

The Second Division consisted of the regular members and in addition Referee Edward M. Hogan when award was rendered.

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(The Norfolk and Western Railway Company

Dispute: Claim of Employes:

1. That under the terms of the Agreement, the Norfolk and Western Railway Company unjustly placed charges against Machinist Aristos G. Antonaros. Investigation was held May 14, 1980 and completed on the same date. On the date of June 5, 1980 he was notified, "you are hereby dismissed from all service with the Norfolk and Western Railway Company, effective immediately."
2. That accordingly, the Norfolk and Western Railway Company be ordered to compensate Machinist Aristos G. Antonaros in the amount of eight (8) hours at the pro rata rate for each day of his work week assignment beginning on the date of April 29, 1980 until he is returned to service with 8% annual interest.
3. And, further, that he be restored to service with all rights unimpaired, health and welfare benefits restored and paid for during the time he is held out of service and all seniority and vacation rights restored as if he had continued in the employment of the Norfolk and Western Railway Company.

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 employes 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 dismissed from the service of the Carrier on June 5, 1980, following a formal investigation held on May 14, 1980. The Claimant had been suspended from the service of the Carrier on April 28, 1980. The charges preferred against the Claimant were: "... to determine your responsibility in connection with missing parts for circular saws (two armatures, one stationary guard, one movable guard, and one housing frame) and unauthorized possession of NW property (one chipping hammer, one pair welding goggles, one six-volt lantern battery, and one box of assorted used material) found at your personal residence."

The Organization vigorously argues that the Carrier has failed to meet its burden of proof and that the findings were arbitrary, capricious and a gross abuse of managerial authority. The Carrier contends that the record of the formal investigation contains sufficient, credible evidence upon which to support the findings of the hearing officer, that the Claimant was guilty of the offense charged, and that the penalty imposed was fair, reasonable and fully commensurate with the serious nature of the proven offense. The Carrier further contends that the Claimant received a fair and impartial hearing.

The record indicates that the Division Supervisor of Material contacted the Carrier's Captain of Police following the receipt of what appeared to be an exceptionally large order for replacement parts for four company-issued saws in March of 1980. The order for replacement parts totalled almost \$2,000.00. Following the receipt of these replacement parts, an officer from the Carrier's Police and Special Services marked these parts with an electric engraver putting his initials ("GD") on the parts. (Several of the parts, because of their size or nature, received other identification marks.) In late April of 1980, the same officer was requested to meet with the Division Supervisor of Material to conduct an inventory inspection of the replacement saw parts. The Claimant was approached at his work place and advised that all of the replacement parts would be collected so that a credit could be obtained from the manufacturer. After inventorying the parts that had been assigned to the Claimant's control, it was found that a number of parts were missing. Upon questioning, the Claimant stated that the missing parts were used in repairing the other saws of the Carrier. The four saws of the Carrier assigned to the Claimant were then dismantled and inspected. The Carrier's Police Officer found that only one saw had the appropriate markings on it. It was subsequently determined that a number of the replacement parts that had been ordered would not have fit the particular type of saw that the Carrier had assigned to the Claimant.

Upon further inquiry, the Claimant authorized a written consent to search his residence. In the presence of the Claimant, three representatives of the Carrier conducted the search and seized a number of items identified as property of the Carrier from the Claimant's garage, including 35 to 40 pieces of copper and brass. The record indicates that the Claimant identified these items as Carrier property, and with respect to the pieces of copper and brass, acknowledged that he did not have permission to remove these items from company property.

The claim before us was extremely well argued by both parties. With respect to the argument of the Organization that the Carrier failed to meet its burden of proof with respect to the first half of the charges preferred against the Claimant ("to determine your responsibility in connection with missing parts for circular saws"), this Board might have been inclined to so rule. However, we do not so find with respect to the second half of the charges preferred against the Claimant ("unauthorized possession of NW property"). Here, we clearly have an admission by the Claimant in the presence of three Carrier representatives. Furthermore, the Claimant's admissions at the formal investigation that he did not have permission to have Carrier property at his residence clearly supports the findings of the hearing officer. As Referee Weiss stated in Second Division Award No. 8406:

"... in this case the Claimant admitted his guilt at the investigation. Therefore, it was not necessary to establish the Claimant's guilt."

