NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23977
Docket Number CL-23959

Lamont E. Stallworth, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Rmployes
(Illinois Central Gulf Railroad

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9365) that:

1. Company violated the terms of the agreement between the parties when they discharged Claimant James L. Thompson from the service of the Company as a result of an improper and unfair investigation.

2. Company shall now be required to reinstate Claimant to the service of the Company with all rights unimpaired and payment for all time lost as a result of his dismissal from the service.

OPINION OF BOARD" On October 9, 1978, Carrier Special Agents Brown, Dorsey and Soukup began an investigation into shortages of Darts from automobiles at the Carrier's Wildwood Auto Ramp located in Chicago, Illinois. In the course of the investigation, Glen E. Mallory, Assistant Ramp Manager at that location, admitted that he had taken part in systematic thefts of automobile tires, wheels, radios and batteries since November, 1977. Mallory indicated to the investigators that Claimant Thompson was aware of these thefts and that he (Mallory) had observed Thompson taking tires and hubcaps from autos in the yard.

Claimant Thompson maintains that he did not receive a fair and impartial investigation. Claimant asserts that he was entitled by the Agreement, Rule 22, to have a precise charge made as to dates and what was allegedly misappropriated on the dates in question. All that was alleged was that certain auto parts (tires, batteries and hubcaps) had been misappropriated commencing in November, 1977 and numerous occasions thereafter. No specific dates were mentioned, nor the items that were allegedly stolen. Claimant maintains that it is impossible to defend against such an approach.

The Claimant also maintains that the Company made no effort to have Mr. Mallory and Mr. Robinson, Claimant's accusers, present for cross-examination by the Claimant. Instead, the Carrier relied on two statements; one of an admitted thief and one from an admitted fence. Therefore, there was no opportunity for cross-examination. Consequently, this resulted in Claimant no& receiving a fair and impartial investigation. Claimant maintains that these procedural objections are well founded, (Award No. 31 issued by Public Law Board No. 2035, Award No. 9 issued by Public Law Board 2409, Third Division Award Nos. 18121, 17490, 14443 and 4425).

The Carrier maintains that Claimant's hearing was fair and impartial. Claimant received notice of investigation which stated that the investigation would be conducted to "...determine whether you misappropriated batteries, tires and radios from automobiles at Wildwood Auto Ramp commencing about November, 1977, and on numerous occasions thereafter." The notice also contained copies of the statements to be used in the investigation. The Carrier maintains that this type of notice is sufficient and proper. (Awards 11170, 11443, 13764 and 18128).

The Carrier further maintains that the use of written, statements in a formal investigation does not constitute a procedural defect (Third Division Award Nos. 16308, 11342 and 9311). Carrier argues that the statements of Robinson and Mallory were substantiated with other documentation, polygraph examinations and physical evidence.

In his statement, Mr. Mallory gave a description of Claimant's participation in the thefts and Claimant's full knowledge of the thefts being made by Mallory and two others. The Carrier contends that Claimant denies these charges, but offers no further repudiation.

The Carrier also maintains that theft is an offense for which permanent dismissal is warranted (Award No. 3 of Public Law Board No. 1462, Award 15 of Public Law Board 2122, Award No. 3 of Public Law Board 1435, Award No.: 26 of Public Law Board 912, and Award No.-12 of Public Law Board 1493).

There is little debate that theft or misappropriation of property is an offense warranting dismissal. However, the quality (quantum) of evidence to substantiate such a charge is of a considerably higher nature than required in other types of discipline cases. In addition, this burden of proof or persuasion rests with the Carrier. In the instant matter, the Carrier failed to meet its burden of proof. Carrier's entire case rested upon the testimony; their Special Agents wherein statements of Mallory and Robinson were read into the record. The Board further concludes that the introduction of such hearsay statements of witnesses is not sufficient evidence to support a finding of. theft.

In these circumstances, the Board concludes that the Carrier's charge is not supported by the record. Claimant shall therefore, be reinstated with backpay and without impairment to his seniority and all other rights.)

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 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 the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 27th day of August 1982.