

AWARD NO. 56

CASE NO. 70

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Track Supervisor Raul Zamarripa, effective February 28, 1978, was without just and sufficient cause and wholly disproportionate to the alleged offense (System File D-11-17-240).
- (2) Claimant Zamarripa be reinstated with all rights unimpaired and compensated for all time lost because of the violation referred to within Part one (1) of this claim."

OPINION OF BOARD:

Claimant was employed for nine years as Track Supervisor prior to his dismissal following investigation into the following charges:

"Your responsibility in connection with your possession of Chicago Pneumatic Air-Impact Wrench belonging to Gleason's Standard Service on February 27, 1978, at approximately 10:30 a.m. in the vicinity of Deval Tower for which you are being charged with violation of Rule 7 of the General Regulations and Safety Rules of the Chicago and North Western Transportation Company."

Rule 7 under which Claimant was charged reads as follows:

"Employees are prohibited from being careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, quarrelsome, or otherwise vicious or conducting themselves in such a manner that the railroad will be subjected to criticism and loss of good will, or not meeting their personal obligations."

The wrench in question was missing from Gleason's Service Station since December 1977. There is undisputed evidence placing Claimant in the

station on the night the wrench disappeared in December. It is unrefuted that the wrench was found in Claimant's car on February 27, 1978. Claimant has asserted throughout that he bought the wrench from a "young hippie" whom he met walking on the tracks. Circumstantial evidence and innuendo that Claimant was involved in a theft of that wrench pervades this record. But Carrier throughout the hearing denied that Claimant was accused of theft. Rule 7 is rather all-encompassing in its coverage. On at least three occasions during the hearing, however, Carrier's hearing officer, ADME Kuehn, who issued the charges, emphatically stated that Claimant was charged not with stealing but rather with subjecting Carrier to criticism and loss of good will by being in possession of stolen property.

There can be no reasonable doubt on this record that Claimant was in possession of the stolen wrench. It is of paramount significance, however, that in the context of the limited charges placed against him by Carrier, Claimant can be found guilty of no more than poor judgement for buying stolen goods. Carrier placed the charges and had control of the proceedings. The ADME, for reasons known only to himself, chose not to charge Claimant with dishonesty or theft and, during the hearing, thrice denied that Claimant was charged with anything other than bringing criticism or loss of good will upon Carrier. After studying the record, however, this Board is convinced that Claimant was branded a thief by Carrier management as a result of those proceedings and disciplined as such. Any debate on that point is settled by review of the denial letter of July 31, 1979 which reads in pertinent part as follows:

"I must disagree with you after reading the transcript and reviewing it that the discipline administered is too severe for the alleged charge. I must also disagree with your statement to the effect that Mr. Zamarripa conducted himself in such a manner that the Railroad would not be subject

to criticism or loss of good will basicly from Mr. Gleason's testimony on Page 8 of the transcript when being questioned by Mr. Kuehn in that he states: 'But I felt indignant that the man who had the gun in his car took it while I was servicing his vehicle and while I was doing a good will for him'. And again, when being questioned by Mr. Binius in that Mr. Gleason states that because of the incident he had to watch extra careful when trucks came in for service.

"I furthermore find it rather peculiar that the air impact wrench that disappeared from Mr. Gleason's station immediately after Mr. Raul left the station was found in his possession at a later date.

"Mr. Zamarripa further states that he bought the air-impact wrench for a price of \$15.00 which he has no proof of and he also states that he bought the air impact wrench for \$15.00 but he knew the price of the wrench to be well over \$100.00. One would tend to believe that if Mr. Zamarripa in fact did buy the wrench, he must have had a pretty good idea that it was not a legitimate sale."

Carrier cannot have it both ways. It cannot be permitted by indirection that which it has emphatically denied it is prosecuting directly in the disciplinary investigation. To hold otherwise would be to reduce the contractual requirement of a "fair and impartial hearing" to a hollow ritual.

Focusing upon the specific misconduct with which Claimant is charged, review of the transcript shows some evidence that Claimant brought a certain amount of disrepute upon his employer as a result of being in possession of property stolen from a vendor. The service station owner testified that after this incident he did eye Carrier trucks and personnel with some suspicion. But when we view this, as we must, in isolation from the circumstantial evidence of theft which Carrier expressly has disavowed, we must conclude that the penalty of dismissal is unreasonably harsh for the charges actually placed and proven. In the circumstances, and also in consideration of his relatively clean personnel history, we shall reduce the penalty to a six-month suspension and restore Claimant to service effective September 1, 1978, with damages from that date forward computed in accordance with Rule 19(d).

FINDINGS:

Public Law Board No. 1844, upon the whole record and all of the evidence, finds and holds as follows:

1. that the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;
2. that the Board has jurisdiction over the dispute involved herein; and
3. that the penalty is excessive for the charges placed and proven.

AWARD

Claim sustained to the extent indicated in the Opinion.
Carrier is to comply with this Award within thirty (30) days of issuance.



Dana E. Eischen, Chairman

H. G. Harper, Employee Member

R. W. Schmiede, Carrier Member

Dated: Dec. 5, 1979