

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

Parties to Dispute: (International Brotherhood of Electrical Workers
(
(Consolidated Rail Corporation (Conrail)

Dispute: Claim of Employees:

1. That under the current Agreement the Consolidated Rail Corporation (Conrail) unjustly dismissed Electrician Steven R. Walker from service effective June 10, 1982.
2. That accordingly, the Consolidated Rail Corporation (Conrail) be ordered to restore Electrician Steven R. Walker to service with seniority unimpaired and with all pay due him from the first day he was held out of service until the day he is returned to service, at the applicable Electrician's rate of pay for each day he has been improperly held from service; and with all benefits due him under the group hospital and life insurance policies for the aforementioned period; and all railroad retirement benefits due him, including unemployment and sickness for the aforementioned period; and all vacation and holiday benefits due him under the current vacation and holiday agreements for the aforementioned period; and all other benefits that would normally have accrued to him had he been working in the aforementioned period in order to make him whole; and expunge his record.

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.

The Claimant is employed by the Carrier as an Electrician at its Buckeye Diesel Terminal facility, located at Columbus, Ohio. Following a trial that was held on June 3, 1982, the Claimant was dismissed from service for the unauthorized possession of, removal or disposal of, material from railroad property *** "in violation of Rule (L-3) of the "General Rules for the Conduct of Employees in the M of E Locomotive Department."

On May 6, 1982 at 11:55 p.m., Conrail Patrolman Washington observed the Claimant pump diesel fuel from the Carrier's diesel pad into a "wooden enclosure" of his personal truck. After observing the Claimant for approximately five (5) minutes, he approached him and placed him under arrest for theft of Company property. Conrail Patrolman Washington then transported the Claimant to the Franklin County jail and charged him with theft. On June 14, 1982 the Claimant entered a plea of guilty to an amended charge of unauthorized use of property. It should be noted that the Claimant's truck was impounded, and after a search warrant was obtained, approximately 158 gallons of diesel fuel was found to be in the "wooden enclosure" of the truck.

The Claimant testified that he was at the location on May 6 to wash off "some parts" with diesel fuel. Even assuming the truthfulness of the Claimant's testimony, he was nevertheless using the Carrier's fuel to wash parts for his personal use without permission or authority of the Carrier to do so. Accordingly, the Claimant violated Rule (L-3) on May 6, 1982.

In its letter to the Claimant dated May 7, 1982, the Carrier notified the Claimant that he was held out of service in connection with Rule (L-3). It set forth Rule (L-3) after which the Carrier stated that the Claimant "will be advised subsequently whether you will be charged, and, if so, the specific charges on which you will be tried." The Carrier's letter was sent to the Claimant on the same day that he was arrested for theft of the diesel fuel. Thus, the reasonable inference to be drawn is that the Claimant was aware of the reason why he had been withheld from service. The Board also concludes that the Carrier's May 7 letter apprised the Claimant of the exact offense for which he was to be tried. Support for this conclusion is based upon the Claimant's testimony in which he stated: "I am charged with violation of Rule L-3 on May 6th and 7th. At that time I was pulled out of service ***." Furthermore, there is nothing in the record to indicate that the Claimant was not prepared to defend himself against the charge that he violated Rule (L-3). Accordingly, pursuant to Rule 6-A-3 the Claimant was "given reasonable advance notice in writing of the exact offense for which he [was] to be tried."

There is another matter which must be addressed. The trial transcript disclosed that John Brown, a Laborer, was charged with having violated Rule (L-3). After trial he was found guilty and the Carrier imposed a penalty of thirty (30) days disciplinary suspension. The Organization contends that the Carrier discriminated against the Claimant by applying a more severe penalty against him than Laborer Brown, who it should be noted had four (4) years of service as opposed to the Claimant's length of service which amounted to approximately thirteen (13) years and three (3) months.

Penalties for the same offense can be applied differently, depending upon the circumstances of each case. However, there is nothing in the record to indicate what actions of Laborer Brown led to the finding that he violated Rule (L-3). The record discloses that he was the "fuel man on the pad" beginning with his shift at 11:00 p.m. on May 6, 1982. Laborer Brown observed the Claimant when he fueled the South Unit during the evening in question, and as he was about to pick up a hose to fuel the North Unit, he "saw the police arriving." He then reported such information to his Foreman. Obviously, these statements do not disclose when Laborer Brown committed the violation of Rule (L-3). Indeed, Laborer Brown's entire testimony revealed nothing about the circumstances which resulted in the finding that he violated Rule (L-3).

The Organization bears the burden of proving that the penalties have been applied by the Carrier in a discriminatory manner. To sustain the Organization's argument on this aspect of the dispute between the parties would mean that the Board has inferred that the circumstances surrounding Laborer Brown's violation of Rule (L-3) are similar to the circumstances involving the Claimant on or about May 7, 1982. Such a conclusion finds no support in the record and would be based upon mere conjecture. The Claimant acted without authority, when he removed approximately 158 gallons of diesel fuel from the Carrier's "diesel pad" and placed the Carrier's property into a wooden enclosure in his personal truck. Simply stated, the Claimant committed an extremely serious offense. The commission of theft by employees cannot be tolerated in the work place. Furthermore dismissal for such conduct "is not an excessive application of discipline or an abuse of discretion." See Third Division Award No. 19735.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 10th day of July 1985.