

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30567
Docket No. CL-30869
94-3-93-3-755

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

(Transportation Communications International
(Union
PARTIES TO DISPUTE: (
(Grand Trunk Western Railroad Company

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

1. Carrier unjustly discharged Pontiac Clerk Gerald Inscho from its service effective September 5, 1991, as a result of an August 27, 1991 investigation, in which it failed to prove the charges and failed to provide Claimant with a fair and impartial hearing and review of the record.
2. Carrier shall now be required to reinstate Mr. Inscho to service with all rights unimpaired and remove any mention of this discipline from his record and pay him for all earnings and benefits lost as a result of being discharged on September 5, 1991."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

At the time of the incident at issue, Claimant was working as a Tower Clerk at Carrier's Pontiac, Michigan yard office. On June 26, 1991, Carrier's Messenger delivered payroll checks to employees

at the Lake Orion Yard. The following day, one of the Lake Orion Engineers informed Carrier that his paycheck was missing. Also on that day, the check in question was cashed at the In-N-Out Store, in Pontiac. Carrier subsequently placed a "stop payment" on the check, prompting the store owner to contact Carrier. A Grand Trunk Police Lieutenant investigated the stolen check, and Claimant was identified as the prime suspect.

By letter of August 9, 1991 Claimant was notified as follows:

"You are hereby notified to attend a formal investigation to be held at 1300 hours on Monday, August 19, 1991 in the District Manager's Office, Pontiac, Michigan to determine your responsibility for the alleged theft Grand Trunk payroll check #131649, dated June 16, 1991 and cashing and receiving monies for same in the amount of \$447.10, without legal authority."

At the request of the Organization the hearing was postponed until August 27, 1991. Following the Investigation, Claimant was notified by letter of September 5, 1991 that he was, as of that date, dismissed from Carrier's service. The Organization appealed the dismissal.

The Organization has raised two procedural objections in this case. First, it alleges that the charges were insufficiently specific to meet contractual requirements. Second, it protests that a witness potentially favorable to Claimant's position, the store owner who identified Claimant, was not called by Carrier to be available for cross-examination by the Organization.

As the excerpt from the statement of charges quoted above clearly indicates, the charges contained therein are certainly sufficiently specific for Claimant and his representatives to identify the incident at issue and to formulate an informed defense. A review of the transcript confirms that Claimant was ably represented by both his General Chairman and his District Chairman. With respect to the Organization's other objection, it has long been held by this and other Boards, that Carrier has no responsibility to provide witnesses favorable to Claimant, nor does it have subpoena power for compelling the attendance of non-employees. (See, for example, Special Board of Adjustment No. 100, Award 301). Moreover, evidence on the record before the Board suggests that Claimant, himself, persuaded the witness at issue not to attend the hearing.

With respect to the merits of this claim, the Organization asserts that Carrier has failed to show, by a preponderance of the evidence that Claimant actually committed the act of which he is accused. In particular, the Organization notes that the report of the policeman is offered without an eye-witness to cross-examine. The evidence so presented is a statement, given by the store owner,

typed by the policeman, then returned to the store owner for verification and signing. This method of obtaining evidence is common practice in police investigations, and there is no evidence in this case to suggest that the statement signed by the store owner does not reflect his actual testimony to the police officer. Moreover, as noted above, there is strong evidence on this record to suggest that Claimant specifically asked this witness not to attend the hearing.

The evidence against Claimant in this matter is compelling. Of particular significance is Claimant's payment of \$450 to the store owner to cover the stopped check. Claimant's argument at the hearing that he did so only to avoid expensive legal fees is at best self-serving, and is contradicted by his request that the store owner not testify at the hearing. In light of the foregoing, we find no basis for disturbing Carrier's assessment of discipline.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

National Railroad Adjustment Board
By Order of the Third Division

Dated at Chicago, Illinois, this 9th day of November 1994.