Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33612
Docket No. MW-34476
99-3-98-3-100

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Louisville & Nashville
(Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline of J. L. Sanders (removal from service and subsequent dismissal) for alleged violation of CSXT Operating Rule 501 in connection with the charges of dishonesty, conduct unbecoming an employe and unauthorized possession, removal, theft and subsequent sale of Company material on April 4, 7, 11 and 16, 1997 was arbitrary, capricious on the basis of unproven charges and exceedingly harsh [System File 3(4) (97)/12 (97-1149) LNR].

(2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service 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."

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.

This case involves the dismissal of Claimant J. L. Sanders following an Investigation held on April 24, 1997 in connection with the charges of theft and subsequent sale of various railroad materials, signal equipment and track tools.

The evidence adduced at the Hearing shows that, in the course of investigating an entirely different matter, Carrier Special Agent Marshall interviewed an employee at City Salvage and Recycling in Hopkinsville, Kentucky. The employee of the salvage yard, Ms. Barker, told the Special Agent that railroad material had been sold to their company by an unidentified source. A few days later, on April 11, 1997, more railroad material was sold to City Salvage. This time Ms. Barker obtained the license plate number of the vehicle driven by the person who sold the materials and wrote it on the original invoice of the sale.

A license plate check revealed that the vehicle identified by Ms. Barker, a red Mazda truck, was registered in the name of the Claimant's wife. Accordingly, on April 16, 1996, Special Agents Marshall and Young questioned the Claimant at his home in connection with the sale of the railroad materials. According to Special Agent Young's testimony, the Claimant admitted that on two occasions he sold railroad material to City Salvage that he had picked up at various locations on CSX, including Pembroke, Kentucky, and from the old IC railroad in Hopkinsville. Before leaving the Claimant's home, Special Agent Young took a photograph of the Claimant and the red Mazda truck parked in the Claimant's driveway.

The next morning, Special Agent Marshall received a message from Ms. Barker that the same person had delivered and sold another load of railroad material the previous day at approximately 3:40 P.M., just prior to the time the Special Agents had questioned the Claimant at his home. Roadmaster Sullivan was called to inspect the railroad materials that had been sold to City Salvage on April 16, 1997. He testified that the lot consisted of knuckles from railroad cars, angle bars, rail, part of a hot-box detector, a welding pot, and a set of crossing board squeezers. The crossing board squeezers had been custom built in 1988 and the Roadmaster was therefore able to positively identify them as belonging to the Carrier. Signal Supervisor Milburn

inspected the hot box detector at City Salvage and stated that it was the same one that was missing from the Carrier's property at Guthrie, Kentucky.

Special Agents Marshall and Young returned to City Salvage on April 18, 1997 with a photographic lineup. According to the testimony of the Special Agents, three of the City Salvage employees who were questioned, including Ms. Barker, identified the Claimant as the person who sold the railroad material on April 16, 1997 and on previous days. Although Ms. Barker submitted a written statement, neither she nor either of the other salvage employees testified at the Hearing.

The Claimant, a Sectionman with 19 years of unblemished service, flatly denied any improper or dishonest conduct in connection with the charges leveled against him. He testified that he did not steal or sell the Carrier's property on any of the dates he was charged. He further testified that he had sold iron scrap material at City Salvage several times during the past five years and that such materials consisted of iron scrap tie plates removed from the former IC Railroad property and a minimal amount of scrap metal that was the byproduct of rail grinding operations.

The Organization contends that it is apparent that the Carrier failed to meet the considerable evidentiary burden it must bear in cases where theft and dishonesty are alleged. After careful review of the record in it entirety, the Board agrees with the Organization. Theft and misappropriation of property are serious offenses warranting summary dismissal. Therefore, the evidence required to substantiate such charges must be of a convincing nature. See Third Division Award 23976.

