PUBLIC LAW BOARD NO. 1844

AWARD NO. 1

CASE NO. 12

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 Machine Foreman H. L. Smith, effective December 19, 1975, was without just and sufficient cause and wholly disproportionate to the alleged offense. (System File D-11-3-194).

2. Machine Foreman H. L. Smith be returned to service with all rights unimpaired because of the violation referred to within Part 1 of the Claim.

OPINION OF BOARD:

At the time this case arose in late 1975 Claimant had been in the employ of Carrier for some eight years, the last five as a Machine Foreman. This case involves Claimant's appeal from his discharge from Carrier's service following investigation into charges contained in a notice dated December 8, 1975, reading in pertinent part as follows:

"Please arrange to appear for hearing as indicated below:

"Place: Trainmaster's Office - Sioux City, Iowa

"Time: 10:00 A.M.

"Date: Wednesday, December 16, 1975

"Subject of Hearing: To determine your responsibility in connection with removing 5 gals. gasoline from company truck at Onawa,

transferring same to your own 5 gal can putting it in your personal vehicle about 6:30 A.M. on Monday, December 8, 1975, for which you are charged with violation of Rule 9 from General Regulations and Safety Rules, effective June 1, 1967, reading as follows:

'Rule 9. Theft or pilferage is prohibited.'

"You may be accompanied by an employee and/or representative of your choice subject to the provisions of the Schedule Agreement with the Brotherhood of Maintenance of Way Employees; and you may, if you so desire, produce witnesses in your own behalf without expense to the Transportation Company.

"You are hereby held out of company service pending results of hearing."

The background facts in this case for the most part are undisputed. In his capacity as Section Foreman, Claimant is assigned a Company truck together with gasoline credit cards for the purchase of gas and necessary parts and equipment on Carrier's account. Early on the morning of December 8, 1975, Carrier's Special Agent, Douglas Maxin, observed Claimant at Carrier's Onawa, Iowa, depot as he removed a 5-gallon can of gasoline from the bed of Carrier's Engineering Department truck. Claimant transferred the gasoline in Carrier's gas can into another 5-gallon container of his own and then placed the can in the back of his own private vehicle. As he was making the exchange a train approached the depot, whereupon Claimant hurriedly turned off all the lights until the train had passed and then he completed his transaction. The foregoing points are all contained in testimony of Agent Maxin at the hearing and investigation, none of which were contradicted by Claimant.

Claimant was detained by the Agent who questioned him about his activities on the morning of December 8, 1975. Mr. Smith did not deny taking the gasoline from the Company vehicle but offered several explanations, to wit.: (1) He was reimbursing himself for five gallons of gasoline purchased three days earlier. (2) He was reimbursing himself for gasoline purchased by him over the past eight-month period. (3) He was just taking the gasoline for his own personal use but

many other employees had done the same thing; and (4) he was reimbursing himself for gasoline purchased over the last three months. When pressed, Claimant conceded that he did have gasoline credit cards to charge gas to Carrier's account and he had no receipts to back up his claims for reimbursement. At the hearing and investigation conducted December 17, 1975, Claimant testified essentially as follows: "...I took it in equal payment to bolts which I had purchased for track machines and welding that I had done on various pieces of track machinery. It was for equal payment." Claimant also asserted that he was advised "in a roundabout way" by Company supervisors to reimburse himself in kind rather than file expense vouchers.

The Organization on behalf of Claimant maintains that there is insufficient record evidence to establish that Mr. Smith was attempting to defraud Carrier or steal Company property. In this connection it is pointed out that the gasoline was not placed in the gas tank of Claimant's vehicle, nor was it physically removed from Company property. Arguendo, the Organization maintains that Claimant is guilty of, at worst, poor judgment, and that the extreme penalty of dismissal from all services is not warranted on this record. Thus, the Organization urges that in light of Claimant's eight years of service he should be returned to service by this Board with all rights unimpaired in accordance with Rule 19-A of the controlling Agreement.

Carrier for its part contends that the record clearly establishes Claimant's guilt as charged of theft of Company property and that such has generally been recognized in railroad labor relations as a dischargeable offense. Carrier urges in the circumstances that no reasonable mind could find doubt as to Claimant's culpability and that the penalty assessed is not arbitrary, unreasonable or capricious.

We have reviewed the entire record, particularly the transcript of the hearing and investigation on the property. There can be no doubt that Claimant in fact stole five gallons of gasoline from the Company truck and converted same to his

own personal use. Claimant in fact admits taking the gasoline but offers bare and unsubstantiated assertions that he was reimbursing himself on orders of his supervisor for gasoline and parts purchased by him for Carrier out of pocket. Claimant offers absolutely no substantiation for this defense. In light of the fact he was in possession of a Company credit card and the absolute paucity of evidence to support his assertions, we cannot find them believable. Nor is the Organization's contention persuasive that because Smith did not remove the gasoline from Company property he was not guilty of theft. Even if we were dealing with common law larceny, the asportation element would have been satisfied when Claimant placed the gasoline in his own container and moved it to his personal vehicle. In our judgment the theft was completed when he placed the gasoline under his dominion and control and every piece of evidence as well as his own admission shows that he intended to use it for himself.

The only question remaining is whether the amount of discipline imposed is appropriate in all of the circumstances. We take no pleasure in presiding over the termination of an eight-year employee. But neither can we condone outright theft of Company property. Numerous awards of the various divisions of the National Railroad Adjustment Board establish the principle that dismissal is not arbitrarily harsh discipline, absent clearly established mitigating circumstances, for employees guilty of theft. See Second Division Awards #1776, #1913, #2484, #2996, #3296, #3537, #3834, and #5043; Cf, Third Division Award #19037. In the facts and circumstances of this particular case we can find no basis for overturning Carrier's imposition of discipline and the claim must be denied.

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 Employees involved in this dispute are, respectively, Carrier and Employees within the meaning of the Railway Labor Act;

2. that the Board has jurisdiction over the dispute involved herein; and

3. that the Agreement was not violated.

AWARD

The claim is denied.

Dana E. Eischen, Chairman

O. M. Berge, Employee Member

R. W. Schmiege, Carrier Member

Dated: [illegible]