

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 24711
ticket **Number** MW-24917

Tedford E. Schoonover, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way **Employees**
(Consolidated Rail Corporation (former
(Penn Central Transportation Company)

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

(1) The dismissal of **Trackman V. R. Spradlin** for alleged "**Unauthorized** purchase of gasoline with company credit cards **#56023**; 56023 B 3572 and 56023 M 3021 at Hurricane, West Virginia **OR December 16th, 20th, 22nd, and 23rd, 1979**" and alleged "**Unauthorized** disposition of company purchased gasoline on **December 14, 16th, 20th, 22nd and 23rd, 1979** at Buffalo, West Virginia" was arbitrary, unwarranted, **on** the basis of unproven charges and in violation of the Agreement (System **Docket** 597).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, his record cleared of the charges leveled **against** him and he shall be compensated for all wage loss suffered.

OPINION OF BOARD: There were two hearings in this case and two transcripts. Following carrier's internal investigation a notice was issued to claimant to appear for an investigation hearing on April 30, 1980 at Columbus, Ohio.

"To develop your responsibility, if any, for unauthorized purchase of fuel oil and gasoline at Hurricane, West Virginia, between December 13, 1979 and **December 24, 1979** with Conrail Credit Card.'

Claimant received proper notice of the hearing and participated therein with his Union Representative. Based on the evidence developed at that hearing, carrier scheduled a trial at the same location for June 10, 1980, on the following charges:

"Charge **#1** Unauthorized purchase of Gasoline with Company credit cards **#56023**; 56023 B 3572 and 56023 **M** 3021 at Hurricane. West Virginia on **December 16th, 20th, 22nd, and 23rd, 1979** while you were assigned and on duty as a camp car attendant in Rail Gang **#301**.

Charge **#2** Unauthorized disposition of company purchased gasoline on **December 14, 16th, 20th, 22nd and 23rd, 1979** at Buffalo, West Virginia while you were assigned and on duty as Camp Car Attendant in Rail Gang **#301**."

Here again claimant received proper notice of the trial hearing and he, together **with** his Union Representative, participated therein.

Some confusion developed in processing this case with this Division due to carrier oversight in failing to include transcript of the trial with its original submission. This error was corrected in its rebuttal brief thus completing the record for our consideration.

Carrier investigation of the allegations was based on information received by telephone from an unidentified **woman** who called on December 17, 1979 and again, three days later with additional information. Both calls were taken by the Head Clerk in the Division Engineer's Office at Columbus, Ohio. He made a detailed record of the information which was forwarded to the Conrail Police Department for investigation by Patrolman **Powelson** during the period immediately following. His investigation included checking fuel trucks, storage facilities and conversations with numerous **employees**, personnel at the gas stations involved and other persons in the area. Evidence adduced during the two hearings included records of such conversations, gasoline and fuel oil charge slips and documentation of the operations of Rail Gang **#301** during the period in question.

The Union points out that some five months elapsed between the time of the alleged offenses and the dates of the investigation and trial hearings. **The** Union contends such a long period of time is unreasonable. We agree that charges against employees should be made within a reasonable period. we must note, however, that this case, by its very nature, involved extensive background investigation. Bearing in mind carrier's original information came from anonymous telephone calls, carrier was duty bound to develop the factual circumstances. In addition to the investigating sources previously noted checks were also made with the West Virginia State Audit in determining that there was an excessive amount of gasoline handled by the gas station at Buffalo.

There is no evidence that carrier failed to act promptly once its internal investigation was completed as shown by the investigation of April 30, 1980, and the trial **on** June 10, 1980. There is, moreover, no evidence that claimant was in any way handicapped by the time lapse. **He** apparently continued **working** throughout the entire period since his dismissal was not issued until June 20, 1980 a full ten days following the trial. It must also be observed that the labor agreement does not contain any provisions as to time limits for investigation and/or trial hearings.

