

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(National Railroad Passenger Corporation (Amtrak))

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10380) that:

1. The Carrier acted in an arbitrary, capricious and unjust manner and in violation of Rule 23 of the Agreement, when by notice of August 22, 1988 it assessed as discipline the termination of Baggage man, Mr. Bernard Wynne.

2. The Carrier shall now be immediately required to reinstate Mr. Wynne to his former position as Baggage man and to compensate him an amount equal to what he could have earned, including but not limited to daily wages, overtime and holiday pay had he not been dismissed, as mentioned above.

3. The Carrier shall now be immediately required to clear Mr. Wynne's record of the charges made against him and restore all his rights privileges and seniority unimpaired.

4. The Carrier shall now also be immediately required to reimburse Mr. Wynne for any amounts paid by him for medical, surgical or dental expenses for himself and his dependents to the extent that such payments would be payable by the current insurance carriers covering his fellow employees in the Craft. Mr. Wynne shall also be reimbursed for all premium payments he has had to make in the purchase of substitute health, dental and life insurance. This and the above claims shall be considered as on-going and therefore shall continue until such time as this dispute is settled."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant was a 10-year employee with the Carrier when, on July 12, 1988, he was confronted by his Supervisors relative to certain alleged improprieties in connection with his preparation of baggage storage tags and the remittance of monetary charges attendant with the storage tags. As a consequence of this confrontation, the Claimant was withheld from service on July 13, 1988, pending charges and a Hearing. Subsequently, by letter dated July 15, 1988, he was instructed to attend an Investigative Hearing on July 20, 1988, on charges of alleged violations of Company Rules "D" - Company Policies and Procedures; "F" - Employee Conduct; "K" - Company Property; and "L" - Obeying Instructions. The particular specifications of these charges were:

"In that on July 12, 1988, you allegedly misappropriated funds from the Parcel Check room, charging passengers for multiple bags on a single parcel check.

Although you correctly charged the passenger at \$1 per bag, your remittance did not reflect the multiple bag amounts that were made on a single parcel check on three occasions.

Also on this date, prior to your remittance, you were instructed by General Supervisor T. J. Quinn the proper procedures for tagging, charging and remitting. You failed to follow these instructions. Additionally, the information you gave Mr. Quinn concerning the multiple remittances was dishonest."

After an agreed-upon postponement from July 20, 1988, the Investigative Hearing was held on August 11, 1988, at which time the Claimant was present and represented. Subsequently, by notice dated August 22, 1988, the Claimant was notified that the portion of the charges dealing with Rule "L" - Obeying Instructions was dropped, but that he was dismissed from Carrier's service on the basis of the remaining charges which, according to the Carrier, were substantiated by the Hearing record. This dismissal was appealed by and on behalf of the Claimant through the normal grievance procedures and, failing a satisfactory resolution on the property, has come to this Board for final adjudication.

This discipline case began on July 12, 1988, when the General Supervisor, while delivering a cart-load of baggage to a passenger, observed that the baggage check tag which was attached to the cart was marked "5 pcs." When the General Supervisor inquired of the passenger how much he had paid for this service, the passenger said he had paid \$5.00 to the Claimant. Thereupon, the General Supervisor confronted the Claimant with this information and informed

him, in the presence of the Baggage Supervisor, that such tagging procedure was improper - that each bag should have been tagged separately and \$1.00 collected for each bag - rather than a single tag on the cart. During their discussion, the Claimant readily admitted that he had - in fact - received \$5.00 from this passenger, but he insisted that the passenger had handed him the \$5.00 and immediately departed before he could give the \$4.00 in change. The Hearing record reveals - after several contradictions and rechecks of the record - that the Claimant did - in fact - remit the full \$5.00 from this transaction in his daily remittance reports.

The General Supervisor subsequently inspected the baggage storage area and found three (3) other carts on which multiple bags were stored and on which the Claimant had attached a single tag to the cart rather than a separate tag to each bag. These single tags contained number references to reflect the number of bags on each cart. The Claimant again readily admitted that he had accepted the cart-load as a single item and had charged the passengers only \$1.00 each. Again, his daily remittance report reflected that all monies collected had been accounted for.

The respective positions of the parties are clear. The Carrier contends that the charges against the Claimant are precise; that the Hearing record contains substantial probative evidence to support its conclusion of guilt on all charges except those relative to obeying instructions; that the Carrier's instructions relative to baggage storage and charges therefor were clear and known (or should have been known) by all concerned employees; that employee dishonesty in any form deserves dismissal; that this Board cannot substitute its judgment for that of the Carrier in assessing discipline; and that the severity of these proven charges - when coupled with the Claimant's prior discipline record - justifies dismissal.

