

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21400
Docket Number MW-21395

Nicholas H. Zumas, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Southern Pacific Transportation Company

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

(1) The dismissal of Extra Gang Foreman I. S. Lopez was without just and sufficient cause and on the basis of unproven charges (System File 011-181 (L)).

(2) Extra Gang Foreman I. S. Lopez be reinstated with seniority, vacation and all other rights unimpaired and that he be compensated for all wage loss suffered in compliance with Rule 45(b).

OPINION OF BOARD: Claimant, a 25 year employe in Carrier service, was foreman of Gang No. 26. Claimant and his crew were working near Bealville, California on Carrier's San Joaquin Division. Because of serious gas shortages, Carrier had its special agents conduct a stake out at the fuel station nearby where the crew was working. On May 22, 1974 the agents observed two individuals fill 5 gallon gasoline cans and place them in the trunk of a private automobile and drove off in Carrier's truck. The agents checked the meter and determined that 8.2 gallons of gasoline had been removed from the pump and no record made. Soon thereafter one of the two persons returned to the private automobile and drove away. The agents later apprehended the driver who admitted taking the gasoline for personal use and implicated the other person with him at the pump. Both men were employed by Carrier and were members of Claimant's crew. The following day the other person was interrogated and he implicated the Claimant stating that they took the gasoline on orders from Claimant and that the gasoline was to be delivered to Claimant's house for his personal use.

All three employes were charged with being dishonest and hearing was held. One of the men charged testified that Claimant told him to fill up the cans (two red cans and one blue can with the name "ARCO" written on it). Claimant denied this. Another member of Claimant's crew (who was not charged) testified that Claimant instructed him earlier that morning to remove an empty gasoline can from the trunk of his (Claimant's) car and place it on one of Carrier's trucks. The witness described the can as blue with the letters "ARCO" written on it. Claimant denied giving such instructions.

All three of the men were found culpable as charged and were dismissed from Carrier's service. Some months later the two members of the crew accepted reinstatement on a leniency basis with seniority unimpaired and no pay for time lost. Claimant was offered the same except that he could not return with seniority as Foreman or Assistant Foreman. Claimant rejected the offer.

An examination of the testimony reveals numerous conflicting and confusing responses as to when and what transpired. However, sifting through the confusion, the Board finds that there was substantive evidence of probative value which, if believed, would make Claimant culpable. Under the circumstances, the Board has no alternative but to support Carrier's finding of culpability.

However, the Board is of the further opinion that under the circumstances, permanent dismissal is not warranted. Claimant, therefore, shall be restored to service with seniority unimpaired as Gang Foreman, but with no pay for time lost.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 Rules were violated in accordance with Opinion.

A W A R D

Claim disposed of in accordance with Opinion herein.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 28th day of January 1977.