (6) percent on all lost wages.
7. Make claimant whole for all losses.

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.

Claimant was discharged from service on August 24, 1978 on the Carrier's finding that he "did in fact receive fuel in a tank on your property which fuel had been consigned to and paid for by the Illinois Central Gulf Railroad". The charges centered on allegations that the Claimant, in cooperation with others

caused more than 46,000 gallons of fuel oil to be diverted to the Claimant for use in his personal business, while at the same time deceit had been practiced in making it appear that the fuel had been delivered to the Carrier, causing the Carrier to pay the supplier for such deliveries.

The Claimant signed a statement concerning the matter on August 8, 1978, after an interview with a Carrier Special Agent. He was notified of suspension from service of August 10, 1978 and notified of a formal investigation by letter of August 11, 1978 "for the purpose of developing the facts and determining your responsibility, if any, in connection with the fuel shortage at Birmingham".

The Organization argues that the Claimant did not receive a fair investigative hearing in accordance with Rule 39 on three bases:

1. Claimant was suspended on August 10 without formal notice or investigation by telephone message.
2. The charges were not precise.
3. The hearing officer signed the notice concerning the hearing, conducted the hearing, and signed the notice of discharge.

Rule 39 reads as follows:

"No employee shall be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing which shall be prompt shall not be deemed a violation of this rule. At a reasonable time period to the hearing such employee will be appraised of the precise charge against him. The employee shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by the authorized committee. If it is found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from such suspension or dismissal."

The Board does not find that these considerations disturbed the opportunity for the Claimant to have a fair and proper hearing. Rule 39 permits "Suspension in proper cases pending a hearing", without specifying the method of delivery of such suspension. The Claimant's August 8 statement, quoted below, involving the possibility of responsibility for substantial theft, was a sufficiently "proper case". As to the wording of the charge, it is reasonable to assume that the Claimant was aware that the hearing would concern the same subject about which he had given a statement three days earlier.

As to the role played by the hearing officer, he was not involved in the interrogation or investigation prior to the hearing and did not participate as a witness for or supporter of the Carrier's case. The investigative hearing afforded the Claimant and the Organization full opportunity for defense.

The Board thus finds that the hearing was conducted in a fair and proper manner.

The gist of the Claimant's defense at the hearing was that, while he did receive and pay for fuel oil for his personal business use over a two-year period, he was not aware that it was the property of the Carrier. This is in substantial contradiction to the voluntary statement he gave to the Carrier on August 8, just prior to the hearing. This statement as accurately read into the record by the Special Agent, is as follows:

"At about April or May 77, received 9,000 gallons fuel from J. M. Black, about three months later, 4 to 5 thousand gallons from Sammy Hayes. After December 77, about 4 to 5 months lapsed before I got any more due to the UMWA strike. April of 78 I received a load. June and August I received a load. April was part of a load, approximately 5,000 gallons. June and August 9,000 gallons at 30¢ a gallon.. The first load from Black I didn't know was railroad fuel. After receiving from Hayes, I found out it was railroad fuel. In July or August of 77 I found out from Hayes it was railroad fuel talking to him at the fuel tank. Around 46,000 gallons I received from both. Black took first load to West Jefferson April or May 77. Later we moved to Sumiton on old 78 Highway where Hayes delivered the rest of the loads at 30¢ a gallon. We moved June or July 77 to Sumiton. Always paid cash, some at delivery, some in advance. My cousin T. E. Ford is not involved."

Of particular significance are the sentences: "After receiving from Hayes, I found out it was railroad fuel. In July or August of 77 I found out from Hayes it was railroad fuel talking to him at the fuel tank".

The carrier reached the conclusion, following the investigative hearing, that the Claimant had knowingly participated with others in a scheme to receive fuel oil intended for delivery to and the property of the Carrier, with the participants sharing in financial gain, to the substantial monetary detriment of the Carrier. The Board finds nothing in the record to show that this was an unreasonable conclusion. Considering the gravity of the offense, the penalty of discharge from service was not excessive. The Board finds no basis to interfere with the action taken.

A W A R D

Claim denied.

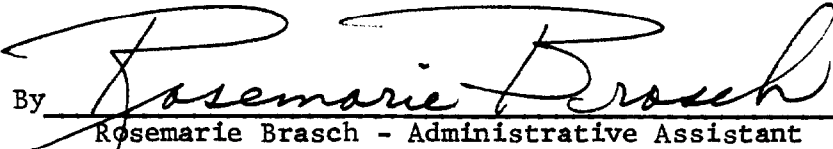
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Award No. 8469
Docket No. 8476
2-ICG-MA-'80

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 8th day of October, 1980.