

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35305
Docket No. MW-34958
01-3-98-3-730**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company (former Southern Pacific
(Transportation Company [Eastern Lines])

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Bridge Tender W. H. Cobb for his allegedly taking Company property without proper authority was without just and sufficient cause and excessive punishment and in violation of the Agreement. (System File MW-98-48/1112857D SPE).
- (2) Bridge Tender W. H. Cobb shall now be reinstated with seniority and all other rights unimpaired and compensated for all wage loss suffered.”

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 were given due notice of hearing thereon.

The Claimant entered the Carrier's service on September 6, 1996. At all times relevant to this dispute, he was assigned as Bridge Tender, Calcasieu River Bridge, West Lake, Louisiana.

On the afternoon of August 12, 1997, the Carrier Special Agent T. J. Goscienski was advised of a reported theft of Carrier bridge materials and safety equipment. During the course of his Investigation, he learned that the incident had also been reported to the Westlake Police Department and that they had interviewed a witness who stated that, several weeks prior to this incident, he had observed the Claimant and two unidentified individuals loading a number of the Carrier-owned bridge posts into a maroon pick-up truck. The record shows that the posts are valued at over \$3,000.00.

On August 21, 1997, the Claimant, accompanied by his Supervisor and Special Agent Goscienski, met with a Westlake Police Department detective. After advising the Claimant of his rights, the Claimant was questioned regarding the theft of the missing railroad property. The Claimant disclosed in a written statement that he and his father had taken the Carrier-owned bridge posts from Carrier property and transported them to the Claimant's father's property in Texas. The Claimant stated, however, that he believed the bridge posts to be scrap or surplus material and that he had checked with some of his co-workers who told him that the posts "had been there forever." The Claimant further indicated in his statement that he would make restitution and return the bridge rail posts to the Carrier property.

Based on the information provided in the Claimant's statement, he was removed from service pending formal Investigation. The Claimant and the Organization were notified by letter dated August 25, 1997 that a Hearing would be held in connection with the Claimant's alleged taking of Company property without proper authority for his own personal use. The Investigation was held on September 2, 1997. At the Hearing, the Claimant's testimony provided substantially the same information as his written statement to the police. Concluding that the charges had been proven, the Carrier subsequently dismissed the Claimant.

The Carrier's position, briefly stated, is that there were no procedural defects in its handling of this case which would warrant overturning the discipline assessed. Moreover, the evidence shows that the Carrier proved the Claimant guilty of the offense set forth in the letter of discipline. Finally, the penalty of discharge is fully appropriate

for misconduct that has uniformly been recognized as a very serious breach of the employment relationship.

The Organization advances several arguments in support of its contention that the dismissal should be overturned. It argues, first, that the decision to withhold the Claimant from service prior to rendering its decision was improper and in violation of the Agreement. Second, it contends that there was a due process defect in the handling of this case. In particular, the Organization asserts that the Carrier introduced written statements at the Hearing without providing that information to the Organization prior to the Hearing and without presenting the witnesses at the Hearing who provided those statements, thereby depriving the Claimant of his right to a fair and impartial Investigation. Finally, the Organization argues that the evidence does not support a finding that dismissal was warranted. The Claimant is guilty of nothing more than bad judgment, in the Organization's view. He offered to correct his mistake and return the Carrier's bridge posts. The Claimant's lack of intent, his forthrightness, and the offer of restitution compel the conclusion that discharge was unduly harsh under the circumstances, the Organization submits.

From our review of the record, it is evident that there were critical facts adduced at the Hearing that support the charges against the Claimant and the ultimate determination of the Claimant's guilt. By far the most important was the Claimant's statement that he took the Carrier's property without permission for his own use. Not only did the Claimant admit this at the Investigation, but he also admitted it to the local law enforcement agency. His admission is binding and conclusive upon the matter at hand.

In raising technical and procedural objections to the Carrier's handling of the case, the Organization seeks to overturn the Carrier's decision. The Board, however, does not find any alleged error raised by the Organization warrants overturning a determination that was based on the Claimant's clear admission of guilt. With respect to arguments that the Carrier should have produced statements to the Organization prior to the Hearing, it is well-established that there is neither a right to advance discovery in these proceedings nor is there any prohibition against introduction of witness statements that have not previously been produced to the Organization. The Notice of Investigation fairly apprised the Claimant of the subject matter at issue and enabled the Organization to prepare its defense. Nothing else prior to the Investigation

was required. See, Third Division Awards 32384; 32452; Public Law Board No. 4757, Award 1.

As far as the admissibility of hearsay evidence contained in written statements introduced by the Carrier at the Hearing, such evidence was properly admitted, considered and weighed. The hearsay nature of the written statements goes to probative weight, not admissibility. Since the Claimant confirmed all the documentary evidence himself when he testified that he had indeed taken the materials and that he did not have authorization to do so, there was no need to weigh the hearsay evidence against the direct testimony presented at Hearing.

By the same token, there was no error in the Carrier's determination to withhold the Claimant from service pending the outcome of the Investigation. The Agreement at Article 14 expressly provides for such action when an employee is charged with a serious offense. The unauthorized taking of an employer's property is universally recognized as just such an offense. In the present case, the charges against the Claimant were sufficiently serious to warrant the Carrier's preemptive action.

Having established that the Claimant was guilty of a significant dereliction of duty and that no procedural or due process defects have marred the handling of the case, we find that dismissal for this short-term employee can hardly be viewed as arbitrary or unreasonable. It is well-established that theft of company property is a major infraction, almost universally punishable by summary discharge. Materials on railroad property are not for the taking, and the Claimant made a serious mistake in judgment when he decided not to ask a Supervisor for permission to take the bridge posts. Had he done so, he undoubtedly would have learned that the materials were worth over \$3,000, not scrap items by any estimation. The Claimant now regrets his actions and while it is admirable that he has faced up to his misconduct, it must be remembered that he did not do so until faced with criminal action. Under these facts, no basis exists to modify or overturn the Carrier's dismissal action.

AWARD

Claim denied.

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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 Third Division

Dated at Chicago, Illinois, this 24th day of January, 2001.