The Union contends there was a violation of Rule 6-A-1 (**b**) of the Agreement **which** provides:

"At hearings on appeal, an **employe** may, if he desires to be represented at such hearings, be represented without expense to the Company, by the duly accredited representative, as defined in Rule 7-H-1:

The record shows claimant was notified of his appeal hearing by carrier letter dated July 11, 1980, as follows:

*In reference to letter dated June 30, 1980 which we received on July 1, 1980 concerning your hearing in which you were dismissed in all capacities.

Mr. Joseph F. **Spirk**, Assistant Production Engineer, System Maintenance Gangs, will be at Rail Gang #320 at **Crawfordsville**, Indiana on Tuesday, the **22nd** of July at 10:00 a.m. to hold your appeal hearing.

If this date is not convenient to you, you will have to wait for another representative to be in that **area**."

The appeal hearing was held as scheduled and claimant's appeal was denied as set forth in the following paragraph from carrier's letter of August 29, 1980 signed by R. H. Smith, Chief Engineer-Maintenance of Way:

"**Mr. Spradlin**, you were present but didn't wish to have your appeal hearing because of no union representation. There is nothing in the agreement that states a union representative must be present for an appeal. Therefore, after reading your trial no new evidence was presented in your behalf to warrant changing your discipline of dismissal in all capacities."

Claimant was notified on July 11 of his appeal hearing set for July 22. There is no evidence that he made any effort to arrange for the presence of his Union Representative during the intervening period nor did he request a postponement. He simply showed up at the hearing and stated he did not wish to proceed without a union representative. **In** view of claimant's failure to take positive action prior to the hearing he must assume a measure of fault for lack of due diligence. Moreover, there is no evidence that he was in any way handicapped or his appeal prejudiced by **not** having his union representative present at the hearing. While his appeal was denied at that level it was also denied at the next appeal step by the Senior Director of Labor Relations. There is still another development to be noted on this point. In the General Chairman's letter of September 18, 1980 to the Senior Director of Labor Relations, it is stated:

"1) Refusal by Appeal Officer to grant postponement of Appeal Rearing **upon** request by Claimant due to lack of representation. Vice Chairman F. P. **Nusbaum** was contacted via telephone on August 29, 1980, the date of Appeal Hearing, by **J. F. Spirk**, who had agreed to postpone the Appeal Hearing when requested to do so by Mr. **Nusbaum**. The Appeal Officer then arbitrarily proceeded with the appeal, denying Claimant **representation**."

The above statement does not accord with the facts. The record shows that the appeal hearing was held on July 22, **more** than a month earlier than the date cited in the General Chairman's letter.

Noting that all of the above observations **bear** upon procedural matters we now turn to the merits of the charges against claimant. The evidence clearly supports the charge that claimant did indeed purchase quantities of gasoline and fuel oil which greatly exceeded the need during the period of reduced operations. Claimant's explanations were unconvincing particularly his responses of "**I don't remember**" and "**I don't know**". Matched against his **inconclusive** replies is the very extensive evidence developed by the carrier during its lengthy and exhaustive investigation. In this connection we note Union's complaint that carrier's entire case was based on hearsay evidence obtained by anonymous telephone calls. In response it must be noted that while carrier's first information of something amiss came about in this way carrier did not **move** immediately to take action against claimant based on this information. Instead, carrier undertook its own investigation to develop the evidence adduced during the hearings. Admittedly, the carrier evidence is circumstantial, it is nevertheless conclusive and clearly establishes the validity of the charges. The offenses amount to out and out theft and a betrayal of the custodial trust carrier vested in claimant. Such actions by **employees** are intolerable. Dismissal action is warranted as just **and reasonable**.

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 Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD **ADJUSTMENT** BOARD
By Order of Third Division

Attest:



Nancy J. Dever - Executive Secretary

Dated at **Chicago**, Illinois this **9th** day of March, 1984