The Organization, of course, has a diametrically opposite position. It argues that the charges were not specific; that the Claimant should not have been withheld from service pending a Hearing; that there is no clearly stated or followed policy relative to baggage checking and pricing; that the Carrier has failed to carry the burden of supporting the charges with substantial probative evidence; and that this Board should reverse the dismissal.

This Board is fully aware of the severity of a proven charge dealing with dishonesty. Dishonesty - in any form - is a pernicious thing which should not be tolerated in any employer-employee relationship. But it must first be proven by substantial evidence that dishonesty has - in fact - occurred. From our review of this record, we do not find that the Claimant was proven to be dishonest or that he misappropriated or used for personal gain any of the Carrier's funds. The records show that he accounted for every dollar which he says he collected. Carrier suspects that he collected more than he remitted, but has offered no proof of such collection. If he really intended to misappropriate the monies collected, would it be reasonable for him to enter on the cart tag the number of bags on each cart? We think not. The General Supervisor readily ascertained the amount paid by the one passenger. Wouldn't it have been reasonable for him to at least attempt to ascertain from the other three (3) passengers how much they paid at the time they stored their bags and carts? We think so. There simply is not substantial evidence here to support the conclusion that dishonesty existed.

The policy - if indeed there is one - relative to tagging of stored baggage, leaves much to be desired. It is true that the baggage tags read: "Charges per piece - \$1.00 per 24 hours or fraction thereof." However, a "piece" means different things to different employees. The General Supervisor says it means any single bag or any single article being checked. He says he has so instructed his employees to this effect, but does not remember when. He has no written or posted statement of policy on what constitutes a "piece." The Claimant says that he had considered a loaded baggage cart as a "piece" because it involved a single handling. Other employees say that small items are not always considered a "piece" and are handled gratis. A policy - to be a policy - must be clearly stated and made known to all who are subject to its application. In this record, there is no showing that there was any clear policy or procedure relative to the handling of checked baggage. The Claimant could not violate a policy which had not been promulgated.

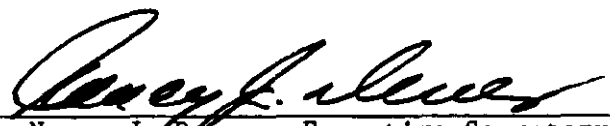
It is the conclusion of this Board that the Claimant should be reinstated to service with seniority and all other rights unimpaired and compensated for actual wage loss sustained during the period he has been out of service less any outside earnings received during this period. There has been no showing that the applicable Rules Agreement contains any provision for the reimbursement of medical expenses. Therefore, that portion of the Organization's Claim is denied.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 19th day of July 1990.

CARRIER MEMBERS' DISSENT
TO
AWARD 28449, DOCKET CL-28942
(Referee Mason)


We disagree with the Majority's sustaining Award in this dismissal case. The Award is erroneous in that the Majority has completely overlooked significant facts.

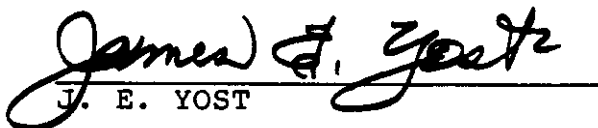
The Claimant was dismissed for dishonesty and misappropriation. He told his Supervisor that he wrote the amount of money he received for luggage on the luggage parcel tags. When the Supervisor examined the tags, he found the amount of money was not recorded.

The Claimant also told the Supervisor that he regularly charged only one dollar to store a cart loaded with luggage. However, the Supervisor discovered that the Claimant received five dollars for a cart, and had not recorded the money.

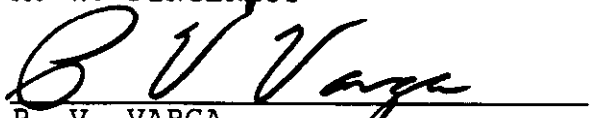
The Majority found the Claimant innocent of the charges, stating: "The record shows that he accounted for every dollar which he says he collected." However, the Claimant accounted for the money he collected after his Supervisor discovered the attempted misappropriation. It is obvious that the Majority overlooked this fact, and this is what makes the Award erroneous.


M. C. LESNIK


R. L. HICKS


J. E. YOST


M. W. FINGERHUT


P. V. VARGA

August 16, 1990