

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23976
Docket Number CL-23958

Lamont E. Stallworth, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(
(Illinois Central Gulf Railroad

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-9364) that:

1. Company violated the agreement between the parties when they discharged Claimant I. Sylvester from the service of the Company as the result of an improper and unfair investigation.

2. Company shall now be required to reinstate Claimant to the service with all rights unimpaired and payment for all time lost as a result of his dismissal from the service.

OPINION OF BOARD: On October 9, 1978, Carrier Special Agents Brown, Dorsey and Soukup began an investigation into shortages of parts from automobiles at the Carrier's Wildwood Auto Ramp, Chicago, Illinois. In the course of the Special Agents' investigation, Glen E. Mallory, Assistant Ramp Manager at that location, admitted that he had taken part in systematic thefts of automobile tires, wheels, radios and batteries since November, 1977 and that he sold these items to George Robinson, a body shop owner. In statements made to the investigators and in his subsequent plea bargaining Mr. Mallory implicated several other employees including Claimant Sylvester. Mr. Robinson also furnished the police investigators with statements.

On October 30, 1979 Carrier addressed a letter to Claimant Sylvester calling a formal investigation for 10:00 A.M., November 8, 1979, to determine if the Claimant was guilty of misappropriating auto parts from the Wildwood Auto Unloading Ramp. As a result of the investigation the Claimant was dismissed from the service of the Carrier.

Claimant Sylvester maintains that he did not receive a fair and impartial investigation. Claimant asserts that he was entitled by the Agreement, Rule 22, to have a precise charge made as to dates and what was allegedly misappropriated on the dates in question. All that was alleged was that certain auto parts had been misappropriated commencing in November, 1977 and numerous occasions thereafter. No specific dates were mentioned, nor the items that were allegedly stolen. The Claimant maintains that it is impossible to prepare an adequate defense when the Carrier uses such an approach.

The Claimant also maintains that the Carrier made no effort to have Messrs. Mallory or Robinson, Claimant's accusers, present for cross-examination by Claimant. Instead, the Carrier relied on two hearsay statements: one of an admitted thief and one from an admitted fence. There was no opportunity for cross-examination which Claimant argues, also resulted in not receiving a fair and impartial investigation. Claimant maintains that these procedural objections are well founded and require that the discipline be reversed. (Award No. 31 issued by Public Law Board No. 2035, Award No. 9 issued by Public Law Board 2409, Third Division Award Nos. 18121, 17490, 14443 and 4425). The Claimant denied that he misappropriated any of the alleged stolen items and he denied selling any items to Mr. Robinson.

The Carrier maintains that Claimant's hearing was fair and impartial. Claimant received notice of investigation which stated that the investigation would be conducted to "...determine whether you misappropriated batteries, tires and radios from automobiles at Wildwood Auto Ramp commencing about November, 1977, and on numerous occasions thereafter." The Carrier maintains that this type of notice is sufficient and proper. (Third Division Awards 11170, 11443, 13764 and 18128).

The Carrier further maintains that the use of written statements in a formal investigation does not constitute a procedural defect. (Third Division Awards 9311, 11342 and 16308). Carrier argues that the statements of Robinson and Mallory are acceptable because they were substantiated with other documentation, polygraph examinations and physical evidence. The Carrier contends that the statements of Mallory and Robinson clearly demonstrate Claimant's guilt. The Carrier maintains that the Claimant offers no evidence of innocence but only denies that the statements of Mallory and Robinson are true.

The Carrier also maintains that theft is an offense for which permanent dismissal is warranted. (Award No. 3 of Public Law Board No. 1462, Award No. 15 of Public Law Board 2122, Award No. 3 of Public Law Board 1435, Award No. 26 of Public Law Board 912, Award 12 of Public Law Board 1493).

There is little debate that theft or misappropriation of property is an offense warranting dismissal. However, the quantum of evidence to substantiate such a charge is of a considerably higher nature than that required in other types of discipline cases. In addition, this burden of proof rests with the Carrier. In the instant matter, the Carrier failed to meet its burden of proof. Carrier's entire case rested upon testimony of their Special Agents wherein statements of Mallory and Robinson were read into the record. The Board further concludes that the introduction of such hearsay statements of witnesses is not sufficient evidence to support a finding of theft.

In these circumstances, the Board concludes that the Carrier's charge is not supported by the record made at the investigation. Claimant shall therefore be reinstated with backpay and without impairment to his seniority and all other rights.

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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 27th day of August 1982.