NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23988
THIRD DIVISION Docket Number MW-24083

Lamont E. Stallworth, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Consolidated Rail Corporation

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

(1) The dismissal of Lampman S. R. Frock for alleged 'theft of company property was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System Docket No. 527).

(2) Lampman S. R. Frock be reinstated with seniority and all other rights unimpaired and he shall be allowed the benefits prescribed in Agreement Rule 6-A-l(d)."

OPINION OF BOARD: Claimant S. R. Frock entered the service of the Carrier on April 14, 1964, as a Trackman at Harrisburg, Pennsylvania. At the inception of this dispute Claimant held position of Lampman, tour of duty 7:00 A.M. to 3:30 P.M.

At approximately 9:40 P.M. on Wednesday, August '29, 1979, Claimant was observed on Carrier property at South Avenue, Enola, Pennsylvania, shweling stone ballast into the trunk of his automobile.

As a result of this incident Claimant was issued a Notice of Trial, dated October 15, 1979 to attend a trial on October 17, 1979, in connection with the following charge: "Apparent theft of company property at approximately 9:40 P.M., August 29, 1979, in the vicinity of South Avenue." Following the trial Claimant was notified he was dismissed, dated December 3, 1979.

The Carrier asserts that the Claimant admitted his guilt in the Claimant's following testimony:

"Q: Mr. Frock, what was your reason for being on company property at approximately 9:40 P.M. on August 29, 1979, in the vicinity of South Avenue?

A: To pick up a couple of stones.

Q: Mr. Frock, would you please identify this terms of "a couple of stones"?

A: About two (2) bucketfuls in the trunk.

Q: Mr. Frock, did you have permission to remove this stone from Conrail property?

A: No."

In addition, Safety Supervisor Fred L. Matter's testimony states that he personally observed the Claimant and 8 younger boy shoveling the stone ballast into the trunk of Claimant's automobile.

Carrier maintains that dismissal from service is an appropriate penalty for dishonest employes (Awards 19735, 19486, 17155).

Claimant maintains that he did not remove anystone ballast from the Carrier's property and tnererore cannot be accused of an "apparent theft." To steal something it must be removed from its original place and/or premise. Since no theft occurred the discipline imposed was arbitrary, capricious and excessive.

The, Carrier's decision-of dismiss81 was based on the testimony 'of one witness, namely Safety Supervisor, F. L. Matter. .The Claimant maintains that an employe should not be found guilty of a disciplinary charge based solely on the unsubstantiated evidence of one witness. (Award 39, SBA No. 374; Second Division Award 6395; Third Division Award 1.8557).

Further, the hearing officer's introduction of a Conrail police report was improper andprejudiced the Claimant's right to a fair and impartial trial since the employe was not present at the trial (First Division Award 15071, Third Division Awards 2162, 2613, 2614, 2634, 2797, 3288, 4295, 4325, 10101, 12252).

In addition, the report was based upon a conversation between Trainmaster A. D. Robinson and Patrolman K. E. Stohl. Therefore the Statement was hearsay andof no evidentiary value (Awards 12252 and 14333).

Moreover, neither Trainmaster Robinson nor Patrolman Stohl were present at the trial (Award 8713).

The Claimant maintains that the burden of proof in discipline cases is upon the Carrier and the Carrier did not meet its burden of proof in this case (Third Division Awards 13240, 13306, 14479, 15412, 15582, 16166, 17228, 19962, 20048, 21109, 21372). Further, the Claimant maintains that when discipline is shown to be excessive, capricious, improper andunwarranted, it cannot stand (Awards 2813, 6074, 10583, 11556, 14120, 14339, 14429, and 16166).

The Board has carefully considered the record in this matter. The Board concludes that disciplinary action was warranted. However, the Board concludes that in these particular circumstances the discipline was excessive. In so concluding, the Board does not condone theft. However, given Claimant's long-term seniority, record and the manner in which this incident occurred dismissal is cot appropriate. The time that Claimant has been out of service should constitute sufficient discipline. The Board concludes Claimant shall be restored to service with seniority and other rights unimpaired, but without any compensation for time lost while out cf service.

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 discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

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.