

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**CINCINNATI, NEW ORLEANS & TEXAS PACIFIC
RAILWAY COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(a) That J. H. Minton, B. & B. apprentice, C. N. O. & T. P. Division, was unjustly dismissed from the service of the Carrier on May 23, 1942;

(b) That J. H. Minton, B. & B. apprentice, be reinstated with seniority unimpaired on the roster of his class and paid for all time held out of service from May 23, 1942 up to and including the date he is returned to service.

OPINION OF BOARD: The claimant, J. H. Minton, was employed as an apprentice on a bridge gang. On information furnished by his foreman, E. Alford, and his assistant foreman, J. A. Alsip, he was charged with wrongfully appropriating to his own use a gallon bucket of paint belonging to the Carrier. An investigation was held and Minton was subsequently dismissed from the service. The dismissal was upheld by the highest officer named by the Carrier to whom such appeals may be made. The case was then brought to this Board.

The record shows that there had been much petty pilfering of company property for a period of four months while the gang was located at the Ferguson shops. Assistant Foreman Alsip says that on the day in question, he and Foreman Alford observed a gallon bucket of paint sitting at the end of the tool box carefully concealed from view. Alsip concealed himself nearby and says that shortly after quitting time, Minton drove up and placed the paint in his car. Alsip accosted Minton and asked him what he was going to do with the paint and Minton replied that he was going to paint a floor at home. Minton's story is that as he was driving past the tool box, he observed a rain coat hanging on the wall that apparently belonged to some other employee. He says he stopped for the purpose of placing the rain coat under a canvass used to protect company property from the weather but that he gave it to Alsip to take care of when he appeared on the scene. Minton denies taking the paint or putting it in his car as Alsip testifies. In weighing this evidence, the reasonableness of the stories told by these two witnesses should be considered as well as their conduct and demeanor while the case was being investigated. Evidently, the investigating officer of the Carrier believed the story told by Alsip. Certainly, if Alsip was speaking the truth, the Carrier was justified in taking disciplinary action against Minton.

It is not the function of this Board to substitute its judgment for that of the carrier or to determine what we might have done if the matter had been before us in the first instance. We can interfere with the carrier's determina-

tion of the controversy only when it is so clearly wrong as to indicate arbitrary action on the part of the carrier. The evidence in the present case was conflicting but it was sufficient to sustain a finding that Minton was guilty of the offense charged. Under such a situation, this Division is committed to the view that it is not a proper function of the Board to weigh the evidence, for if the evidence is substantial and supports the charge made, the findings of the carrier with reference thereto will not be disturbed. The decision of the case before us, resting solely on a question of fact, is not one for our determination for the reason that there was substantial evidence, though it was contradicted, to sustain the findings of the Carrier. We cannot, therefore, say that the Carrier's action was capricious or arbitrary.

Complaint is also made that Minton was not given a full opportunity to obtain witnesses because of the short notice given of the investigation. The record shows that Minton appeared with a representative and informed the investigating officer that he was "about as near ready as ever." He is in no position to complain when he fails to ask for additional time and indicates that he is ready to proceed.

It is also claimed that Minton was not advised of the charges against him before he appeared at the hearing. The record shows that Minton had made a previous statement and that he was aware of what the investigation was about. Again he failed to voice any objection to the hearing and voluntarily participated therein. A party will not be permitted to voluntarily participate in an investigation and take his chances on a favorable result and then, when the decision is adverse, to decry the procedure to which he voluntarily acquiesced when, as here, no positive rule of the Agreement was violated.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon and upon the whole record and all the evidence, finds and holds:

That the carrier and the employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That no basis for a claim exists.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 6th day of November, 1944.