NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1

Award No. 29589
Docket No. MW-30223
93-3-91-3-680

The Third Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance
(of Way Employes
(
(Burlington Northern Railroad
(Company (former Fort Worth and
(Denver Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Machine Operator C. C. Dawson for alleged violation of Rules 530(B), 535, 535(A) and 575 for theft of ice after work hours on September 28, 1990 was arbitrary, capricious, on the basis of unproven and disproven charges and in violation of the Agreement (System File F-90-26/MWD 91-02-19 FWD).

(2) The Claimant shall be returned to the Carrier's service with seniority and all other rights unimpaired and compensated for all wage loss suffered in accordance with Rule 26(c)."

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 employe 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.

Following an Investigation, Claimant was dismissed from the Carrier's service on December 4, 1990, for the theft of ice from an ice dispenser at the North Yard in Ft. Worth, Texas. According to the record of the Investigation, this event occurred between the hours of 5:00 and 6:00 on the evening of Friday, September 28, 1990. At the time, Claimant was on a medical leave of absence. Although he had been released by his personal physician to return to work on light duty, he had not yet been cleared by the Carrier to return to service.

There is a dispute in the testimony as to how may bags of ice Claimant placed in his personal vehicle, a truck with a camper shell. Claimant testified he took four ten-pound bags, but a Carrier witness testified he saw Claimant take eight or nine bags. At the time, Claimant explained he was taking the ice because he intended to drive over the weekend to Sterley, Texas, a distance of approximately 300 miles, to start work there on Monday morning. On Sunday evening, however, Claimant was told by the Roadmaster that he would not be able to work if he was restricted to light duty.

The Organization first argues Claimant was denied the right of due process guaranteed him under the Agreement. Specifically, the Organization objects to the fact that Claimant was originally summoned to the Investigation under the charge of "taking of ice," but he was dismissed for "theft of ice" and the violation of certain enumerated Rules. We do not find merit in the Organization's objection. The purpose of the notice of investigation is to advise the employee of the subject matter of the proceeding with sufficient specificity to enable him to call witnesses in his behalf and prepare a defense. The Investigation, itself, is to find out what, if any, Rules were violated. See Third Division Award 25039. In the absence of a specific requirement in the Agreement, the Carrier is not obligated to cite Rules in a notice of charge. For the same reason, there is no prohibition against the Carrier's Rules being introduced at the Investigation.

With regard to the merits, we find there is substantial evidence to support the Carrier's charge. The Organization cites Rule 34(b) of the Agreement, which states:

> "An adequate supply of ice for the cooling of drinking water and refrigeration of perishable foods shall be provided by the Company without cost to the employes."

Claimant, however, took the ice knowing that he had not yet been approved to return to service. This being the case, we cannot agree he had a right to take ice under this Rule. Even, arguendo, had he been approved to work, there is some question as to the right of employees to take ice to be used when driving to an assignment. Carrier asserts the ice is to be taken and used while at work. Although the Rule is unclear as to this intent, and we leave it to another day to decide this question, there is strong evidence of past practice supporting the Carrier's position.

Having found substantial evidence to support the Carrier's charge, we turn to the quantum of discipline imposed. Theft of company property has almost universally resulted in discharge in this industry. This Board has been reluctant to draw distinctions based upon the relative value of the property stolen. Thus, we have upheld dismissal in cases involving the theft of scrap material or a few gallons of gasoline. We see no reason to modify the Carrier's decision in this case. We note the Carrier agreed to reinstate Claimant without prejudice to his claim for time lost, and he returned to work on October 1, 1991. Under the circumstances, we find the discipline imposed in this case was neither arbitrary nor unreasonable, and 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 9th day of March 1993.