

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24198  
Docket Number CL-24040

John B. LaRocco, Referee

PARTIES TO DISPUTE: { Brotherhood of Railway, Airline and Steamship Clerks,  
{ Freight Handlers, Express and Station Employees  
{ Norfolk and Western Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9403)  
that:

1. Carrier violated the Clerk's Rules Agreement at Roanoke, Virginia when it failed to afford Clerk Garrett F. Hudgins a fair and impartial investigation.
2. Carrier's action in dismissing Clerk Garrett F. Hudgins from all service subsequent to his removal from service of the Norfolk and Western Railway Company in the capacity of Supervisor-Material on April 28, 1980 based on the same alleged circumstances was without proper cause and therefore arbitrary, capricious, unfair and unreasonable.
3. Carrier shall now be required to clear the record of the charges made against Clerk Garrett F. Hudgins, restore him to service and pay him for all time lost.
4. Carrier shall pay 15% interest on all compensation lost, based upon Clerk Hudgins' monthly rate of pay on date of dismissal of \$1,663.08 plus all subsequent wage increases until returned to service.

OPINION OF BOARD: On April 28, 1980, Claimant occupied the position of Supervisor of Materials at Shaffers Crossing. On that date, he purportedly admitted that he had misappropriated company oil and gasoline for his personal use. The Carrier immediately relieved Claimant of his supervisory responsibilities. Thereafter, Claimant properly exercised his seniority rights to claim a clerk's position.

By notice dated May 6, 1980, the Carrier charged Claimant with taking one case of motor oil from the Shaffers Crossing Oil House and taking ten to twelve gallons of fuel on ten or twelve occasions from the company gasoline pump at Shaffers Crossing Storehouse. Subsequently, on June 9, 1980, the Carrier discharged Claimant. At the time of his dismissal, Claimant had served the Carrier for twenty-four years.

The Carrier relied exclusively on the testimony of the Regional Manager of Police Services and the Manager of Audits to support its contention that Claimant voluntarily confessed that he had committed the thefts. According to the two managers, Claimant confessed to misappropriating company oil and gasoline while he was answering preliminary questions before he took a polygraph examination. The Carrier argues that since theft and dishonesty are serious offenses, dismissal is a reasonable penalty in spite of Claimant's clean prior disciplinary record.

At the outset, the Organization raises three procedural objections. First, the Organization submits that the notice of charges was imprecise which deprived Claimant of a fair Rule 27 hearing. Second, the Organization contends the Carrier was barred from imposing discipline on Claimant after he had displaced to a clerk's position under the principle of double jeopardy because the Carrier had already disciplined Claimant for exactly the same offense when it removed Claimant from his supervisory position. Third, the Organization asserts that the Carrier had an obligation to procure the presence of the polygraph operator at the investigation and, by failing to do so, the Carrier prejudiced Claimant's defense.

On the merits, the Organization contends that there is little or no evidence in the record showing that Claimant misappropriated Carrier property. According to the Organization, the two Carrier Officials who were present at the time of Claimant's alleged admission were unsure of both the questions asked and Claimant's responses. At the investigation, Claimant denied making any confession. Claimant testified that he told the two Carrier officials (and the polygraph operator) that he took old, used oil (which was an accepted practice). Also he said that many years ago at another point on the system, he filled his personal auto with company fuel, but only when he had used his car for company business. Thus, the Organization argues that the Carrier misinterpreted and mischaracterized Claimant's innocent statements as an admission of theft. The Organization also emphasizes Claimant's prior record of outstanding service as well as his honest reputation (which was attested to by several of his fellow workers) demonstrate that Claimant was an honest employee.

The Carrier shoulders the burden of proving with substantial evidence that Claimant actually committed the offenses. While this Board has consistently ruled that the hearing officer may properly resolve credibility issues, there must first be an underlying conflict in the testimony of the witnesses. In this case, the two Carrier officials offered contradictory accounts of Claimant's purported admission. The managers were uncertain regarding the time period covered by Claimant's remarks as well as whether or not Claimant was referring to new or old oil. Thus, the alleged admission, standing alone, is insufficient evidence to show Claimant committed the charged offense.

In addition, the Carrier failed to prove that any particular theft actually occurred. The record before this Board lacks any inventory records or other documentary evidence suggesting that there was an unexplained shortage of fuel and oil. Carrier officials were engaged in an ongoing inquiry into possible losses (and Claimant assisted in the investigation), but there is no proof that any losses were the result of this employee's misappropriation.

Since we are sustaining most of the merits of this claim, this Board need not address any of the procedural objections raised by the Organization.

Claimant shall be reinstated with his seniority unimpaired and with back wages. The back pay shall be computed in accord with Rule 27(d). The claim for interest is denied.

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 in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest: Acting Executive Secretary  
National Railroad Adjustment Board

By

  
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of March 1983.