

NATIONAL RAILROAD **ADJUSTMENT BOARD**

THIRD DIVISION

Award Number 21244
Docket Number MS-21343

Irwin M. **Lieberman**, Referee

(Henry J. Wesolowski
PARTIES TO DISPUTE: (
(Boston and Maine Corporation

STATEMENT OF CLAIM: This is to serve notice, as required by the rules of the National Railroad Adjustment Board, of my intention to file an **ex parte** submission on (30 days from date of this notice) covering an **unadjusted** dispute between me and the Boston and Maine **Corporation** involving the question:

STATEMENT OF CLAIM:

1. The hearing officer's decision lacked substantial basis in fact as will be more fully shown in petitioner's submission.
2. Petitioner was deprived of due process and fundamental fairness at the initial hearing because he was denied the opportunity to confront and **cross-examine** adverse witnesses as will be more fully shown in petitioner's submission.
3. Petitioner was deprived of due process and fundamental fairness because he was not given advance notice of the adverse **information** to be presented in sufficient detail to allow him to prepare a defense as will be more fully shown in petitioner's submission.
4. Petitioner was deprived of due process and fundamental fairness because the hearing officer served as prosecutor, judge **and** jury, and petitioner was denied a fair and impartial hearing thereby as will be more fully shown in petitioner's submission.
5. Petitioner was deprived of due process and fundamental fairness by being required to defend himself against two distinct and separate types of charges, unauthorized use of a company vehicle and unauthorized sale of company property, simultaneously as will be more fully shown in petitioner's submission.
6. Petitioner was deprived of due process and fundamental fairness because he was not informed prior to the hearing of the criteria or standards of proof that would be adhered to, as will be more fully shown in petitioner's submission.
7. Petitioner was deprived of due process and fundamental fairness because he was not informed prior to the initial hearing of the possible penalties as will be more fully shown in petitioner's submission.
8. The penalty given to Petitioner was unduly harsh in the light of his **prior record** as **will** be more fully shown in petitioner's **submission**.

OPINION OF BOARD: This **is** a discipline dispute in which Claimant was dismissed from service for "...the unauthorized use of a **Company** vehicle and the unauthorized sale of Company wire and/or other **equipment** during the past twelve months".

Claimant's position in this matter relates to both procedure and substance. On procedure, **itis** alleged that the charge was not precise, the **hearing** was not **conducted** fairly for a variety of reasons including Claimant's inability to **cross** examine the only adverse witness: **junk dealer Henry**. With respect to the preciseness of the charge, there is no question but that Carrier had the **information** which could have **informed** Claimant much more definitively of the nature of the accusation. Did the lack of information impair **Claimant's** defense? Although we can only conjecture on this score, it is clear that his **defense** was obviously poorly handled at the initial **hearing**. However, since Claimant and his representative made no objection at the hearing, and did not request postponement, their conduct constituted waiver of the objection; it will not be considered further. With respect to the **fairness** of the hearing itself, a few **comments** are in order. An examination of the transcript **indicates** that the hearing officer did not act improperly as "prosecutor, judge and jury"; he did not act as witness and it is well established that his multiple role is an acceptable one in **railroad investigatory** hearings (see Awards 20859, 20602, 20027, 17532 and a host of others). There was **no** question **concerning** the fairness and due process in the conduct of the hearing on another score. The Carrier's sole witness, Lieutenant Slade not **only** testified, but in fact conducted the hearing since he was permitted to interrogate all the other witnesses as part of his testifying; he asked **almost** three times as **many** questions as the hearing officer. However, as Carrier states, any objection to the conduct of the hearing must be raised prior to the close of the hearing itself; in this case the objection was not **timely** raised and must be considered waived (see awards 19928, 19916, 16678, and 16261 and many others).

The appeal hearing upheld the earlier decision to **dismiss** Claimant. It is interesting to note that no credence or weight **was** given, at that hearing, to the letter **from** the scrap dealer which recanted the **testimony** he offered at the hearing proper (by letter), which was the real basis for Carrier's position in the **entire** matter.

We recognize full well the limitations of the functions of this Board in disciplinary **disputes** such as this. We do not weigh evidence or **attempt** to resolve conflicts in **testimony**, for **example**. However, we do have the responsibility to evaluate the **record** to determine whether or not there is substantial evidence in Support Of Carrier's conclusion that Claimant is guilty. In this case, a study of the transcript convinces us that Carrier has failed to produce that quantum of **evidence** which can be

characterized as "substantial" in support of its conclusion. The record indicates that there is no question but that Claimant used a company vehicle without authorization - this was admitted. There also is no question but that Claimant sold copper scrap, including copper wire, to **junk** dealer Henry. However, there is **absolutely no** evidence that the wire he sold was railroad property; the only evidence is that he secured the wire from his girlfriend's garage. It must be noted that nowhere in the record is there **any** reference to Claimant securing the wire from Carrier's **property** (and indeed no **testimony** as to the theft of the wire in question by anyone). Without going further, it is apparent that no reasonable analysis of the record would lead one to conclude that there was substantial evidence to prove Claimant engaged in the unauthorized sale of Company property, including wire over the period of time in question.

There is no question but that Claimant should have been disciplined for the unauthorized use of the Carrier vehicles. Further, his penalty obviously should be considerably in excess of the subordinate who was investigated jointly with him and who was given a thirty day suspension. For all the above reasons we find that Claimant's discharge shall be converted into a four month suspension. **He** shall be reinstated, with seniority and all other rights unimpaired, and reimbursed for wage loss (less the suspension period) in accordance with Article VI Sections 6 and 8.

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 Employee involved in this dispute are respectively Carrier and **Employee** 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 the discipline was inappropriate for the infraction found.


A W A R D

Claim is partially sustained **in** accordance with the foregoing Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1976.