

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29781
Docket No. MW-30001
93-3-91-3-391

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Kansas City Terminal Railway Company

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

- (1) The discipline imposed upon Station Maintainer L. Gray for alleged responsibility '... in the theft of a water pump from the Union Station and a further charge of insubordination for removing the pump after receiving a directive from the Chief Engineer concerning the removal of company property.' was unwarranted, on the basis of unproven charges and in violation of the Agreement.
- (2) The Claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

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 employes involved in this dispute are respectively carrier and employe 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.

This discipline case involves a B & B Station Maintainer, who was summarily dismissed from Carrier's service by notice dated July 19, 1990. On appeal, Claimant was reinstated to service on October 29, 1990, with the time he had been out of service counted as

suspension. It is the suspension period which we are considering here.

Claimant was a 32-year employee of the Carrier at the time of the incident here in question. There is no record of any prior discipline having been assessed against the Claimant. The incident which gave rise to this dispute involved an alleged act of insubordination by Claimant and his alleged involvement in the theft of a piece of equipment, a water pump, from Carrier's property on July 16, 1990. Following Claimant's termination from service on July 19, 1990, a hearing was requested and conducted on August 8, 1990, at which time Claimant was present, represented and testified on his own behalf. Following the completion of the hearing, Claimant was notified, in writing, that he had been adjudged guilty as charged and his dismissal from service was reaffirmed. On subsequent appeal, the dismissal was converted to a suspension to cover the time he had been out of service. Because the Organization contended that the charges against Claimant had not been proven, they have brought the case to our Board for final and binding adjudication.

The applicable rule involved in this dispute is:

"Rule 19 - Discipline and Grievances

Employees disciplined or dismissed will be advised in writing if requested, the cause for such action. Upon written request within ten days from date of advice of discipline or dismissal, employee will be given an investigation within ten days from date of request, by an officer superior in rank to the officer having administered the discipline, at which investigation the employee may be represented by one or more representatives of his own choice, and decision will be rendered within twenty days after completion of the hearing. A copy of all evidence taken in writing at the hearing shall promptly be made available for the use of a duly accredited committee, when such committee requests same."

This is a somewhat convoluted case in which there is considerable speculation, surmise, conjecture and suspicion but not much in the way of direct, first-hand testimony. Carrier acknowledges that it was a Signal Foreman who "ultimately received the stolen pump and removed it from Company property in his personal truck". And yet, Carrier says that "without him (Claimant) the removal of the pump could not have taken place".

Carrier argues that dishonesty deserves dismissal and, in its opinion, Claimant was guilty of dishonesty. And yet, the Signal Foreman was assessed only a 30-day suspension plus reduction in rank for his theft of the pump. Carrier says that Claimant should have known that the Signal Foreman was going to use the pump for his personal use but offers little more than its suspicion in support for this allegation.

The Organization has raised several procedural arguments in addition to their contention that the charges have not been proven and, in any event, the discipline as assessed was excessive and disparate. We have examined the procedural arguments and do not find them to be dispositive of the issue here involved. While the charging officer was the same individual who made the initial decision to terminate and also testified as a witness at the hearing, such a situation does not violate Rule 19 or Agreement due process rights inasmuch as, on this property, termination can and does precede the making of a charge.

As to the contention relative to failure to sequester the witnesses at the hearing, there is no rule requirement that such an act is mandated. This Board has repeatedly held that, in the absence of a rule requirement, failure to sequester witnesses does not, per se, create a situation where the hearing is unfair or partial. Third Division Award 18647 is representative of the many Awards in this regard.

The Organization's argument relative to the standing of the hearing officer in relation to the rank of the officer who administered the discipline has been closely examined by this Board. The specific language in Rule 19 is a requirement which demands compliance. In this case, the discipline was administered by the Chief Engineer. The hearing officer was addressed as "Honorable" and carried the title of Manager of Operations. While the record of this case does not exactly identify the relative superiority or rank of the Chief Engineer in relation to the Manager of Operations, the Board is convinced that, on the basis of the record in this particular case, there was no deliberate violation of Rule 19 in this regard. Carrier is advised, however, that care must be given to the relative rank of officers who are involved in the administration of the provisions of Rule 19. The negotiated rule means what it says. To simply state, as Carrier did in this case, that "Mr. Arnold is the hearing officer for this railroad" does not, in and of itself, satisfy the requirement that the hearing be conducted "- - by an officer superior in rank to the officer having administered the discipline - -" (underscore ours for emphasis). Carrier has dodged the bullet in this case, but may not in the next one if this somewhat cavalier attitude persists.

In any discipline case, the measure of proof required from the Carrier is guilt by SUBSTANTIAL evidence. This term "substantial evidence" has been defined for us by the U.S. Supreme Court and its definition has been repeated by this Board on countless occasions. Once more we repeat it here:

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (Consolidated Edison v. N. L. R. B., 305US 197,229)

When that definition is applied to the record in this case, there are several deficiencies to be found in the quality and quantity of Carrier's proof. The record is replete with unresolved contradictions in testimony from the Claimant as well as from the hearsay testimony of the Signal Foreman who was the individual who actually committed the theft. Strangely, the Foreman was not called by Carrier to offer first-hand testimony. The single Signaller who testified as an Organization witness and who was also involved in the theft and who received only a 10-day suspension for his involvement in the theft stated, without challenge by the Hearing Officer or contradiction by any Carrier witness, that Claimant had no knowledge of the Foreman's taking of the pump. The key words found in the definition of "Substantial evidence", namely, relevant, reasonable, adequate are not found in the majority of the testimony offered in this case.

At most, from this record, Claimant was shown to be guilty of poor judgement when he decided on his own to move the pump from the station building to the shop area. This act violated the instructions of his superior officer. For this violation, some discipline was warranted. On the basis of the totality of evidence as found in this case, it is the Board's determination that a 90+ day suspension was indeed excessive for the proven violation of disregarding the Chief Engineer's instructions which is a form of insubordination. There is not, in this record, substantial evidence to support the conclusion that Claimant was a major player in the theft of the pump. Suspicions are not proof. Therefore, it is the conclusion of this Board that the suspension as assessed should be converted to a 30-day suspension. Claimant is to be compensated for the actual wage loss sustained for the difference of time between the original suspension and the 30-day suspension ordered by this Award.

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A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 20th day of September 1993.