

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 13948
Docket No. 13815
NRAB-00002-060029
(06-2-29)**

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

**(International Association of Machinists and Aerospace
Workers**

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company

STATEMENT OF CLAIM:

- “1. That the Union Pacific Railroad Company (hereinafter referred to as Carrier or Company) violated Agreement dated June 1, 1960, as amended, between the International Association of Machinist and the Union Pacific Railroad Company when it dismissed Machinist Howard Short (hereinafter referred to as claimant) from the service of the Carrier.**
- 2. That the Union Pacific Railroad Company be ordered to reinstate the Claimant, compensate him for all lost wages, and give back to him all lost benefits.”**

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

By Notice amended January 26, 2006, the Claimant was notified to attend an Investigation over an allegation "... that at approximately 2040 hours on Thursday, December 22, 2005, while on medical leave . . . you allegedly attempted to remove Union Pacific Property from the North Little Rock Ramp premises, that were not your own personal items." Following several postponements, the Formal Investigation was held on May 23, 2006. Subsequently, by Notice dated June 16, 2006, the Claimant was found guilty and assessed a Level 5 Discipline, dismissing him from the service of the Carrier.

The Organization argues that the Carrier has failed to prove the charges. Most importantly, the Claimant was not at the North Little Rock Ramp, but in Jackson, Tennessee. At the hearing, the Claimant presented proof to support his position on a number of related facts. First, the Claimant did not have a driver's license. Importantly, the Claimant provided notarized and signed statements submitted to "verify that Howard Short was at my home and attended our group for our Christmas session potluck and services . . . Mr. Short was at our home from the night of 12/20/2005 to 12/24/2005 . . ." The Claimant also testified that his truck was in Park Hill, North Little Rock, Arkansas at a friend's home and that others had access to it. Lastly, he denied violating any Rules or theft. The Organization maintains the Claimant should be returned to service, unimpaired.

The Carrier argues that the evidence proves the Claimant violated Rules 1.6 Part 4 (Dishonest) and Rule 1.13 (Reporting and Complying with Instructions). The Carrier points to testimony from Manager Delahunt and Special Agent Sullivan to support its conclusion of guilt. The Carrier also notes that although there were signed statements, some notarized, that the Claimant was many miles from the event; the Carrier determined that they were insufficient to overcome the testimony supporting guilt. The Carrier maintains that guilt was proven and the discipline assessed was proper.

A full reading of the testimony provides sufficient proof to support the Carrier's determination of guilt. The following testimony from Manager Delahunt is an extensive response to one question which asked him to explain what happened the night of December 22, 2005 (TR 18-21). In pertinent part, this is the testimony of Manager Delahunt:

"At approximately 8:40 in the evening there, I went out of the south end of the Ramp shop . . . to check on a couple of locomotives. As I came through the washhouse . . . I noticed a gentlemen coming out of the cab . . . and coming down the ladder. What caught my attention is they were not wearing any personal protective equipment. As I walked around that corner, saw the gentlemen standing here with two boxes . . . And we made eye contact. We were probably about 40 . . . feet apart . . . And the person walked off with the boxes, so I proceeded on around the ramp to find out . . . who was there at the ramp. As I got to the roadside of the loading dock area, I saw a red and white Ford pickup, extended cab F150-250 type pickup. There was a lady in the driver's seat, older lady, blonde hair. The person that I saw with the boxes at that time was getting into the other side, the passenger side of the truck. As I stepped up to the front of the truck and looked in, I realized that that was Mr. Short I was seeing in the vehicle. And I stood there at the driver's door approximately a couple of feet away . . . and was saying, excuse me. The lady that was in the vehicle didn't bother looking at me at all at anytime. Mr. Short was in the truck and he was making a motion to move away . . . And they proceeded to drive away. As the vehicle was driving away, I just wrote down the license plate number of the vehicle."

The Board's study of the transcript includes Special Agent Sullivan's testimony that the license plate number belonged to the Claimant. As to the challenge from the Organization on credibility and merits, the Board concludes that the credibility decision has firm foundation in this record. As to merits, the testimony, above, is an eyewitness account that the Claimant committed attempted theft and that his vehicle was used. Further evidence of record is that the boxes taken and left behind belonged to the Carrier. The testimony documents that the

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Manager personally observed the attempted theft, the vehicle, the license plate, the Claimant removing materials and clearly identified the Claimant. There is no reason in this record to find the Manger's testimony, immediate call to the Special Agent, or match of the vehicle license plate to the Claimant as anything but reliable.

Based upon the full record, the Board concludes that substantial evidence exists to support the Carrier's conclusion. The record persuades this Board that the Claimant was guilty. Dismissal for attempted theft can not be considered arbitrary, capricious, or excessive. The claim is denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 15th day of July 2008.