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CORRECTED

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26155
Docket Number MW-26461

Edwin H. Benn, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(Union Pacific Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Roadway Equipment Operator T. J. Watson for alleged 'theft of Company material' was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File 5-18-12-15-55/013-210-W).

(2) The claimant's record shall be cleared of the charges leveled against him, he shall be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: Claimant first began working for the Carrier on March 18, 1977, at Gibbons, Nebraska, as a Sectionman. In 1980, Claimant was promoted to a Roadway Equipment Operator. In 1983, Claimant was working as a Laborer and on occasion, as a Crane Operator on the Carrier's Nebraska Division. On January 13, 1983, Claimant was furloughed. In April 1983, Claimant was recalled to a System Gang in Idaho which began performing work on the former Western Pacific property. Claimant established a new seniority date and was governed by the Western Pacific Agreement. At the same time, Claimant maintained his seniority with the Carrier.

By letter dated October 18, 1983, Claimant's estranged wife informed the Carrier that Claimant had been stealing equipment from the Carrier. On November 11, 1983, Special Agent K. Schleiger and the Local Sheriff searched Claimant's residence and inventoried a number of items that Claimant's wife contended belonged to the Carrier. Those items, valued at approximately \$800 and some bearing the Carrier's insignia, included propane tanks, wash basins, motor oil, tools, a hard hat, metal fence and posts, electrical cable, paper products, and other items which are routinely found in outfit cars and at rail yards. In two separate statements taken on November 11 and 14, 1983, Claimant's wife again stated that Claimant had been taking property from the Carrier over a period of time and had put some of the items to his own personal use.

On December 9 or 10, 1983, the Special Agent's Investigation report dated November 29, 1983, was received by Carrier's Division Engineer, J. Sundberg. Based upon the Findings in the report, by letter dated December 21, 1983, Sundberg issued the instant Notice of Investigation and charges against

Claimant arising from the alleged theft and further set an Investigation for December 29, 1983. Claimant requested and was granted postponements until January 17 and February 7, 1984.

At the Hearing, Claimant's wife's statements were introduced into the record of the Investigation although she did not testify. The Special Agent testified as to the conduct of his Investigation and the observation of the Carrier's equipment at Claimant's residence. Claimant also testified and stated that the inventoried equipment was in fact the Carrier's with the exception of the fencing and posts, but claimed that he was merely holding the equipment due to the fact that his outfit car was condemned. Claimant testified that he intended to use the items to equip his new outfit car upon his return to service. Claimant further testified that he did not receive authorization to have the Carrier's equipment at his home. By letter dated February 16, 1984, Claimant was dismissed.

At the same time, Claimant was charged with identical allegations arising out of the same facts under the Western Pacific Agreement, which is the Controlling Agreement on what is now the Carrier's Western Division Seniority District. That Hearing was conducted on January 23, 1984. Claimant was also dismissed as a result of that Hearing and his dismissal under the Western Pacific Agreement was ultimately upheld in Public Law Board No. 3241, Award No. 2.

Initially, the Organization contends a sustaining Award is required under Rule 48(a) of the Agreement since the Hearing was not held within 30 calendar days from the date the Carrier became aware of the allegations made by Claimant's wife. The Organization asserts that date to be November 11, 1983.

Rule 48(a) provides:

"(a) Except as provided in Paragraphs (k), (l) and (m) of this provision, an employee who has been in service more than sixty (60) calendar days, whose application has not been disapproved, shall not be dismissed or otherwise disciplined until after being accorded a fair and impartial hearing. Formal hearing, under this rule, shall be held within thirty (30) calendar days from the date of the occurrence to be investigated or from the date the company has knowledge of the occurrence to be investigated, except as provided hereinafter."

Under the circumstances of this case, we must reject the Organization's position that the Carrier had "knowledge of the occurrence to be investigated" on November 11, 1983 after receipt of the letter from Claimant's wife and the conducting of the search of Claimant's residence by the Special Agent. We find that the "Company" did not have sufficient "knowledge" until the Special Agent's report was made and the Carrier's Division Engineer Sundberg received that report on December 9 or 10, 1983. The Special Agent's function was to simply investigate the allegations made by Claimant's wife and report

the Findings to the Carrier's officials. There is nothing in this record to show that the Special Agent was clothed with authority, either apparent or inherent, to implement the disciplinary process or otherwise bind the Carrier under Rule 48(a). The "agent" of the Carrier in this case for clothing the Carrier with knowledge within the meaning of Rule 48(a) was Sundberg. After Sundberg gained knowledge of the facts that supported the allegations made by Claimant's wife, he set a Hearing for December 29, 1983, a date within the 30 day requirement of the Rule. There is no evidence to show that Sundberg delayed setting the Hearing. Indeed, he set a date within 30 days of the date of the Special Agent's report. To find otherwise, especially in this case when allegations were made by an estranged spouse who theoretically might have an ax to grind, would cause the holding of Investigation Hearings on what might amount to the flimsiest of allegations. Here, the Carrier proceeded cautiously and after the allegations were substantiated by facts, the Carrier timely implemented the disciplinary process envisioned by Rule 48(a). See Fourth Division Awards Nos. 4235, 4232, 4030.

Similarly, we find no merit to the Organization's objections to the introduction of Claimant's wife's statements at the Hearing. Standing alone, the statements must be considered in light of the obvious animosity between Claimant and his wife and given the appropriate weight. "[T]he absence of Claimant's wife reduced the probative value of her statements but did not render her statements inadmissible." See Public Law Board No. 3241, Award No. 2. But here, the decision to terminate is supported in the record by much more than the assertions contained in Claimant's wife's statements, i.e., the independent testimony of the Special Agent that he observed the items at Claimant's residence and Claimant's own testimony that the items found were in fact the Carrier's and that he did not have permission to possess those items.

With respect to the ultimate merits of the Claim, we find that there was substantial evidence in the record to support the Carrier's decision to terminate Claimant's employment. As noted, Claimant admitted that the items were in fact the Carrier's and that he did not have authorization to possess those items. The kind of conduct attributed to Claimant falls squarely within the prohibitions of General Regulations 700, 705 and 708 which prohibit dishonesty and the disposing of the Carrier's property without proper authorization, and further require the exercising of care and economy in the use of such property. Claimant's assertions to the contrary that he was just holding the items until his next assignment do not require a different result, especially in light of his admission that he possessed the property without the appropriate authorization. We therefore find that the Carrier's conclusion that Claimant engaged in dishonest acts amounting to theft amply supported by the record.

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:


Nancy J. Deter - Executive Secretary

Dated at Chicago, Illinois this 29th day of September 1986.