NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24201
Docket Number MW-24179

John B. LaRocco, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Consolidated Rail Corporation
(New York, New Haven and Hartford Railroad Company)

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

(1) The dismissal of Truck Driver James A. Oliver for alleged 'unauthorized removal of company property', 'alleged violation of Rule E' and for 'alleged violation of Rule L' was without just and sufficient cause and on the basis of unproven charges (System Docket NH-33).

(2) Truck Driver James A. Oliver shall now be allowed the benefits prescribed in Agreement Rule 14(d)."

OPINION OF BOARD: On October 18, 1979, the carrier held an investigation pursuant to proper notice to determine if Claimant, a boom truck driver at Middleboro, Massachusetts, had engaged in the unauthorized removal of scrap metal from the Carrier's property. Claimant did not attend the investigation. On October 31, 1979, the Carrier dismissed Claimant from service.

At the October 18, 1979 hearing, a Carrier Police Officer gave a detailed narrative report of an investigation he conducted between September 27, 1979 and October 10, 1979. The Police Officer first examined the weight receipts of a scrap metal dealer (Metal Recycling Company) and discovered that a Carrier truck with Massachusetts Registration No. C26667 had delivered scrap metal to the dealer on August 28 and 31, 1979. The dealer had purchased a total of 20,600 pounds of scrap steel. Thereafter, the Police Officer reviewed the Carrier's records which showed that Claimant had been assigned to operate a Carrier truck bearing Massachusetts Registration No. C26667 on August 28 and 31, 1979. When questioned by the police officer, Claimant was not certain which truck he drove on August 28 and 31 but Claimant confirmed that his signature appeared on two gasoline credit card receipts dated August 28 and 31. The credit card receipts demonstrated that Claimant purchased fuel for a vehicle with Massachusetts Registration No. C26667. During the questioning, Claimant specifically denied that he had removed scrap metal from Carrier property and further attested that he had never heard of Metal Recycling Company. The Track Supervisor at Middleboro testified that on August 28 and 31, 1979, Claimant was assigned to assist the trackgang which was changing crossings. In the process of repairing the crossings, the gang would have generated a substantial amount of track scrap material. Also, the supervisor expressly stated that he had never given Claimant permission to sell scrap metal. On September 10, 1979, the Carrier Police Officer participated in Claimant's arrest for larceny. Subsequently, the District Attorney for the Commonwealth of Massachusetts dismissed the criminal charges against Claimant.

At the start of the October 18, 1979 investigation, the Carrier's hearing officer denied the Organization's request for a postponement. The Organization now argues that the Carrier's failure to grant a postponement prejudiced Claimant's right to a fair hearing since he was unable to appear at the investigation. We disagree. In this particular case, the record discloses that the Carrier provided Claimant with an opportunity to reopen the hearing process before it imposed any discipline but Claimant voluntarily elected to stand on the record compiled at the October 18, 1979 investigation.

On the merits, the Organization asserts that since the criminal charges against Claimant were dropped, the Carrier must also exonerate Claimant. In addition, the Organization avers that the Carrier has not met its burden of proving that Claimant committed the charged offense because no person actually observed Claimant remove scrap metal from Carrier property. On the other hand, the Carrier contends it presented substantial, credible evidence proving that Claimant did remove scrap metal from the Carrier's possession and delivered the material to the scrap dealer on August 28 and 31, 1979. The Carrier urges this Board to disregard the dismissal of criminal charges against Claimant since the argument was not raised during the handling of the claim on the property.

After carefully reviewing the record including the exhibits presented at the October 18, 1979 investigation, we conclude that the Carrier has met its burden of proving, with substantial evidence, that Claimant removed scrap metal from Carrier property without permission. The Metal Recycling Company weight tickets, Carrier time records and gasoline credit card receipts conclusively show that (on August 28 and 31, 1979) Claimant was operating a truck bearing Massachusetts Registration No. C26667, that the truck delivered scrap metal to the scrap dealer and that the scrap had been removed from Carrier property. The District Attorney's decision not to prosecute Claimant is unrelated to the issue before this Board. We have made an independent determination from the record before us that there is substantial evidence that Claimant committed a serious violation of Carrier rules.

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 not violated.

A W A R D

Claim denied.

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 14th day of March 1983.