Award No. 15186
Docket No. CL-15841

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE NEW YORK CENTRAL RAILROAD, EASTERN AND NEW YORK DISTRICTS
(Except Boston and Albany Division)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5794) that:

1. Discipline of 60 days be removed from the record of James C. Matthews, Fork machine Operators, Weehawken, N. J., and

2. James C. Matthews be reimbursed for all monetary loss from May 26, 1964 to and including July 26, 1964.

OPINION OF BOARD: This is a discipline case. Claimant was assessed (60) sixty days of actual suspension from work by Carrier for attempted pilferage and conduct unbecoming an employe on May 26, 1964. Carrier originally scheduled the investigation for June 3, 1964 but ultimately postponed it until June 23, 1964. During the interim period, charges preferred against the claimant for larceny were dismissed by the Municipal Court of Weehawken, New Jersey.

In the first instance, Petitioner contends that Claimant was denied a fair and impartial hearing because the hearing was postponed on several occasions by Carrier, allegedly to await and benefit from the Municipal Court decision. However, the record discloses that Petitioner acquiesced in the postponement by Carrier and both Claimant and his representative at the hearing affirmed that Claimant had received proper notification.

No other probative evidence was offered by Petitioner in support of its position that the hearing was not fair and impartial and we find no merit in this contention.

Petitioner also contends that Carrier violated Rule 22 (d) of the Agreement by depriving Claimant of an initial appeal from the decision of the Hearing Officer to the Supervisor directly in charge at Weehawken, N. J., Carrier avers that this is a new procedural issue which was not handled between the Petitioner's General Chairman and Carrier's highest appeals officer on the property. Therefore, it is Carrier's position that the alleged

violation of Rule 22 (d) is improperly before the Board for consideration. It is well established that the Board will not consider new issues raised for the first time subsequent to the consideration of a dispute on the property by the parties. Accordingly, we will dismiss the procedural objection and proceed to consider the merits of the claim.

The essential facts involved in this dispute are not in issue.

On May 26, 1964, Claimant reported for work at 3:00 P. M. on Pier No. 2. Thereafter, he stopped his fork machine near a pile of copper ingots, placed three of them where his seat normally was located, covered them with an old coat and ultimately proceeded to an assignment on Pier No. 5 after an intervening conversation with Carrier's patrolman, who had observed Claimant's actions but who did not question Claimant during said conversation. Claimant was apprehended by two patrolmen of Carrier as he was about to enter Carrier's Pier No. 5 and was taken to the West New York Police Station after being allowed to change clothes at approximately 3:30 P. M. He was charged with larceny at the police station, which charge was brought to trial on June 16, 1964. The presiding judge dismissed all charges on the ground that intent had not been proven inasmuch as Claimant had not left the Carrier's property with the copper ingots.

Claimant's defense, in both the proceeding before the Municipal Court and the hearing in this dispute, was that the ingots were placed on the fork machine by Claimant as a temporary seat and were still on the machine when he was arrested on the Carrier's property.

Although the Carrier is not bound by the requirements of proof necessary for conviction of a charge of larceny in a court of law in order to invoke disciplinary action, probative evidence supporting the charge of attempted pilferage by Claimant must be offered to sustain such action by the Carrier. Here, Carrier relies upon Claimant's admission that he removed three copper ingots from a shipment on Carrier's Pier No. 2 without authority and used them as a seat on his fork lift truck away from their original location but still on the Carrier's property. Claimant denies that he intended to remove the ingots from the Carrier's property for his personal use and merely took them for use as a seat while performing his assigned duties for Carrier.

"Pilferage" connotes stealing of articles in small amounts and a necessary element is the intent of the person charged with the wrongful act. Testimony of the arresting officers concerning the attitude of Claimant when he was arrested does not constitute competent evidence that Claimant intended to convert the ingots to his own personal use away from Carrier's premises.

In fact, there is no competent evidence before us in support of the charge that Claimant was guilty of attempted pilferage as opposed to conduct unbecoming an employe.

The discipline assessed by Carrier arose out of two specific and conjunctive charges. Petitioner denies that Claimant is guilty of attempted pilferage and offers an affirmative defense in support of its position. Carrier has failed to show that Claimant intended to steal the copper ingots found on the fork lift used by Claimant in the performance of his duties on Carrier's property. Therefore, we must sustain the claim.

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

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of January 1967.

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