

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37379
Docket No. MW-37156
05-3-02-3-131

The Third Division consisted of the regular members and in addition Referee Joan Parker when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The discipline (withheld from service beginning on April 2, 2001 and subsequent dismissal) imposed upon Mr. R. Carabez in connection with ‘***alleged misappropriation of company property for personal use in violation of GCOR Rules 1.6, 1.19, 1.25, Safety Instructions General Rule 0, 749 and Company Policy’ was arbitrary, capricious, and in violation of the Agreement (System File D-29-01-610-02/8-00416 CMP).
2. As a consequence of the violation referred to in Part (1) above, the discipline shall now be expunged from Mr. R. Carabez’ record and he shall be reinstated to service with seniority unimpaired and he shall be compensated for ‘... all lost wages, including but not limited to all straight time, overtime, paid and non-paid allowances and safety incentives, expenses, per diems, vacation, sick time, health & welfare and dental insurance, and any and all other benefits to which entitled, but lost as a result of ***’, the aforesaid discipline.”

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, a Switch Maintenance Crew Foreman with about 13 years' seniority, was discharged for alleged misappropriation of two pairs of the Carrier's off-set angle bars. In late September or early October 2000, the Claimant notified Neill Cartage, a customer of the Carrier, that a section of Neill Cartage's rail was broken on its property in the Bensenville Industrial Park. Neill Cartage then engaged the Claimant, who had his own contracting company called TRACKMEX 88, to repair the rail. According to the Claimant, Neill Cartage characterized the repairs as urgent. After his shift had ended with the Carrier, the Claimant took from the Carrier's property two pairs of the Carrier's off-set angle bars, worth a total of about \$290.00, which the Claimant used that afternoon to repair the Neill Cartage's track. The Claimant testified that he did not ask permission from his supervisor to use the off-set angle bars because his supervisor, Orlando Sanchez, was not present. He also testified that his regular suppliers did not stock the materials, which would take weeks to order. In order to perform the repairs, the Claimant also appropriated, without permission, rail from a private spur near Neill Cartage belonging to a third party. By invoice dated October 3, 2000, the Claimant billed Neill Cartage \$1,300.00 for the repairs.

After completing the work for Neill Cartage, the Claimant did not notify management that he had used the two pairs of the Carrier's off-set angle bars in conjunction with the repairs, and did not order replacements for the Carrier. When

asked at the Hearing why he had not replaced the off-set angle bars, the Claimant stated: "It slipped my mind. I forgot. I didn't think that it was a big deal."

On March 28, 2001, about six months after the Claimant had performed the work for Neill Cartage, Supervisor Sanchez noticed that two pairs of the Carrier's off-set angle bars had been used to repair rails on Neill Cartage private track. Sanchez then learned from Foreman Juan Martinez that the Claimant had performed the repair work for Neill Cartage. When Sanchez asked the Claimant if he had performed the repairs with two pairs of the Carrier's off-set angle bars, he admitted that he had, and offered to buy replacements for the Carrier. The following day, the Claimant explained to Sanchez that he had not asked permission because Sanchez had not been in the area at the time and had forgotten both to tell him later and to buy replacements. In addition, the Claimant clarified that he had not performed the repair work on Carrier time, but after his shift had ended.

By letter dated April 2 the Carrier notified the Claimant that an Investigation would be held on May 25, 2001 to determine his responsibility, if any, with respect to his alleged misappropriation of Carrier property in violation of GCOR Rules 1.6, 1.19, 1.25, Safety Instructions General Rule O, 749 and Company Policy. The April 2 letter also advised the Claimant that he would be withheld from service pending the Investigation.

Following the Investigation, which was postponed at the Organization's request until April 12 the Carrier notified the Claimant in a letter dated April 26, 2001 that he was being dismissed from employment for violating Carrier Policy and Rules. By letter dated June 22, the Organization filed an appeal, challenging the termination. Because the parties were unable to resolve the dispute, it was submitted to the Board for resolution.

At the Hearing, the Claimant acknowledged that he had used, without prior authorization, two pairs of the Carrier's off-set angle bars, valued at \$290.00, to perform repair work as a principal of TRACKMEX 88 for Neill Cartage. Likewise, the Claimant acknowledged that he had failed both to notify the Carrier that he had performed the repair work and to order replacement bars for the Carrier. His explanation was: "It slipped my mind. I forgot. I didn't think that it was a big deal."

The Organization raises a procedural defense, asserting that the Claimant was denied a fair Hearing because the Hearing Officer allegedly repeatedly asked leading questions of a Carrier witness in order to elicit desired testimony. Because the facts of the case were essentially undisputed, even if the Hearing Officer did ask some leading questions of a Carrier witness, the Claimant was not prejudiced thereby.

On the merits, the Organization urges that the Claimant, who performed the emergency repair work for Neill Cartage, a Carrier customer, to satisfy the customer, actually benefited the Carrier because the repairs enabled the customer to promptly resume doing business with the Carrier. Merely because the Claimant's repair work may have benefited the Carrier, however, does not alter the fact that the Claimant should have promptly notified his supervisor that he had used Carrier materials to perform the repairs.

The Organization also emphasizes that the Claimant merely made a careless mistake by not reporting to the Carrier that he had used its off-set angle bars. According to the Organization, such an innocent mistake did not justify the Claimant's discharge, particularly because the Claimant, when confronted by Supervisor Sanchez, immediately admitted his error and offered to replace the bars. The Board disagrees. In his testimony, the Claimant trivialized his mistake, characterizing it as not a "big deal." Notably, too, almost six months passed after the Claimant performed the repair work, affording him ample time to tell the Carrier that he had used the materials. Moreover, the six-month time period allowed the Claimant ample time to order replacement bars for the Carrier and to reimburse the Carrier for the bars. The Claimant's failure to take any remedial action over such a long period of time leads the Board to conclude that he never had any intention of reporting to the Carrier his misappropriation of Carrier property, and instead intended to use that property to enhance TRACKMEX 88's profits on the Neill Cartage work.

Furthermore, the Organization argues that one of the Carrier's witnesses, Foreman Juan Martinez, had a grudge against the Claimant and stood to benefit from the Claimant's termination. Because the Claimant admitted all facts leading to his termination, any bias on Martinez's part would have been inconsequential.

In addition, the Organization argues that dismissal was too severe for an employee like the Claimant with a clean record during 13 years of service. Multiple Carrier Rules, however, placed the Claimant on notice that employees were prohibited from using Carrier property for their own use. Moreover, such a violation is a serious one, undermining the Carrier's trust. It is not the Board's role to substitute its judgment for that of the Carrier where, as in the instant case, the Carrier's decision to dismiss the Claimant was not arbitrary or capricious under all the circumstances.

In summary, on the merits, there is substantial evidence to support the Carrier's conclusion that the Claimant misappropriated two pairs of Carrier off-set angle bars for his own use and profit. Furthermore, because the Claimant's violation was a serious one, termination of his employment was neither harsh nor excessive.

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 Third Division

Dated at Chicago, Illinois, this 24th day of February 2005.