

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20292
Docket Number CL-20465

Joseph A. Sickles, Referee

(Brotherhood of Railway, Airline and Steamship
(Clerks, Freight Handlers, Express and Station
(Employees
PARTIES TO DISPUTE: (
(Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the Burlington Northern System Board
of Adjustment (GL-7445) that the Carrier:

1. Violated the rules of the March 3, 1970 Rules Agreement by discharging John E. Rouser, Clerk, North Kansas City, Missouri, from the service of the Railway Company, effective August 23, 1972, and

2. Shall now reinstate John E. Rouser into the service of the Railway Company with seniority and other rights unimpaired and payment of all wage loss, commencing August 23, 1972.

OPINION OF BOARD: Claimant was notified to attend an investigation for the purpose of ascertaining the facts and determining his responsibility in connection with alleged misappropriation of a stenographic recording machine.

After investigation, Claimant was dismissed from service.

The Claimant makes certain procedural objections dealing with Carrier's references to a subsequent incident; and deficiencies in the conduct of the investigation.

The Board has totally disregarded all adverse references to incidents which allegedly took place after the circumstances giving rise to the charge properly before this Board, and the Board is unable to note any procedural deficiencies which would preclude it from issuing a decision on the merits of the dispute.

In most part, the facts which give rise to the instant charge are undisputed. From a review of the testimony taken at the investigation, coupled with the admissions contained in the statements of the Claimant, we note the following basic sequence of events.

On July 26, 1972, a fellow employee (Gamboa) brought with her to the Company's premises a stenographic machine. Gamboa uses the machine for study purposes, and had been in the practice of transporting it to work for approximately one year and eight months prior to the incident. On the day in question, she left the machine in front of the Credit Union door.

At about 6:15 p.m., the Claimant saw the machine, which he recognized as belonging to Gamboa, and, along with his coat and umbrella, placed the machine in the back of a car owned by another employee (Tolbert). The Claimant had no permission to take the machine. He states that he was on his way back from Tolbert's car to ask Gamboa if she wanted him to bring the machine to her, but he stopped to talk to Tolbert, and forgot about the machine. Thereafter, Tolbert, on his lunch hour, drove the Claimant home.

When Gamboa realized the machine, which she values at approximately \$290.00, was missing, she advised the Chief Clerk (LaSala) and Special Agent McCroskie. Approximately two hours later, she notified the North Kansas City Police Department.

Gamboa states that at the time she reported the loss to LaSala, he stated that he saw the Claimant put something in Tolbert's car, but he did not know what it was. When called to testify, LaSala confirmed that testimony.

Claimant admits that he did not advise Tolbert that the machine was in the back of Tolbert's car when Claimant was driven home.

When Claimant arrived home, he placed the machine in the back of his car. He went into his house and made a couple of phone calls, one of which was an unexplained call to Gamboa. During the course of that discussion, Gamboa asked Claimant if he had the machine and Claimant replied in the negative.

Thereafter, Claimant drove to Carrier's local office, but at that time he saw police cars in the parking area. He states that he was concerned because he did not have a driver's licence and consequently drove away. After a period of time, he hired a taxi cab to deliver the machine to the Carrier's office.

Approximately nineteen (19) hours later, Claimant visited the Assistant Regional Manager for Security. That individual was aware of the episode concerning the stenographic machine and con-

sequently specifically advised Claimant that the matter was under the active process of investigation by the Police Department and that any statement made by Claimant would not be considered privileged information. Thereupon, Claimant admitted that he had taken the machine, but stated that his action was motivated by a desire to "play a joke." After discussing the matter with the Assistant Regional Manager, the Claimant advised the Police Department of his involvement.

Although Claimant admits his complicity in the removal of the machine, he denies that he intended a misappropriation, but in point of fact, was merely playing a joke on Gamboa.

By his own admission, Claimant has violated Company rules which prohibit playing of practical jokes. The Board is of the opinion that, by his actions, Claimant exhibited an intent to do something beyond that of playing a joke.

It has long been held in this and in other forums, that a trier of fact is not limited to exculpatory statements by one charged with an offense, and need not accept the individual's testimony of intent where his actions are to the contrary. Individuals are presumed to intend the natural and logical consequences of their actions, and an individual's intent may be reasonably inferred from outward manifestations and activities.

If Claimant was merely "joking" at the time, we wonder why his taking of the machine was concealed. The record is void of any indication that he advised anyone that a "joke" was being perpetrated. When he returned to the Carrier's local office later in the evening, he could have resolved the matter by returning the machine, but did not do so because the police were on the scene, and after driving around chose the surreptitious manner of sending the machine back by means of a taxi cab. Further, he waited approximately nineteen (19) hours before he advised anyone of his complicity. While these items could be explained and, giving Claimant the benefit of all doubts, we could conclude that the "joke" got out of hand and the Claimant panicked. However, viewing the record in the most favorable light to Claimant, we are unable to explain away one damaging piece of evidence. Assuming that the Claimant had forgotten that he had taken the machine, nonetheless, he called Gamboa before he was aware that the police were on the scene and Gamboa asked him specifically if he had the machine. At that point in time, if the matter was merely a "joke" we cannot understand why Claimant replied in the negative. He had an opportunity to rectify the situation, and deliberately failed to do so. Accordingly, we find no basis for overturning the Carrier's

conclusion that the Claimant was not perpetrating a practical joke.

We have reviewed the rather lengthy record in detail and find that the Carrier established Claimant's complicity by a substantial preponderance of the evidence (including Claimant's own testimony). Further, we find no basis for attempting to substitute our judgement for that of Carrier concerning the quantum of discipline assessed.

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 Employees involved in this dispute are respectively Carrier and Employees 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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1974.