

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 29251  
Docket No. MS-30081  
92-3-91-3-502

The Third Division consisted of the regular members and in addition Referee Hugh G. Duffy when award was rendered.

PARTIES TO DISPUTE: (Kenneth M. Donmoyer  
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

"Case Re: SD-2871D  
Dismissal"

FINDINGS:

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

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

By letter dated January 24, 1991, Carrier's Senior Engineer C&S/ET removed Claimant, a Substation Electrician, from service in connection with his alleged unauthorized possession and sale of company materials at about 3:15 P.M. that date.

On January 31, 1991, Carrier's Assistant Division Engineer Electric Traction directed Claimant to report for a formal Investigation to be held on February 13, 1991, in connection with the following charge:

"Violation of Amtrak's 'Rules of Conduct' Rule 'F', Paragraph 3, which states in part 'Conduct involving dishonesty...is prohibited,' and Rule 'K' which states in part '...theft, misappropriation of Amtrak property is prohibited.'

SPECIFICATION: In that on January 24, 1991 at approximately 3:05 P.M. you were observed by Amtrak Police removing Amtrak property from the Dock Street Substation, Harrisburg, PA and taking said Amtrak property to the American Scrap Yard at 2201 North 7th Street, Harrisburg, PA. At approximately 3:20 P.M. you sold said Amtrak property to American Scrap Yard for \$48.60. You did remove said Amtrak property without proper authorization."

The Investigation was postponed several times and was ultimately held on April 15, 1991. At the outset, Claimant acknowledged he was ready to proceed, however, he refused to testify in his behalf, stating that his attorney had advised him not to make any statements because of the pending criminal trial. An Amtrak Police Sergeant testified that he observed the Claimant and a fellow employee taking scrap material from a storage area at the Dock Street Substation in Harrisburg, Pennsylvania, and placing same in a white bucket located in the trunk of the other employee's personal vehicle. The Sergeant further testified that shortly thereafter, the Claimant and the fellow employee entered the American Scrap Yard, removed the scrap material from the trunk of the car and carried it over to the loading dock to be weighed. At the time of the arrest, Claimant had \$48.60 in his hand and a receipt for this amount. Upon leaving the building at American Scrap Yard, Claimant made a spontaneous, uncoerced statement, saying:

"...come on, we never took anything that was new.  
We only took scrap. We only took stuff that they  
weren't going to use. I can't believe we did this."

Both employees were then taken to the Harrisburg Train Station where the General Foreman of the Electric Traction Department identified the scrap materials in the bucket as scrap catenary parts. The General Foreman advised the Sergeant that neither the Claimant nor the other employee had permission to remove the material from the substation. Another Amtrak Police Officer corroborated the testimony of the Sergeant.

Following the Hearing Officer's April 26, 1991 conclusion that the Claimant was guilty as charged, Carrier's Division Engineer dismissed the Claimant effective April 29, 1991. Conference was held on May 16, 1991, and under date of June 14, 1991, Carrier's Director of Labor Relations denied the appeal. The claim is now before this Board for adjudication.

Claimant's September 7, 1991 Notice of Intent to the Board seeks reinstatement on a leniency basis, based on his unblemished service record for twenty-eight years and his expression of regret over his acknowledged lack of sound judgment and common sense. He neither refutes the charges nor any evidence presented at the investigation. He says that others have done such things in the past and Management has granted leniency. However, he does not offer any incident by name, date or location to substantiate this allegation.

This Board has thoroughly studied the entire record which has been presented and has considered all arguments advanced by the parties. Suffice to say that where, as here, there is no mitigation of the admitted guilt, this Board is powerless to reverse the dismissal assessed by the Carrier. The precedent in this regard is so overwhelming as to preclude the necessity of numerous citations. In denying a similar claim on this property the Board held in Second Division Award 12102:

"The Claimant is a seventeen (17) year employee with only one previous infraction. Attempted theft of Carrier materials was more than a 'stupid action' and a 'mistake.' It was a grievous act of dishonesty against the Carrier. The Claimant indicated he was 'deeply sorry for his actions' and in essence requested leniency. This Board does not grant leniency. If guilt is established, it may only limit its review to the quantum of discipline. The Claimant was caught in the act of removing Carrier property. Theft is an action that this Board has ruled warrants dismissal. Dishonesty in any form undermines the nature of the relationship between the employee and employer. The Board does not find that the penalty of dismissal is excessive or harsh.

The fact that the Claimant is a long-term employee is something the Claimant should have considered before he acted to remove Carrier property (Second Division Awards 9140, 6615). The Carrier considered the Claimant's length of service in its assessment of whether to maintain the Claimant in its employ or sever the relationship. For its own reasons, the Carrier chose to dismiss the Claimant. In view of his admitted guilt, Carrier's dismissal was fully warranted. There was no violation of the Claimant's rights or any probative evidence that a Rule was procedurally violated. The Claim must be denied."

With this guidance, the result in this case must be to deny the claim. All Divisions of this Board have consistently held that the reinstatement of employees based on leniency is exclusively within the discretion of the Carrier. Here Claimant was guilty of a dishonest act as charged by the Carrier. Discharge is severe, but not inappropriate under the circumstances. The Board is not empowered to grant leniency and hence has no alternative but to deny the claim.

A W A R D

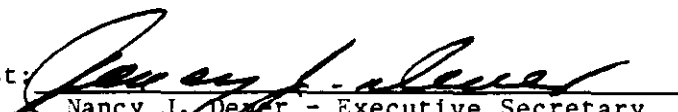
Claim denied.

Form 1  
Page 4

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NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 12th day of June 1992.