

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen  
(CSX Transportation, Inc. (former Baltimore & Ohio Railroad Company)

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the CSXT, Inc. (B&O):

Claim on behalf of R. M. Beno, for reinstatement to service with all lost time and benefits restored, beginning January 8, 1990, account of Carrier violated the current Signalmen's Agreement, as amended, particularly, Rule 50, when it failed to comply with the agreement." Carrier's File No. 15 (90-20). BRS Case No. 8304-CSXT.B&O.

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 is employed as a Signalman in a Signal Gang. In November 1989, the Claimant was on a signal gang working around Pittsburgh, Pennsylvania. The Carrier's police department received information through an anonymous letter that the Claimant was stealing Company property. A Special Agent was assigned to conduct a surveillance of the Claimant in order to investigate the report.

On November 22, 1989, the Special Agent observed the Claimant load two locomotive batteries into his personal truck and leave the Carrier's property. The Special Agent stopped the Claimant about fifty feet off the Carrier's property, discovered the two batteries, about fifty pounds of copper wire, and two new axe handles in the Claimant's truck. The Claimant admitted he removed the items from Company property without permission, but the Claimant stated he was using the items to add weight to his truck during bad weather.

In a letter of December 6, 1989, Claimant was notified to attend an Investigation:

"...to determine your responsibility, if any, for the unauthorized possession and removal of company material from railroad property, on Wednesday, November 22, 1989, which is a violation of CSX Operating Rules - General Rule 'L'..."

After an Investigation, the Claimant was found guilty. The Carrier dismissed the Claimant from service.

The Organization argues the Carrier violated time limitations due to its mishandling of the tape recording of the first Hearing. As a result, the Organization asserts the Carrier failed to render a decision within the thirty day requirement of Rule 50. The Organization reports the incident occurred on November 22, 1989, but the Carrier failed to render a decision until January 16, 1990; more than five days beyond the thirty day limit.

The Organization contends the Carrier subjected the Claimant to "double jeopardy" by requiring a second Hearing in order to obtain a transcript after the mechanical recording problem during the first Hearing resulted in no transcript. It further asserts the Carrier deprived the Claimant of a fair and impartial Hearing. The Organization also maintains the Carrier failed to charge the Claimant with a precise offense in violation of Rule 50.

The Carrier maintains the Claimant was afforded a fair and impartial Hearing, and the Carrier committed no procedural violations that would serve to overturn the discipline assessed. In response to the Claimant's argument concerning the second Hearing, the Carrier argues affording the Claimant the opportunity for a second Hearing assured the fairness of the disciplinary process. The Carrier notes the second Hearing was actually scheduled within the ten days required by the Agreement, but the Claimant failed to appear at the Hearing. The Carrier stated the extension of the Hearing beyond the ten day requirement did not interfere with the Claimant's right to a fair and impartial Hearing.

With respect to the merits of the case, the Organization argued the Claimant was using the material for weight rather than stealing. The Organization contended the discipline was excessive.

The Carrier contends the Claimant was guilty as charged based on the testimony of the Special Agent. The Carrier rejected the Claimant's explanation of the incident as incredible, because the Claimant admitted the total weight of the objects in the truck was not enough to do him any good as ballast in bad weather. Further, the bad weather had been forecast, but it was not occurring at the time of the incident.

The Carrier asserts the penalty of dismissal was fully justified, because it is well established that dishonesty in any form constitutes grounds for dismissal. The Carrier indicates any claim for the wage equivalent of any fringe benefits and/or vacation rights is excessive and is not supported by Agreement Rules.

With respect to the procedural issues, the Claimant clearly contributed to the violation of the ten day Rule by his own failure to appear at the second Hearing. Because the Claimant lacks clean hands, this Board finds the violation of the ten day Rule insufficient to overturn the discipline in this case.

With respect to the substantive issue, this Board finds the Carrier proved the Claimant committed theft. Theft is an act of dishonesty. "... [D]ishonesty in all of its shapes and sizes is a serious matter which, when proven, this Board has repeatedly held to be sufficient cause for dismissal." Third Division Award 22119.

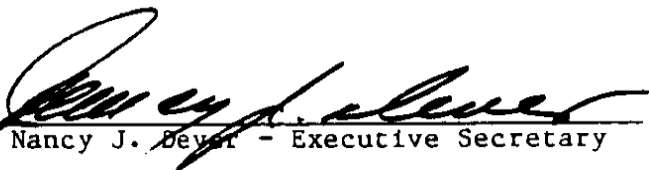
However, the procedural errors committed in this case constitute a mitigating circumstance. Therefore, dismissal was too severe a penalty in this case. This Board recommends the Claimant be reinstated with seniority and all other rights unimpaired, but without compensation for time lost.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Bevan - Executive Secretary

Dated at Chicago, Illinois, this 24th day of July 1992.