

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25312  
Docket Number MS-25316

Marty E. Zusman, Referee

PARTIES TO DISPUTE: (David Lawrence  
(  
(Norfolk and Western Railroad Company  
(Lake Region)

STATEMENT OF CLAIM:

Whether petitioner was correctly found guilty of theft and/or unauthorized possession of a oxygen-acetylene cutting torch claimed to the property of respondent.

OPINION OF BOARD: By letter dated October 3, 1979, Claimant D. A. Lawrence received notice to attend a formal investigation to be held October 12, 1979. The charges were "theft and/or unauthorized possession of a cutting torch, property of N&W Railway Company". Following the investigation, by letter of October 26, 1979, Claimant was found guilty as charged and assessed a five (5) day actual suspension.

The record before this Board indicates lines of argument in submissions which were not handled on property and for which this Board may not now consider admissible. The record also indicates that on Tuesday, July 31, 1979, Claimant found an Airco oxygen-acetylene cutting torch on Carrier property. By Claimant's own admission he "put it under the seat on the motor car" and later that day took the torch home. There is no evidence that Claimant notified his Supervisor or any Carrier Official before removing his "find" from Carrier property and right of way. The record is clear that although crews were using torches in the area none of these carried the Airco label and said Airco torch carried home by Claimant was not marked N&W property. On Wednesday, Claimant was informed that the torch was stolen and immediately admitted possession and volunteered its return on Thursday. Yet on Thursday, Claimant did not return said torch, nor did he return it on Friday. As such, Railway Officers had to pursue the issue by locating Claimant and proceeding to Claimant's house to retrieve the torch.

On Claimant's behalf it has been argued that the property in question has never been identified as belonging to the Norfolk and Western Railroad Company. It has been further argued that he had found the item and in removing it was in no way under the impression that it belonged to the Railroad, but was simply taking one of numerous items often found laying about on Carrier's right of way. Most importantly it is maintained that Claimant never hid nor attempted to deny that he had found and would return the torch.

This Board has carefully reviewed the procedures, charges, transcript and the issues discussed and considered on property. The Board can find nothing that would in any way negate Carrier's position in the whole of this case. The Claimant had removed the torch and only admitted to that act when "Jim Jury told me the torch was stolen". Even after admission, Claimant failed to return the torch. That said torch belonged to Carrier is substantiated by the weight of the evidence. At best, Claimant exercised such poor judgment as to appear (by the weight of substantial evidence) guilty as charged. By long established position, this Board will not substitute its judgment for that of Carriers, unless Carrier's action is an abuse of discretion (Second Division Award 8308, 8326 and Third Division Award 24625). Such is not the case here. Since the unauthorized possession of Carrier property is a most serious offense, there is no basis for judging the discipline assessed by the Carrier as unreasonable, arbitrary or capricious. As such, the Board will not disturb the Carrier's determination in this matter.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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; and

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1985.