

PUBLIC LAW BOARD NO. 1838

Award No. 74

Case No. 74

Carrier File MW-MRN-81-22

Parties Brotherhood of Maintenance of Way Employees

to and

Dispute Norfolk and Western Railway Company

Statement of Claim Former employe D. Neville, Box 401, Calendonia, Ohio 43314, was dismissed account of allegedly charged with gasoline theft on September 29, 1981. Employees request Mr. Neville be reinstated and be paid for all time lost, his seniority, vacation and all other rights unimpaired beginning September 30, 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.

Claimant, with approximately 9½ years of service, was removed from service, on September 30, 1981, for alleged unauthorized removal of gasoline from N&W Truck No. 2347 in the vicinity of Section No. 2 tool house, Marion, Ohio.

Under date of October 9, 1981 Claimant received notification to appear at an investigation, on October 15, 1981, to answer to the charge of the unauthorized removal of company gasoline. As a result of the hearing, under date of November 17, 1981, Claimant was notified that his dismissal was reaffirmed.

The testimony of the investigation clearly supported the results. Claimant at no time ever denied the unauthorized removal of fuel from the company truck.

Carrier had been experiencing a loss of fuel from company vehicles for several weeks, but said loss was most particularly noticeable over week-end periods. As a result thereof, Carrier assigned two detectives to surveil the area which the vehicles were stored. On the night of September 29, 1981, Claimant was observed removing a five gallon gas can from his vehicle, going between two company vehicles where he was out of sight of the public, inserting a siphon into a company vehicle and attempting to siphon gasoline therefrom. Two company detectives accosted Claimant in the midst of his activities whereupon Claimant offered an explanation that he was following instructions to get fuel for other company motorized equipment. A call to Roadmaster E. M. Johnson brought Johnson to the scene and he removed Claimant from service.

Organization avers, and the record so discloses, that Claimant was candid and forthright in his admission of his wrongdoing and appeared to be genuinely contrite over his wrongdoing. Nevertheless, Carrier, in view of the seriousness of the offense, chose not to reinstate Claimant.

The claim rests before the Board on what is tantamount to a leniency plea. It has been consistently held by all divisions, Public Law Boards and Special Boards of Adjustment that reinstatement on a leniency basis is solely within the discretion of the Carrier. See Third Division Award No. 20236, Award No. 17900, Award No. 16950, and Award 15572 and the Awards set forth therein. We note, however, that Claimant had been out of service since September 30, 1981 to the date of

this Award. There is some merit to Organization's contention that Carrier's failure to respond to Claimant's candor, forthrightness and genuine contriteness would have a chilling effect on any other employees in like circumstances to come forward and readily admit their wrongdoing particularly in view of Claimant's past record which we deem to be without negative entry, since it was not mentioned in the transcript of the hearing or in the handling on the property.

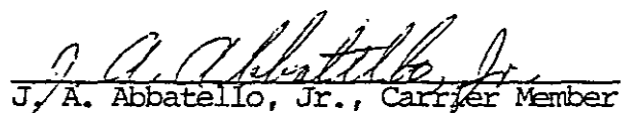
Apparently Claimant was otherwise a good worker, well thought of by his employer. We note in that regard Roadmaster E. M. Johnson's testimony which, in pertinent part, was:

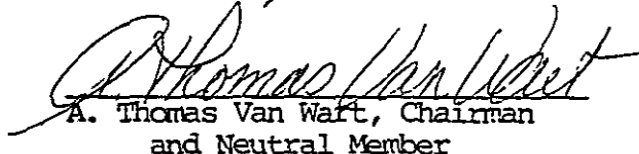
"I am glad to hear that David has apologized for what he has done, and he has finally realized what he is doing and he says he is never going to do it again, and he has learned his lesson by it. My personal opinion that it fine with me."

In view of said record and Claimant's length of service we deem it appropriate to recommend to Carrier that it give reconsideration to its position in this claim.

AWARD: Claim disposed of as per findings.

  
Bryce Hall, Employee Member

  
J. A. Abbateello, Jr., Carrier Member

  
A. Thomas Van Wart, Chairman  
and Neutral Member

Issued at Salem, New Jersey, March 2, 1984.