

PUBLIC LAW BOARD NO. 3558

PARTIES)
TO)
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
) SOUTHERN PACIFIC TRANSPORTATION COMPANY
) EASTERN LINES

AWARD

STATEMENT OF CLAIM:

"1. Carrier violated the effective Agreement when Laborer Driver A. Celestine, Jr. was unjustly dismissed from service.

2. Claimant Celestine shall now be reinstated to his former position with all seniority, vacation rights and any other rights accruing to him unimpaired, in addition to all pay lost commencing December 8, 1986, and to run concurrently until he is restored to service; and his personal work record be cleared of the alleged charge." (MW-87-23)

OPINION OF BOARD:

Prior to the incident in this matter, Claimant had twenty one years of service and worked as a Laborer-Driver for nineteen years. By letter dated December 9, 1986, Claimant was suspended from service and charged with violation of Rule 607 for alleged dishonesty. After hearing held on January 7, 1987 and by letter dated January 8, 1987, Claimant was dismissed from service for alleged improper use of a Carrier credit card.

According to Captain R. N. Bennett of the Carrier's Police Department, a review of the Carrier's records showed that excessive amounts of gasoline were being purchased by credit card on some of the Carrier's vehicles. Based upon an investigation conducted by Bennett, the Carrier concluded that between January 14, 1986 and December 1, 1986, Claimant made unauthorized purchases of gasoline in the amount of \$1,844.86.

At the hearing in this matter, the Carrier introduced a statement taken by Bennett from F. Landry, the owner of the gas station at which the purchases were allegedly made by Claimant. The statement discloses that during 1986 Claimant came to Landry's station

which is located approximately one mile from Claimant's home, and charged gasoline purchases on a Carrier Gelco credit card for a red dump truck and a gold Chevrolet. Further, Bennett testified that although a personal identification of Claimant was not attempted, Landry identified a picture of Claimant taken from a photographic lineup as the individual making the purchases. Although requested by the Carrier to attend the hearing, Landry did not appear to testify and hence, Claimant and the Organization could not cross examine Landry.

Aside from Landry's statement, at the hearing the Carrier introduced a summation of purchases allegedly made by Claimant during the time in issue. Although the receipts are not part of the record, at the hearing the Carrier produced for the Organization's examination the receipts for gas purchases that contained Claimant's signature. The record in the hearing also discloses that Claimant was the registered owner of a gold or tan colored Chevrolet Impala and Claimant admitted that he owned a red dump truck. The record further discloses that Claimant was assigned to Carrier vehicle L-84 and the credit card used to make the purchases was also assigned to that vehicle. Finally, at the hearing Claimant's supervisor, Foreman A. Lormand, Jr. testified that on a number of the dates when purchases were made, Claimant was not authorized to be in the area of Landry's station with a Carrier vehicle.

At the hearing, Claimant denied making the alleged unauthorized purchases for his personal vehicles.

The record further discloses that in a criminal proceeding on September 2, 1987, Claimant entered a guilty plea; was sentenced to one year at hard labor which was suspended; was placed on a three year supervised probation; was required to spend forty five days in jail; make restitution; pay costs and pay a twelve percent surcharge.

As recently stated in Third Division Award 26920:

"The admission of written statements in investigations without the writer being present is not error per se. See Second Division Award 6232. However, a balance must be struck and when all of the

evidence against an employee consists of assertions in written statements whose authors cannot be cross-examined because they are not present at the investigation and where the employee further denies the allegations contained in those statements, the right to a fair hearing may well be infringed upon."

We must therefore reject the Organization's argument that Claimant was denied a fair and impartial hearing by virtue of the fact that Landry did not testify and his statement was received in the record. We do not find in this case that "*all* of the evidence against an employee consists of assertions in written statements whose authors cannot be cross-examined because they are not present at the investigation" [emphasis added], Award 26920, *supra*. This record contains independent corroborative evidence, specifically, Claimant's ownership of the vehicles that were used for the purchases; the presence of the signed receipts with Claimant's signature; the close physical proximity of the station to Claimant's home; and the assignment of the Carrier vehicle and its corresponding credit card to Claimant. Under the totality of the circumstances and the above precedent, we do not believe that reliance upon Landry's statement deprived Claimant of a fair hearing.

We must be mindful that the standard of review to which we are bound is not a *de novo* review, but is one of requiring determination of the existence of substantial evidence in the record to support the Carrier's determination that an infraction occurred. Under a *de novo* review standard, the Organization's arguments would be much more persuasive. However, such is not the standard in this proceeding. On balance, we believe that substantial evidence does exist in this record to support the conclusion that Claimant was dishonest within the meaning of Rule 607.

In this case, and in light of the evidence presented by the Carrier, the fact that Claimant's signatures on the receipts were not verified by a handwriting expert does not detract from the Carrier's showing. Although generally denying culpability, Claimant gave somewhat evasive responses concerning the forty two receipts bearing his signature:

"Q Mr. Celestine, have you ever purchased fuel or oil for your personal vehicle?

A No.

Q Could you please explain for the record so that we can be clear how does your name appear on approximately 42 fuel and gas purchases throughout the year in Breaux Bridge, La.?

A I don't recall myself signing that many tickets. I know I've bought some but not that much.

Q Now these are unauthorized purchases. I'm not talking about authorized purchases. Do you understand what I'm asking you, Mr. Celestine?

A Yes.

Q Do you know anything about these 42 unauthorized purchases at this Exxon station on Poydras Street in Breaux Bridge?

A No.

Q Could you explain how your name appears on these 42 tickets?

A I don't know about that. ***

Q Do you ever recall turning in any of these tickets to Foreman Lormand in 1986 from Mr. Landry's Exxon Service Station?

A *It's like I say, I'd put the ticket in the ash tray and they'd stay in there a month at a time. I don't know, they could fly out of the truck or something.*

* * *

Q Is it your testimony then that you did not make any of these 42 purchases from the Exxon station in Breaux Bridge in 1986?

A I did not." [Emphasis added].

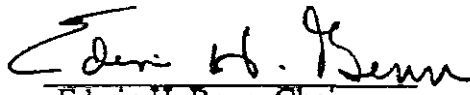
Under the circumstances of this case, Claimant's lengthy seniority alone cannot require a reduction in the amount of discipline imposed by the Carrier. See Third Division Award 26533 where an employee with thirty seven years of service was nevertheless dismissed for theft:


"Claimant's lengthy seniority cannot change the result. It is regrettable that an employee with such a long period of service is being dismissed, but such length of service cannot detract from the gravity of the proven and admitted misconduct."

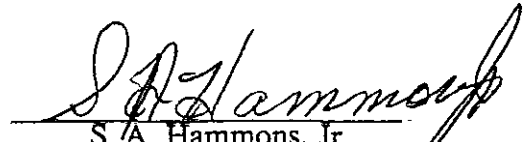
We must therefore deny the Claim.

AWARD:

Claim denied.


Edwin H. Benn, Chairman
and Neutral Member


C. B. Goyne
Carrier Member


S. A. Hammons, Jr.
Organization Member

Houston, Texas
April 29, 1988