

PUBLIC LAW BOARD NO. 1838

Award No. 72

Case No. 72

Carrier File MW-PO-82-04

Parties Brotherhood of Maintenance of Way Employees

to and

Dispute Norfolk and Western Railway Company

Statement Former employe, J. A. Holloway, P. O. Box 603, Wayne, WV
of was dismissed for unauthorized removal of gasoline on December
Claim 25, 1981. Employe requests that Mr. Holloway be reinstated
and be paid for all time lost, with seniority, vacation rights
as well as any other rights unimpaired beginning December 25,
1981.

Findings: The Board, after hearing upon the whole record and all
evidence, finds that the parties herein are Carrier and Employee within
the meaning of the Railway Labor Act, as amended, that this Board is
duly constituted by Agreement dated March 1, 1976, that it has
jurisdiction of the parties and the subject matter, and that the parties
were given due notice of the hearing held.

The instant claim arose as a result of an incident that occurred on
December 25, 1981. Claimant with approximately five years seniority,
was dismissed on December 29, 1981, account of his unauthorized removal
of gasoline belonging to the N&W Railway from a Valvoline Hydraulic Oil
drum Wayne Section Tool House, Wayne, West Virginia. At approximately
2:15 PM Carrier's Special Officer Thompson, with 25 years seniority, was
passing the area of the Section Tool House at Wayne, West Virginia, when
he observed a door of the Tool House opened. Thompson investigated same
and came upon Claimant Holloway in the midst of pumping gasoline from a
drum through a hose into his personal automobile. At the time he was
confronted, Claimant offered the explanation to Officer Thompson that he

was close to running out of gas and did not have enough to get home, and that there was no fuel station open.

On December 29, 1981 Claimant was dismissed from Carrier's service.

Organization, on Carrier's behalf, requested a formal investigation which was held on January 18, 1982. As a result thereof Claimant's dismissal was withheld.

The Board is satisfied that Claimant was accorded a full and fair hearing according to the mandates of the investigation rule. An examination of the evidence supporting the charges discloses it to be credible, and free of material inconsistencies or defects. Claimant freely admitted the removal of the gasoline, and there was little or no conflict between his testimony and that of Officer Thompson's. At the time that Thompson encountered Claimant removing the gasoline, after Claimant offered his explanation, Thompson asked Claimant to turn on his ignition in Claimant's vehicle and Thompson made the observation that Claimant's fuel tank indicator reflected a quarter tank present. Claimant lived approximately three-quarters of a mile to one mile from the Wayne Tool Shed.

Claimant contended that he was low on fuel and he was afraid to try to make it home for fear of running out of gas. However, Officer Thompson testified that approximately half mile from the site a Sunoco station was open, and, additionally, Thompson testified that in the west end of Wayne there were three or four gas stations located at the same vicinity, although he couldn't specifically state whether or not they were open. Claimant contended that there were no gas stations open.

Notwithstanding Claimant's contentions, nor the circumstances that he allegedly found himself in, Carrier chose to conclude that Claimant's

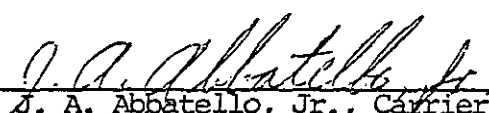
explanation lacked credibility when juxtaposed to the close proximity to his home and the fact that he had taken a quarter tank of gas to cover a mile or less distance.

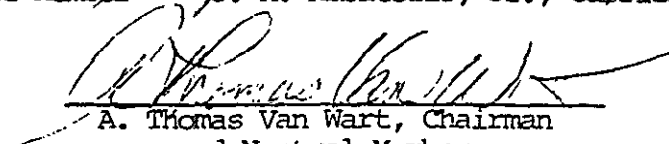
Claimant had approximately five years seniority, during which time he had an unblemished record. Notwithstanding, under the particular circumstances of this case Carrier chose to levy the ultimate penalty.

The Board can find no abuse by Carrier of its discretion to resolve the limited conflict in testimony against Claimant particularly when viewed against the unchallenged facts. Theft is an occurrence warranting the ultimate penalty in any circumstances. It was wholly within the discretion of Carrier to determine whether or not it wanted to afford Claimant leniency. It has been too often stated to warrant citation in support thereof that the Board does not have the authority to exercise leniency. In the particular circumstances of this case we find no circumstances that would warrant an intrusion into the results thereof by the Board. Therefore we must conclude that the claim will be denied.

AWARD: Claim denied.


Bryce Hall, Employee Member


J. A. Abbateello, Jr., Carrier Member


A. Thomas Van Wart, Chairman
and Neutral Member