

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26536
Docket Number MW-26932

John E. Cloney, Referee

(Brotherhood of Maintenance of Way Employees

PARTIES TO DISPUTE: (

(The **Chesapeake** and Ohio Railway Company (Southern Region)

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

(1) The dismissal of Foreman C. R. Carter for 'alleged theft of Company material from the **C&O** Railway and the sale of that material to Georgia Bonded Fibers during the month of October 1984' was arbitrary, unwarranted and in violation of the Agreement (System File C-D-2664/MG-5018).

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

OPINION OF BOARD: The letter of **November** 13, 1984, notifying Claimant, a Track Foreman with 9 years service, to attend a" Investigation regarding the alleged theft of Company material stated in part:

"You are charged with the alleged theft of Company material from the C & O Railway and the sale of that material to Georgia Bonded Fibers during the month of October, 1984. It is your responsibility to arrange for . . . witnesses if desired."

At the Hearing the General Chairman objected that there were several witnesses necessary **to** prove the Organization's case that were not present and he proceeded under protest. There is no evidence that any specific witness was requested or called by the Organization.

At the Hearing Captain **Dunford** of Carrier's Police identified a statement signed by Claimant in his presence and it was introduced into the record. **Dunford** admitted he had not asked Claimant if he wished to have a Representative present when he questioned him. **No** evidence was presented to indicate Claimant requested Representation. At the Hearing the Organization offered a statement from a non-employee who was not present as a witness. It was rejected.

Contrary to the Organization **we** do not believe Claimant was denied a fair Hearing. The Charges were sufficiently specific to **put** Claimant on Notice. There is nothing to suggest his right **to** call witnesses was in anyway inhibited by Carrier.

The Hearing Officer was J. C. Tomkins. On November 30, 1984, C. L. Bialik, Manager, Engineering notified Claimant:

"I find you to be guilty as charged, and, accordingly, the discipline to be assessed is dismissal **from** Company service."

Relying on those cases which teach that a Hearing Officer is the proper person to make credibility findings the Organization argues Claimant's contractual rights **were** denied. We **cannot** agree. Claimant's admissions afforded Carrier substantial **evidence** upon which to conclude the charges were proven. There were no vital credibility findings to be made.

Finally, the Organization argues the discipline was excessive. In addition to our historic reluctance to disturb the extent of discipline when it is not arbitrary, capricious or unfair we note that on November 25, 1985, Carrier notified the Organization that Claimant had threatened his former Supervisor with a rifle and attempted to force the Supervisor's vehicle off a road. Claimant has since been convicted of these offenses. This would not be an appropriate case for interference with Carrier's discipline.

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

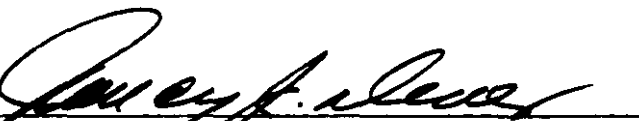
That the Agreement was not violated.

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 30th day of September 1987.