Award No. 16269
Docket No. TE-16789

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard E. Perelson, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on The Kansas City Southern Railway Company, that:

1. Carrier improperly dismissed Paulien Guillot, Junior, from its service.

2. Carrier shall reinstate Paulien Guillot, Junior, with all rights unimpaired and pay for all time lost.

3. Carrier shall reimburse him for all hospital and medical expenses, if any, or other benefits accruing to him while out of service which would have been paid by the Travelers Insurance Company under the provisions of Policy GA-23000.

OPINION OF BOARD: This is a discipline case.

The Claimant was a Telegraph Operator in the employ of the Carrier for upwards of 10 years. He occupied a position in CD Office, Shreveport, Louisiana, until the time of his dismissal from Carrier's service.

Under date of April 19, 1966, a communication was addressed to the Claimant by Mr. H. F. Bailey, Terminal Trainmaster of the Carrier, which reads as follows:

"Arrange to be present in Terminal Trainmaster's Office, Deramus Yard, Shreveport, Louisiana at 9:00 A. M., Monday, April 25, 1966, for formal investigation to ascertain the facts and determine your responsibility in connection with your violation of General Rules K, second paragraph, of the Kansas City Southern Lines Operating rules, by your removal of two railroad switch stands belonging to the Kansas City Southern Railway Lines Company without first securing proper authority. You may bring representative and/or witnesses if desired.

/s/ H. F. Bailey
Terminal Trainmaster"

At the request of Mr. C. A. Lewis, Jr., General Chairman of TCU, the investigation was, by consent, adjourned to May 2, 1966. On May 2, 1966, a request on behalf of the Claimant was made for a further adjournment of the investigation, but such request was denied, and the hearing and/or investigation held.

Under date of May 6, 1966, the following communication was personally delivered to the Claimant by Mr. G. M. Switzer, Superintendent of the Carrier.

> "Reference formal investigation, held May 2, 1966, in the Terminal Trainmaster's Office at Deramus Yard, in which you were charged with violation of Rule K, second paragraph, of Operating Rules of the Kansas City Southern Lines.
>
> The investigation clearly developed that you violated this rule by the removal of railroad property from company premises without proper authority.
>
> For your violation of Rule K, you are hereby dismissed from the service of the Kansas City Southern Railway Company. Please arrange to turn in all Company property, including keys which have been furnished you for the purpose of gaining access to company buildings for the performance of your duties.
>
> /s/ G. M. Switzer
> Supt. KCS Lines
>
> cc: C. A. Lewis, Jr."

Thereafter, the claim herein was filed and progressed on the property and duly appealed to this Board.

The transcript of the testimony adduced at the investigation is made a part of the record before this Board.

An examination of the record discloses that sometime in the year 1962 or 1963, the year not being definitely established, the Claimant inquired of Roadmaster C. L. Smith, who was the custodian of the Carrier's scrap material, that he would like to acquire two discarded switch stands stating that he would like to place them on each side of the driveway to his home. Mr. Smith informed the Claimant that two broken switch stands, which had value only as scrap, had been overlooked during the scrap drive of that year and that they could be found and/or located along that portion of Lake Shore Drive that ran parallel to the Carrier's track in Shreveport, Louisiana. The Claimant went to the location specified by Mr. Smith, found the two broken switches, loaded them into his automobile, and took them to his home. He cleaned and painted them and placed them in a poured cement foundation on either side of his driveway. They were at all times in plain view of anyone passing the home of the Claimant.

In April of 1966, a period of three or four years after these switches had been installed by the Claimant on his property, someone advised the Carrier's office that there were two switch stands located on Crawford Road, which was the location of the Claimant's home. The Carrier ordered an inves-

tigation to be made. The Investigator went to the place where the switches were located and ascertained that the location was the premises of the Claimant. The Claimant, upon being questioned with reference to the switches, did not deny that he took them, and stated the manner in which he obtained them.

At the investigation hearing while Mr. Smith denied that he gave the Claimant specific consent to take the two switches, he did not deny that he did inform the Claimant where they were and that they were scrap.

This Board has held, on numerous occasions, that in a discipline case it is not its function to determine the credibility or weight of the evidence nor will it substitute its judgment for that of the Carrier as to the degree of the discipline. We have, however, held that in view of the nature of the proceeding, that

> "It was incumbent upon the Carrier to establish the findings on which it assessed discipline by **positive evidence.** Failure to do that, or when the case is brought here for review on charges of impropriety and unfairness, failure to produce a record disclosing testimony of that character, **is fatal and precludes the sustaining of its action."** See Award 2813. (Emphasis ours.) See also Award 13179.

While the Carrier might not be bound by the requirements of proof necessary for a conviction of a charge of larceny in a court of law in order to invoke disciplinary action, the Carrier must produce and submit direct, positive, substantial, material and relevant evidence to sustain its charges and actions. It is true that the letter of April 19, 1966, does not contain the word "larceny", but the law is well settled that the taking of property without the consent of the owner is and does amount to a larceny.

The burden was on the Carrier to prove by direct, positive, substantial, material and relevant evidence that the Claimant was guilty of the charges preferred against him. We have examined and carefully searched the record in this case, and find that this the Carrier has failed to do.

As to those parts of the claim numbered 1 and 2, we find and hold that the Carrier's action was arbitrary, unjust and without any foundation in law and fact, and that

1. The discipline imposed by the Carrier was arbitrary, unjust and without any foundation in law and fact.

2. That the Carrier improperly dismissed Paulien Guillot, Jr., the Claimant herein, from its service.

3. That the Carrier shall reinstate Paulien Guillot, Jr., the Claimant herein, with all rights unimpaired, his record cleared of the charges preferred against him and paid for all lost time, less any amount earned elsewhere.

With respect to Part 3 of the Claim, the record contains no showing of loss which would have been paid as contemplated by this portion of the claim. Therefore, Part 3 will be dismissed. See Award 10405.

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 Carrier violated the Agreement.

AWARD

Parts 1 and 2 of the claim sustained; Part 3 dismissed, all in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1968.

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