

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29604
Docket No. MW-29891
93-1-91-3-269

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance
(of Way Employes
(Illinois Central Railroad

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Track Foreman N. Armstrong, Sr., for alleged violation of Rules H and L for the theft of copper wire on December 12, 1990 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (Carrier's File 143 MofW).

(2) The Claimant shall be reinstated in the Carrier's service with seniority 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 from December 13, 1990 until 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 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.

Rules relevant to this dispute read in pertinent part as follows:

"RULE L. CARE AND USE OF PROPERTY

Employees must exercise care and economy in the use of company property and when leaving the service, or upon demand by proper authority, must return property entrusted to their care.

* * * *

Employees are prohibited from the unauthorized use, removal, disposal, or sale of any tools, materials, vehicles, or equipment, from railroad property, or from property served by the railroad. Articles of value found at stations, on trains, or on railroad property must be reported to proper authority for disposition."

"RULE H. CHARACTER

Dishonesty, disloyalty, desertion from duty, insubordination, wilful neglect, gross carelessness, making false reports or statements, concealing facts concerning matters under investigation, immoral conduct or serious violations of the law, are prohibited."

Prior to his dismissal, Claimant, with a seniority date of April 10, 1967, was employed by the Carrier as a Section Foreman. On December 12, 1990, Claimant was working as Section Foreman with headquarters at F Yard (material yard) at Markham Yard, and had been assigned one Track Laborer.

Claimant and the Track Laborer went on duty at 7:00 A.M. at the Material Yard, boarded their rail motor car, and with Claimant operating the car, stopped near the Markham Rip Track to pick up some tie plates to take to Riverdale. At a point north of the Rip Track, the Claimant stopped the car a second time and walked two times to a weeded area, returning both times with a bundle of coiled copper wire. Claimant placed the coiled wire on the motor car, and then they traveled to the location near 140th Street at Riverdale where the wire was unloaded. Claimant used a rail saw to cut the wire, and then burned the insulation off of the wire.

While the insulation was burning, a Special Agent was in the area on other railroad police business. Having observed the smoke, the Special Agent approached the area and found the Claimant standing beside the fire. Nearby, he found eight bundles, each containing about one hundred pieces of wire measuring approximately three feet in length. At this time, the Track Laborer was working in the motor car approximately forty yards away.

According to the Special Agent, he approached the Claimant and asked him who was burning the copper wire, and where it came from. The Claimant informed him that he had "found the wire" along the right-of-way "where old railroad ties are dumped" when he had passed the North end of the Harvey area in the motor car.

Claimant further explained, upon questioning, that he had not gotten permission to remove the copper wire, but assumed it was "okay because it was scrap wire." The Special Agent advised Claimant that he would be reporting him to his supervisor, and a full investigation would ensue. When questioned about the Track Laborer's participation in the event, Claimant assured the Special Agent that the Track Laborer was not involved. Subsequent conversation with the Track Laborer confirmed Claimant's statement.

After being informed of the situation, Claimant's Supervisor arrived and took Claimant to his personal vehicle which was parked at the Markham Yard. Claimant was notified by letter dated December 13, 1990 to attend a formal Investigation on December 18, 1990, to determine the facts and his responsibility, if any, in connection with the theft of the copper wire.

The Investigation was held, and on December 19, 1990, Claimant was notified by letter that he was dismissed for his violation of Rules H and L (as quoted above) for theft of the copper wire.

For its part, the Organization maintains that Claimant did not remove anything from Carrier property, nor was he charged with damaging or destroying property. The Organization asserts that without a showing that the Claimant "removed the copper wire from the Carrier's property, converted it to his personal use, or deprived the Carrier of ownership," Carrier's charge of theft against the Claimant must fail. Further, the Organization asserts that the Carrier did not offer any proof that the wire had value, other than scrap, prior to Claimant burning off the insulation. Additionally, the Claimant stated that his Supervisor had "always instructed us to pick up scrap in the walkway," and that he often did so. Finally, Claimant denied ever telling the Special Agent that he intended to take the copper wire to a scrap yard in Gary, Indiana, and stated that the Special Agent had "falsified" that part of his testimony.

Carrier maintains that the Claimant "willfully" moved company property (copper wire), from the North Rip Track area where he used a company rail saw to cut the coiled wire into pieces, and proceeded to burn the insulation off "without authority or permission and with the intention to sell it." Carrier asserts the charges have been proven, and that "theft is, and always has been grounds for dismissal."

A review of the evidence presented convinces this Board that the Claimant knowingly and willfully took property from the Carrier with the intention to sell it for personal gain. Although Claimant denied that he told the Special Agent he intended to sell the wire to a scrap dealer in Gary, we found the Special Agent's narration of that conversation to be straight-forward, consistent and credible. Further, he would have no reason to enter false testimony. Claimant, on the other hand, in hopes of saving his job, had ample reason to testify in a less than truthful fashion.

The fact that the Claimant is a long-time employee of the Carrier makes the circumstances of this case particularly unfortunate. Nevertheless, as we have noted in numerous Awards, theft of Carrier property constitutes grievous misconduct. In particular, we noted in Third Division Award 29148:

"The circumstantial evidence of Claimants' intent to steal is so incriminating that their illegal motivation may be inferred. The fact that the action was discovered before Claimants could carry their misdeed to its intended conclusion does not mitigate the seriousness of the misdeed."

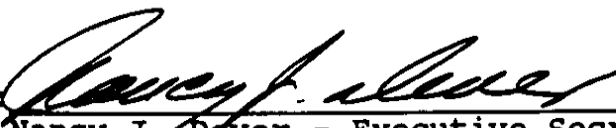
In light of the foregoing, we see no reason to disturb Carrier's assessment of discipline in this case.

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.