

The Third Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(St. Louis Southwestern Railway Company

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

(1) The dismissal of Track Foreman W. O. Smith for alleged violation of Rules 607, 609 (Paragraph 3) and 613 (first sentence) on September 22, 27 and October 4, 1989 was without just and sufficient cause (System File MW-89-40-CB/486-6-A.

(2) The Claimant shall be restored to the Carrier's service with seniority, vacation and all other rights unimpaired; he shall have his record cleared of the charges leveled against him and he shall be compensated for all time lost both regular and overtime, beginning October 9, 1989 and continuing until he is returned to service."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The Claimant received a charge letter dated October 9, 1989, suspending him from service pending a formal Investigation on October 16, 1989. The Hearing was to determine the Claimant's responsibility for allegedly violating Rules 607 (Dishonesty), 609 (Paragraph 3), and 613 (First Sentence) of the Chief Engineers Instructions for the Maintenance of Way and Structures, St. Louis Southwestern Railway Company, such Rules reading as follows:

"Rule 607. CONDUCT: Employes must not be:
(4) Dishonest

Rule 609, Paragraph 3: Employees must not appropriate railroad property for their personal use.

Rule 613, 1st Sentence: CREDIT OR PROPERTY: Unless specifically authorized, employees must not use the railroad's credit and must not receive or pay out money on the railroad account."

Following the Hearing, the Carrier determined the Claimant was guilty and dismissed him from service.

The charges against the Claimant were based on accusations made on October 5, 1989. On that day, a service station operator advised officers of the Carrier that someone had used a Carrier credit card to put gasoline into his own vehicle on three separate occasions (9-22-89, \$41.00; 9-27-89, \$18.00; and 10-4-89, \$18.25). The signature on the gas receipts and the car license number implicated the Claimant. When the Claimant was confronted, he admitted he used the credit card for his personal vehicle. He further explained that on weekends the arrangements the Carrier had made for gangs to purchase gasoline for Carrier vehicles was inadequate. The supplier who had agreed to service the workers gave them a hard time, because he claimed it took so long to be reimbursed by the Carrier. Therefore, the Claimant used his personal funds to purchase gasoline for Carrier vehicles on several different occasions. In his mind, the use of the Carrier's credit card on the days in question served to reimburse him.

At the Hearing, the Carrier's Special Agent reiterated the statements of the service station attendant. Other than this hearsay evidence, the only evidence which implicated the Claimant came from the gas receipts and the Claimant's own admission.

The Claimant was cooperative in every phase of the Investigation. In addition he made no attempt to hide his identity from the attendants when purchasing the gasoline for his car.

The Organization contends the evidence against the Claimant is based on hearsay evidence which should be discounted. Besides, as the Claimant stated when first questioned, he was merely recouping monies he had to pay to keep Company vehicles operating on weekends without disrupting the work schedule. Finally, if the issue of credibility is raised, it should be noted that the Carrier Officer who rendered the decision was not present at the Hearing. Therefore, he was in no position to evaluate the evidence presented.

It is the Carrier's position that the Claimant, who held a position of responsibility, violated the trust placed in him. His actions constituted theft and cannot be tolerated. The charges were substantiated by the Claimant's own statement. The discharge should be upheld.

The Organization's point regarding hearsay evidence is well-taken. No one should be permitted to uphold an employee's discharge based on hearsay evidence. For one thing, all testimony should be subject to cross examination and the accused normally has a basic right to face his accusers. However, in this case, that right is negated by the testimony of the Claimant who readily admitted he had used the Carrier's credit card without authorization. Even if the Claimant is correct in his assertion he was replacing personal funds he had used to buy gas for Carrier vehicles, it does not alter the fact he had no permission to do so. There were arrangements made to obtain gas for vehicles on weekends. Even if he had previously purchased gas for Carrier vehicles out of his own pocket, he should have advised the Carrier when it occurred, and should have sought reimbursement through the proper channels. His veracity is suspect by his failure to do so.

The Claimant tainted the trust the Carrier placed in him as an employee. It goes without saying that the unauthorized use of Carrier's credit cards to purchase fuel for personal vehicles constitutes theft.


This Board does take into account several mitigating factors in this case. First, the loss to the Carrier was determined to be minor by the Investigating Officers. In addition, the Claimant was cooperative and forthright in his discussions with Investigating Officers and in his testimony at the Hearing. These two facts taken together with the Claimant's fifteen year tenure and otherwise unblemished record, leads this Board to a conclusion the penalty assessed was excessive. The Claimant is to be reinstated to his former position with seniority and all other rights unimpaired, but without backpay. The Board hopes the Claimant has analyzed his actions and recognizes that any future such actions cannot be tolerated.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of August 1991.