In the instant matter, the core of the Carrier's case hinges on the hearsay account of Ms. Barker, the salvage yard employee. The evidence subsequently relied upon by the Carrier as evidence of Claimant's guilt - the identification of the license plate of the car, the photo lineup, and the materials identified as Carrier property - all flow from Ms. Barker's account. Although the hearsay evidence was properly admitted in evidence at the Hearing, one must always bear in mind the inherent weaknesses of such evidence, particularly in discipline cases where the Carrier has the burden of proof.

The Carrier contended that it does not have subpoena power and therefore could not compel Ms. Barker to testify. However, that does not outweigh the fact that this witness, the Claimant's primary accuser, failed to appear at the Hearing to face the Claimant and test her account against cross-examination. Without this individual's

testimony, the Board cannot ascertain whether there was motive to falsely accuse the Claimant, whether there was misperception or error in her account, or whether her account was otherwise unreliable. Her unsworn statement and the hearsay statements given to the Carrier's Special Agents cannot be relied upon under these circumstances because, as it developed, the matters contained therein were too important to deprive the Organization of its right to cross-examination.

In short, there had to be some residuum of non-hearsay evidence on the record that independently established the misconduct alleged. The Claimant's so-called "admission" does not provide the necessary corroborative evidence. The Claimant's statements to the Special Agents, even if fully credited, suggest that he sold materials that truly were scrap and not the items specifically identified by the Carrier's witnesses. Having delineated the Carrier's failure to meet its burden of proving the charges leveled against the Claimant, the claim must be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 16th day of November 1999.

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 33612; DOCKET MW-34476
(Referee Ann S. Kenis)

The Majority's decision is in error.

The Board's findings acknowledge that Special Agents Marshall and Young testified that Claimant J. L. Sanders' admitted his guilt at the time he was interrogated by them. The Special Agents' testimony revealed that three employees of City Salvage and Recycling in Hopkinsville, Kentucky, positively identified Claimant J. L. Sanders in a photographic lineup and one of the three scrap dealer employees attested that the Claimant sold railroad material to City Salvage and Recycling. At the April 24, 1997 Investigation the Special Agents introduced material invoices covering the transactions and the material was identified as the Carrier's by not only the two Special Agents, but also by Roadmaster Sullivan and Signal Supervisor Milburn.

In discipline cases the Carrier is required to produce substantial evidence - that is evidence upon which a reasonable person may make a finding of guilt. In our view, the evidence produced in this case exceeded that measure. As a matter of fact, upon receipt of the Award the Carrier's Labor Relations Department belatedly discovered that the same evidence had been produced in a civil proceeding initiated in Robertson County General Sessions Court where a misdemeanor charge was bound over by the Grand Jury and trial was set for April 15, 1999. Not surprisingly, prior to jury selection the Claimant entered a plea of guilty to theft for which sentence was issued.

The Court certainly requires a much more stringent standard of proof to determine guilt than the arbitral fora in this industry. Ironically, the measure of evidence in this case was sufficient for the Carrier's Hearing Officer and the Court, but not for this Referee. In our view, the Referee's decision to substitute her judgment for that of the Carrier's Hearing Officer, who observed the demeanor of the witnesses first hand, was unwarranted.

We dissent.

Michael C. Lesnik
Michael C. Lesnik

Martin W. Fingerhut
Martin W. Fingerhut

P V Varga
Paul V. Varga

December 23, 1999

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 33612, DOCKET MW-34476
(Referee Kenis)

It has been my observation that the Carrier Members have taken to dissenting to nearly every award that does not come down in their favor. Whether this is merely coincidence, frustration or madness is a mystery to me. Also evident is the propensity of the Carrier Members to not only dissent to the award, but along the way manage to attempt to vilify the referee in the process. The Carrier Members' Dissent in this award is a case in point.

