Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36337
Docket No. MW-36698
02-3-01-3-242

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.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline (withheld from service and subsequent dismissal on October 23, 2000) imposed on Mr. J. C. Filipowicz in connection with charges of theft, unauthorized removal of Company material, conduct unbecoming an employee, making false statements and concealing facts concerning matters under investigation in connection with his personal use of a five (5) gallon gas can on July 18, 2000 was arbitrary, capricious, unwarranted and in violation of the Agreement [System File H39226900/12(00-0833) CSX].

(2) As a consequence of the violation referred to in Part (1) above, the aforesaid charges against Mr. J. C. Filipowicz shall be dropped and he shall be reinstated to service and paid for any lost wages and benefits."

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 hired as a Welder Helper on November 22, 1999. He was assigned as a Welder on July 19, 2000 when, according to the testimony of Welder Helper D. O. Beran, he was observed by Beran removing a gasoline can from his personal automobile and returning it to the welding truck he was assigned to use. According to Welder Helper Beran, the can had been full the day before and the Claimant returned it empty.

Beran reported the matter to Regional Engineer Track J. F. Bippus on July 20 and the Claimant was questioned about the incident. At that time, according to Bippus, the Claimant admitted to taking the can home without permission, but denied that there was any significant amount of gas in it. Bippus subsequently notified the police. He stated that he asked the police to investigate because "I didn't know what story to believe or what was going on." The police investigation resulted in a report dated September 7, 2000 which indicated that the Claimant had admitted during the preliminary investigation to taking some gasoline.

The police report was submitted to the Carrier and, based upon the findings in the report, Bippus issued the instant Notice of Investigation dated September 19, 2000, charging the Claimant with theft, giving false information, unauthorized removal of company material, and conduct unbecoming an employee. The Claimant was removed from service and the Investigation was held on October 3, 2000.

At the Hearing, CSX Special Agent E. A. Patricks testified as to the course of his investigation and his interviews with both Welder Helper Beran and the Claimant. According to his testimony, the Claimant admitted that he took the gas can home, that the can was about half full, and that he put the gas in an engine he was working on at home. Officer Patricks further testified, and his report states, that the Claimant "wants to pay for the gas he took and that he is sorry for making a mistake."

Welder Helper Beran also testified. In addition to his testimony concerning his observations, Welder Helper Beran testified that the Claimant told him that he "sort of stole 5 gallons of gas but I was gonna stop and get gas and fill it up." The Claimant denied making that statement or any other admission. He testified that he took home a 5-gallon gas can that he believed to be empty and returned the can on the following day. Following the Investigation, the Claimant was dismissed.

This case centers around two issues: timeliness and credibility. With reference to the first issue, the Organization contends that the Investigation was not held within the 30-day time limit as prescribed by Rule 25(d) and amended by Side Letter No. 21. As stated therein, "The hearing shall be scheduled to begin within thirty (30) days from the date management had knowledge of the employee's involvement and such hearing shall not begin in less than ten (10) days from the date of the notice." The Organization asserts that management had knowledge on or about July 20, 2000, when Regional Engineer Track Bippus was informed of the matter.

The Carrier argues that the timeliness issue was waived because it was not included in the formal Statement of Claim. We disagree. This issue was raised by the Organization on the property, at the Hearing and during the claims handling process. We find that the Statement of Claim, which asserts that the discipline issued was "arbitrary, capricious, unwarranted and in violation of the Agreement," sufficiently encompasses the timeliness argument made on the property so as to be properly before the Board for consideration.

So stating, we nevertheless must reject the Organization's threshold argument under the particular circumstances of this case. We find that the Carrier did not have sufficient "knowledge" until the police report was made available to the Carrier on or about September 7, 2000. Prior to that time, it would have been premature to issue charges against the Claimant. The Carrier is correct that allegations of prejudgment or predisposition could have been lodged by the Organization had charges been directed against the Claimant while the police investigation was ongoing. As the record stands, the Notice and Investigation were within the 30-day time limit requirement of the Rule.

Our findings in this regard are consistent with other Awards which have held that the Carrier has "knowledge" for purposes of the time limits Rule after its receipt of the results from investigations by Special Agents or Police. As explained in Third Division Award 26155: "To find otherwise . . . would cause the holding of Investigation Hearings on what might amount to the flimsiest of allegations. Here, the Carrier proceeded cautiously and after the allegations were substantiated by facts, the Carrier timely implemented the disciplinary process. . . ." Also see, First Division Award 24805.

Turning to the merits, we note that the limited scope of our review in discipline cases is firmly established. The Board does not resolve at this appellate level pure conflicts of testimony or credibility. The Organization herein argued that the

Claimant's denial of wrongdoing suggests that he did not have the requisite intent which must be established in cases of dishonesty or theft. In order to accept that argument, however, we would necessarily have to find that the Hearing Officer erred in determining that the Claimant's testimony, which was inconsistent with his prior statements and admissions, should have been credited over the other witnesses, including a fellow bargaining unit employee with no apparent ax to grind. No such conclusion is warranted on this record. The evidence adduced at the Hearing reasonably supports a finding of the Claimant's culpability and, in our judgment, there has been no showing on this record to impeach the determination of the Hearing Officer that events transpired essentially as described by the Carrier witnesses. That being the case, we find there is substantial evidence to support the alleged wrongdoing.

Employee theft is one of the few offenses for which summary discharge is deemed appropriate. The Carrier is entitled to expect its employees to be honest and to assume responsibility for not stealing, no matter how large or small the value of the item. In this instance, when the Claimant removed the gasoline can from Carrier property, it is clear that his intent was to deprive the Carrier of the gasoline contained therein and convert it to his own use. On that basis alone, discharge was not an unreasonable or arbitrary action on the part of the Carrier.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of December 2002.