Additionally, with respect to the Organization's contention that the Carrier failed to meet its burden of proof, we feel that references to two prior awards of this Division are pertinent. In Second Division Award No. 7542, Referee Eischen stated:

"the only way for us to sustain the claim is to make a credibility determination by rejecting the patrolman's version and accepting the Claimant's. On the state of the record before us, the hearing officer could have easily done so, but his acceptance of the patrolman's story is not per se arbitrary, unreasonable and capricious. Even if Carrier believed the wrong man where the issue is narrowed to credibility alone, we are unable to resolve such conflicts. Rightly or wrongly, it is firmly established by a host of Awards that this appellate tribunal shall not resolve pure credibility questions."

Also pertinent is Second Division Award No. 7698 in which Referee Weiss states:

"The patrolman's testimony was clear, forthright, and unequivocal. The Carrier had a right to rely on the patrolman's statement and testimony, which was subjected to close cross-examination at the hearing, unless there was substantial reason not to believe its witness. No such reason was expressly stated or implied in the record before us."

Consistent with the above, this Division has consistently held that dishonesty, in any form, is an extremely serious matter. (See Second Division Award Nos. 7279, 7762, 7831, 7697, 7918, 6392, 8333, and 8665.) As Referee Perelson stated in Third Division Award No. 16168:

"Dishonesty, in any form, is a matter of serious concern and dishonesty usually and frequently results in dismissal ..."

We are also guided by Referee Fitzgerald's Second Division Award No. 8130 in which this Board stated:

"In this case, as is found in most discipline cases which come to our Board for appellate review, petitioner has advanced a number of arguments that amount to nothing more or less than a request that this Board substitute its judgment for that of the Carrier on the issues of guilt and discipline. All Divisions of this Board have consistently recognized the fact that Carriers owe to employees, and to the public, a heavy legal obligation to maintain discipline among those in their employ, and it would be both illegal and improper for this Board to attempt to impose any restriction upon a Carrier's complete freedom in disciplinary matters except to the extent of recognizing and applying restrictions created by an applicable labor agreement. Otherwise, we do not substitute our judgment for that of the Carrier; we do not weigh evidence; we do not attempt to resolve conflicts in testimony; we do not pass upon the credibility of witnesses."

We are also not persuaded by the Organization's contentions that the findings were arbitrary, capricious, and a gross abuse of managerial authority. Our thorough examination of the record indicates that the findings were consistent with the record before the hearing officer. As this Board is not a trier of fact or in a position to hear evidence first hand, we have consistently held that we will not substitute our judgment for that of the hearing officer. Traditionally, this Board has sustained claims if our examination of the record indicates that there was an abuse of managerial discretion or evidence of arbitrary or capricious behavior on the part of the hearing officer. Here, we find none.

Lastly, we must examine the contention of the Organization that the Claimant failed to receive a fair and impartial hearing. We cannot agree with the contention of the Organization that the hearing officer was biased, nor do we agree that the Claimant's failure to receive "Miranda" warnings affected the outcome of the formal investigation. In fact, our examination of the record indicates that the Claimant was fully aware of the nature of the investigation. In essence, the Organization is requesting that this Board substitute its judgment for that of the hearing officer. It has been the longstanding policy of this Board not to substitute its judgment or weigh questions of credibility unless the record indicates that there was no basis for such a finding by the hearing officer.

Therefore, consistent with the above, this Board finds that sufficient credible evidence exists upon the record before us to support the finding of guilt, that the discipline assessed is consistent with the findings, and that the Claimant received a fair and impartial hearing.


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Award No. 10017
Docket No. 9522
2-N&W-MA-'84

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: 
Nancy J. Lever - Executive Secretary

Dated at Chicago, Illinois this 8th day of August, 1984.