NATIONAL RAILROAD ADJUSTMENT BOARD

Form 1 SECOND DIVISION Award No. 12501

Docket No. 12447

93-2-91-2-260

The Second Division consisted of the regular members and in addition Referee Nancy Connolly Fibish when award was rendered.

PARTIES TO DISPUTE: (International Association of
(Machinists and Aerospace Workers
(
(Richmond, Fredericksburg, and
(Potomac Railroad Company

STATEMENT OF CLAIM:

1. That, in violation of the current agreement, the Richmond, Fredericksburg, and Potomac Railroad Company arbitrarily disciplined Machinist John V. Snead by unjustly suspending and subsequently dismissing Machinist John V. Snead from all services of the Carrier on May 4, 1991.

2. That, accordingly, the Richmond, Fredericksburg and Potomac Railroad Company be ordered to reinstate Machinist John V. Snead to his former position, compensate him for all time lost from May 4, 1991, until restored to service with seniority unimpaired, made whole for all vacation rights, payment for Health and Welfare and Death Benefits under Travelers Insurance Policy GA 23000 and Railroad Employees National Dental Plan GP 12000 and annuity benefits to which he would have been entitled to had he not been improperly withheld from the service of the Carrier.

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 had been employed as a Machinist at the Carrier's Bryan Park Terminal, Richmond, Virginia, for seven years when on May 4, 1991, he was charged, in part, with unauthorized removal of material from the Carrier's property on May 4, 1991. An Investigation was held on May 10, 1991, and by letter dated May 28, 1991, the Carrier dismissed the Claimant effective May 4, 1991.

On May 4, 1991, the Claimant had been called into work at approximately 1:50 A.M., along with two other employees, to make up a locomotive consist for Train No. 412. After finishing their work at approximately 2:30 A.M., the employees prepared to leave. The Supervisor of Police and Safety at the terminal, observed the Claimant loading two five-gallon cans of diesel fuel into his personal vehicle at approximately 3:15 A.M. According to the Supervisor's testimony, the trunk of the Claimant's car was open, and it was still parked where the Claimant had parked it when he had reported to work, that is, in the parking lot near the servicing area. The Supervisor also testified that the Claimant had admitted to the General Foreman, during a telephone call placed from the Supervisor's office later in the early morning hours of May 4, 1991, that he "had got the fuel oil to burn brush," an admission which was verified by the General Foreman in his direct testimony. The Supervisor indicated that the Claimant offered no resistance to taking the two five-gallon cans back into the service building and putting them into the basement storage area before he left the property at about 3:55 A.M.

The Claimant admitted at the Hearing that he had placed the two cans of diesel fuel into the trunk of his car with the intent to burn some brush and leaves. However, he was standing beside his car, with its trunk open, and another car in the parking lot, debating whether it was worthwhile to jeopardize his job by taking the fuel and whether to take it back to the service building from which he had taken it, when the Supervisor appeared. He explained that his internal debate ("talking to himself") about bringing the two cans of diesel fuel back to the shop was still going on and the Supervisor's approach did not give him a chance to go back to the trunk of his car to get the diesel fuel and bring it back to the shop.

The Organization cites Rule 34, which reads in part: "At a reasonable time prior to the hearing, the employee shall be apprised of the precise charge against him." The Organization contends that the charge against the Claimant was not precise in that it stated that the Claimant had been charged with "the unauthorized removal of material from company property in that you were observed by Supervisor of Police T. W. Grubbs loading two five-gallon cans of diesel fuel into your personal vehicle." It further claims that when the Hearing Officer realized that the charge was not precise, and that no material had actually left the Carrier's property, she tried to establish a basis for questioning with respect to the material leaving the designated area where it was stored rather than one based on the original charge.

Emphasizing that the transcript of the Hearing clearly shows that the Claimant did not remove any material from Carrier's property, the Organization claims that the Carrier failed to sustain its burden of proof in the Hearing and that, as a result, its penalty against the Claimant must be upset and the claim sustained. The Organization cites a number of Awards in support of its position: Fourth Division Award 2463; Third Division Awards 20530, 14120, and 12996; and Second Division Awards 11627, 8990, and 7606.

The Carrier points out that the Claimant admitted that he put the two five-gallon cans of diesel fuel into his vehicle and that he did not have permission to take the fuel. The Carrier asserts that when the material was removed from its accustomed and proper place and put into the Claimant's vehicle, the material was removed from the control of the Carrier and placed under the control of the Claimant. In effect, the Carrier asserts that the unauthorized act of putting Company material into his personal vehicle was clearly removing it from Company property. The Carrier denies that the charge fails because the material was not actually removed from the property and that the Organization's question about the value of the diesel oil (estimated at about $6.00) is irrelevant, maintaining that the taking of the goods, not their value, is the essence of the charge.

The Carrier cites a number of Awards in support of its position on the essence of the charge of theft: Second Division Awards 12102, 7768, 6875, and 6615; Third Division Award 29148; and Fourth Division Award 4759; as well as two on the admission of guilt: Third Division Award 28484 and Fourth Division Award 3725.

The Board has reviewed the entire file, including the testimony at the Hearing and the supporting Awards cited by both parties. There is no dispute that the Claimant removed the two five-gallon cans of diesel fuel from the shop and put them into his personal vehicle. There is also no dispute that he did not take them off the Carrier's property. Both the Supervisor and the General Foreman admitted in their testimony that the material never left the property. This case turns on the Carrier's essential charge against the Claimant and whether it sustained its burden of proof for that charge.

Both the Carrier's initial charge in its Notice of Hearing and its letter of dismissal to the Claimant referred to the same charge: "unauthorized removal of material from Company property in that on Saturday, May 4, 1991, at approximately 3:15 A.M. you were observed by Supervisor of Police and Safety, I. W. Grubbs, loading two five-gallon cans of diesel fuel into your personal vehicle."

Had the Carrier's charge referred only to the unauthorized removal of material from Company property and not to the Claimant loading the two cans of diesel fuel into his car, the Organization's claim that the Carrier had not sustained its burden of proof might be sustained.

Moreover, the "burden of proof" cases provided by the Organization in support of its position that the Carrier lacked substantial evidence to warrant its discipline in this instant appeal do not appear to deal with the matter of theft. The Carrier, on the other hand, provided a plethora of cases dealing with the charge of theft, one of which in particular (see Second Division Award 6875) dealt precisely with a situation where the Claimant was charged with the unauthorized removal of material from Company property but in which the material was not taken off the property. In that decision, the Board stated "[t]hat Claimant never actually removed the parcel from the property is irrelevant," and denied the claim.

If we credit the Claimant's testimony that he was wrestling with the question of whether to return the diesel fuel cans to the storage shed, that still does not negate the fact that he admitted that he was not authorized to take the material in the first place. This matter of wrestling with his conscience deals with intent, which the Organization quite rightly points out is not at issue in the charge in this instant appeal. In another case, where the Claimant was charged with attempt to steal (see Second Division Award 7768) but in which he returned the material to the area from which he had taken it, the Board ruled that "...the Carrier need not show that the Claimant left the property to prove theft or intent to steal."

In sum, we find that the Carrier's charge satisfied the requirements of Rule 34, and that it met its burden of proof. We accordingly deny the claim.

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 27th day of January 1993.