The National Railroad Adjustment Board does not take testimony or evidence de novo. Consequently, all the referee has to deal with is a cold dead record of the investigation that was held months, if not years, prior to review by the Board. Moreover, the Carrier has the three-pronged duty of being the prosecutor, judge and jury in discipline matters. Hence, in order for an employe to get a fair and impartial investigation, the Carrier must assure that the employe receives proper notice of the investigation, ample opportunity to attain representation, be able to face his accusers and be given an independent review of the discipline assessed, if any. The Carrier Members' Dissent begins by rehashing the same arguments it raised on the property concerning the Claimant allegedly admitting his guilt to the Carrier's special agents when they interrogated him on April 16, 1997. The record of the hearing reveals that he denied admitting guilt to the special agents on said date. In order to support its assertion that the Claimant was guilty, the Carrier contended that an employe from the salvage company identified him as the person who sold CSX property on various dates in 1997. In support of its assertion, the Carrier presented a written statement from the salvage yard employe, ostensibly identifying the Claimant as the person who sold CSX scrap iron. The Organization's representative properly objected to the hearsay assertions proffered as evidence by the Carrier. Furthermore, the Organization requested that the employe of the salvage company be called to the investigation to give testimony in the matter. Of course, the Carrier refused to make an attempt to call the witness and continued the investigation over the objections of the Organization.

Following the investigation, the Carrier found the Claimant guilty of the charges leveled against him and dismissed him from service on May 16, 1997. A claim was filed in favor of the Claimant and the case proceeded to the Board for adjudication. This case was argued before the Board on July 12, 1999 and the award was adopted on November 16, 1999. The referee considered all of the arguments of the parties and made the proper determination that the Carrier failed to meet its burden of proof and sustained the claim. In rendering her decision, the referee clearly stated that theft and misappropriation of Carrier property are serious offenses warranting dismissal; however, the evidence required to substantiate such a decision must be of a convincing nature. Since the Carrier's case hinged on hearsay testimony of the salvage yard employe who the Carrier chose not to call to offer testimony, it failed to meet that higher burden of proof. Now comes the Carrier

within its dissent to the award with additional alleged evidence that the Claimant was charged in a civil matter concerning this incident and he allegedly pled guilty to an unknown misdemeanor charge on April 15, 1999. If what the Carrier Members contend within their dissent is true, being a matter of public record, the Carrier could have attempted to present such documentation before the Board at the referee hearing. After all, the Carrier was notified that a referee hearing was going to be held in the matter and if such a contention was true, it could have brought said evidence to the referee hearing that was scheduled to be held on July 12, 1999. The Carrier did not do so and is now raising yet another unsupported contention that can in no way be connected to this case. To incorporate these allegations into a dissent is nothing more than incredible and is clearly designed to denigrate the integrity of the referee over something she was not aware of nor had any control over. As I stated earlier, the referee had nothing more than a cold dead record from which she must render her decision. The award is correct and nothing contained in the dissent distracts therefrom. The Majority considered the arguments raised on the property, the testimony within the transcript of the investigation held in the matter and properly sustained the case. The Carrier Members' Dissent represents the same twisted logic previously presented and that which the Majority rejected.

Finally, in a last ditch attempt to impugn the referee's integrity, the Carrier Members state:

> "*** In our view, the Referee's decision to substitute her judgment for that of the Carrier's Hearing Officer, who observed the demeanor of the witnesses first hand, was unwarranted." (Emphasis added)

The problem with the Carrier Members' statement, cited above, is that it is false. For the record, the investigation was held on April 24, 1997 and was conducted by Hearing Officer F. E. Haddix. On May 16, 1997, Division Engineer P. M. Tucker issued the following findings:

> "Based on a thorough review of the transcript (copy enclosed), the facts developed in the investigation proved conclusively that you were guilty as charged. Due to the seriousness of the proven charges, you are hereby dismissed from the service of CSX Transportation and forfeit all rights and seniority. ***"

A review of the above-cited quotation from the letter of discipline reveals that the decision to dismiss the Claimant from service was not made by Hearing Officer Haddix, but was rendered by Division Engineer Tucker. Hence, the Carrier Members' allegation that the referee overstepped her authority by substituting her judgment for that of the Carrier's hearing officer, "*** who observed the demeanor of the witnesses first hand....", is false and must be considered for what it is, i.e., claptrap.

The award is correct and stands as precedent.

Respectfully submitted,

Roy C. Robinson
Labor Member