

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

(District Lodge No. 19
(International Association of Machinists and Aerospace
Parties to Dispute: (Workers, AFL-CIO
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(Atchison, Topeka and Santa Fe Railway Company

Dispute: Claim of Employes:

1. That the Carrier improperly dismissed Machinist G. W. Kassler (hereinafter referred to as Claimant) from service of January 12, 1983.

2. That, accordingly, the Carrier be ordered to restore Claimant to service with seniority and service rights unimpaired, with compensation for any wage loss.

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.

On January 6, 1983, Claimant was served with notice to attend formal investigation on January 12, 1983 concerning a report that he was involved in the theft of merchandise from interstate shipment in violation of Rules 2, 4, 14, 16 and 29 of General Rules for the Guidance of Employees, 1978.

On the morning of December 18, 1982, Claimant, who was working a 12 midnight to 8:00 a.m. shift, made a mechanical inspection and temperature reading of twelve (12) mechanical temperature control (MTC) cars in the vicinity of the 25th Street Pier, Galveston Wharves. The pier at 25th Street is approximately 1.3 miles from the roundhouse area. Claimant used Carrier's vehicle to drive to the wharves and carry out the inspection of the MTC cars. During the morning of December 18, 1982, only Mechanical Foreman Scott, and Relief Foreman Garcia were in the roundhouse area. Claimant testified he was the only mechanical department employee on duty in the roundhouse area from 3:00 a.m. to 8:00 a.m. that morning.

The evidence in the transcript of the investigation shows that Claimant made his inspection at 25th Street at approximately 6:00 a.m. At approximately 6:30 a.m. Mechanical Foreman Scott arrived at the Galveston Roundhouse. Claimant had by that time returned to the roundhouse from the 25th Street Pier.

Relief Foreman Garcia arrived at the roundhouse at approximately 7:00 a.m. As he went to turn the lights out in the roundhouse, the Relief Foreman walked between the Company pick-up and Claimant's truck, and noticed a box of butter in the bed of Claimant's truck. In the meantime, the Claimant was directed by the Mechanical Foreman to proceed to take a caboose off of charge for an outbound train at the 59th Street yard. The Relief Foreman witnessed Claimant's departure in the company pick-up, and immediately thereafter informed the Mechanical Foreman of the location of the box of butter. Together the Foremen took four (4) photographs of the box as it was found in the bed of Claimant's pick-up.

Upon Claimant's return to the Galveston Roundhouse from the 59th Street yard at approximately 7:30 a.m., he parked the company truck next to his own pick-up. Claimant was then confronted in the general foreman's office about the box of butter, but denied any knowledge of its location in the bed of his pick-up. A second inspection of Claimant's truck with the General and Relief Foreman present revealed that the box of butter had been turned in such a manner so as to hide the manufacturer's churn lot and weight. This second inspection occurred approximately fifteen minutes after the photographs were taken.

The Claimant, General Foreman and Relief Foreman then made an inspection of the same cars Claimant had inspected earlier that morning at the 25th Street Pier, Galveston Wharves. The box of butter was determined to be of the same lot number and manufacturer as the butter contained in MTC Car, SFRC 55344. MTC Car, SFRC 55344 was the only car Claimant inspected which had a seal missing. Further, SFRC 55344 had not been unloaded at the pier as of the morning of December 8, 1982. On the inspection form, Claimant failed to insert the date or time of inspection, although he admitted that the temperature and fuel readings on the form were in his handwriting.

The Organization contends that Carrier failed in its burden of proof in that only weak, circumstantial evidence connected Claimant to the box of butter found in the bed of his pick-up truck. The Carrier argues that the evidence amounted to circumstantial proof of Claimant's involvement with theft of merchandise from interstate commerce.

This Board finds that the Carrier sufficiently proved its charge by circumstantial evidence. As we stated in Second Division Award No. 10044, circumstantial proof requires that the charge must be the most natural inference from the established facts. This Board determines that Claimant's involvement in the theft of the merchandise from an interstate shipment is more probable than any other allegation of fact upon thorough review of the record.

Although Claimant was not charged, or convicted in State or Federal Court of a criminal offense by the date of the investigative hearing, this fact does not mitigate the seriousness of an employer's charge of theft within the Railroad industry. (Award No. 9330, Second Division). Carrier's determination that Claimant was involved in theft of interstate commerce was supported by sufficient credible evidence.

On the entire record, and considering Claimant's past employment record which involved theft of Carrier material, the Board finds that the Carrier's decision to discharge the Claimant was for just cause, and was not arbitrary, capricious or excessive.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 20th day of February 1985.