

The Second Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States  
and Canada  
{ Chesapeake and Ohio Railway Company

Dispute: Claim of Employes:

1. That, Craig A. NaDell was removed from service at 2:05 P.M., Saturday, March 17, 1979, and subsequently, was unjustly dismissed from all service of the Chesapeake and Ohio Railway Company effective April 27, 1979, as a result of an investigation held on April 2, 1979.
2. That, accordingly the Chesapeake and Ohio Railway Company compensate Carman Craig A. NaDell his applicable straight time rate of pay, overtime wages lost, holiday pay, vacation rights, medical benefits, and any other benefits lost from March 17, 1979, until restored to service.
3. That, accordingly Carman Craig A. NaDell be reinstated to service with seniority rights unimpaired.

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.

On March 17, 1979, the Claimant was removed from service. As a result of an investigation held on April 2, 1979, the Claimant was dismissed effective April 27, 1979. On the day in question, the Carrier's Property Protection Department conducted a stake out at its Maple Road Compound. Patrolman K. Tracy was in a position behind some box cars on Track 13. Patrolman W. Goodfellow was in a caboose located on Track 3, and Lieutenant J. Munson was in a nearby parking lot. At approximately 2:05 P.M., an individual attempted to gain entry into the caboose where Patrolman Goodfellow was concealed. Unable to open the north door, this individual kicked in the south door, walked through, unlocked and opened the north door. Standing on the north platform of the caboose was Roy Webster, a car inspector. In his possession were four five gallon water cans and one vinyl spare tire cover. Patrolman Goodfellow identified himself as a railroad police officer, then made radio contact with Patrolman Tracy and Lieutenant Munson.

Goodfellow read a statement of their legal rights to Webster and the man who unlocked the south door of the caboose, the Claimant. Patrolman Tracy, arriving on the scene, observed and heard Goodfellow administer the rights.

The Organization argues the charges were improper in that conduct unbecoming is ambiguous. The charges also involve an allegation of unauthorized possession of one Delco Freedom Battery, which subsequently is shown to only involve former employee Webster. The Organization also asserts that, in the absence of the foreman, Claimant acted correctly and in accordance with instructions from his lead man, Car Inspector Webster.

Procedurally, the record of the investigation demonstrates a fair and impartial hearing was afforded Claimant. There is no showing that any duty owed Claimant was denied in the course of the investigation. The Organization correctly asserts that no evidence linked Claimant with the theft of a Delco Freedom Battery. However, that single item is not essential or material to proving the overall charge of attempted theft and unauthorized possession of several items other than the battery.

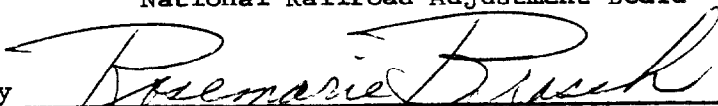
The burden of proof rests clearly with the Carrier. The Organization excuses Claimant's involvement asserting he was following instructions of Webster, his lead man. We find the record falls short of establishing this defense. On the day of the incident, both Webster and Claimant signed voluntary statements. We note that, in Webster's statement, he said, in part, "... and we decided to take a couple of jerry cans for our own use". Claimant's statement indicated he and Webster "took" the cans. Carrier correctly asserted these two statements, examined in the context of who was working the day in question, clearly affirms the references of "we" and "our" refer solely to Webster and Claimant. The testimony of the two patrolmen and Trainmaster Yoeman contain damaging admissions. Carrier's resolution of the conflicting testimony was reasonable and based on substantive evidence. The denials of the Claimant are not credible. The Board finds the Carrier had just cause for dismissing the Claimant.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Acting Executive Secretary  
National Railroad Adjustment Board

By   
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of April, 1982.