File: (A)MWB 82-04-23D
P-P 588C

Public Law Board No. 4161

Parties to Dispute

Brotherhood of Maintenance of Way Employees

vs

Burlington Northern Railroad

Case No. 9

Award No. 8

STATEMENT OF CLAIM

1. The dismissal of Rank C Mechanic, H.S. Fisher for alleged violation of Safety Rules 564 and 575 for theft of company property was improper, without just and sufficient cause and on the basis of unproven charges.

2. The Claimant shall be reinstated with seniority and all other benefits unimpaired and he shall be compensated for all wage loss suffered.

FINDINGS

On August 28, 1981 the Claimant was advised to attend an investigation on September 3, 1981 to determine facts and place responsibility, if any, in connection with his alleged theft of company property at Vancouver, Washington equipment repair shop on August 25-6, 1981. After several postponements the investigation was conducted on October 21, 1981. On August 28, 1981 the Claimant was also advised that he was "...being held out of service pending results of this investigation". On November 4, 1981 the Claimant was advised that he had been found guilty as charged and he was dismissed from service. The discipline was appealed on property up to and including the highest Carrier officer designated to hear such before this case was docketed before this Public Law Board for final adjudication.

At the time of the alleged incident the Claimant was a Rank C Mechanic at the Carrier's Vancouver Equipment Repair Shop. The Claimant was notified to attend the hearing which was ultimately held on October 21, 1981 because of an investigation conducted by Carrier's Special Agent J. M. Ruiter and Patrolman J. L. Stutesman on August 26, 1981. This investigation was conducted because the Security Department had received a call from Work Equipment Foreman J. C. Johnson. The Foreman informed the Security Department that a shop employee had been allegedly observed placing some company property in his lunch pail. This same employee allegedly took the lunch pail and placed it in the storage box on the back of his motorcycle which was parked on company property. Foreman Johnson told the Security Department that he had received this information "...from an anonymous shop employee".

According to the report by the investigating officers to the Division Special Agent, which included an interview with Foreman Johnson and the Claimant, the Claimant admitted that he had taken a used limit switch from company property prior to the date he was allegedly observed putting a new one in his lunch pail. When the investigating officers went later to the Claimant's home, on August 26, 1981 and searched his shop, with his permission, no used limit switch was found nor was any other property belonging to the Carrier.

When the investigating officers searched the Claimant's motorcycle on August 26, 1981, with his permission, they found in his lunch box a new Norberg GO Proximity Limit Switch, Model No. 43-100-C, Part No. 7889-2000 which the anonymous tipster had allegedly seen the Claimant put there. The Foreman put a value on the switch at $147.00. According to the Special Agent's report, the Claimant stated that he did not know how the switch got in his lunch box.

A review of the record before the Board shows that the discharge of the Claimant was based, therefore, on two separate considerations: (1) the taking of a used switch by the Claimant from the Carrier's shop prior to August 26, 1981; and (2) the alleged attempt on his part to take a new switch from Carrier's property on that date.

It is axiomatic that in discipline cases the burden of proof rests with the Carrier as moving party. Innumerable Awards from the various Divisions of the National Railroad Adjustment Board have precedentially established this principle (First Division 22407, 22439; Third Division 14479, 15412, 15582 inter alia). Such proof must be based on the criterion of substantial evidence which has been defined as such "...relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (Consol. Ed. Co. vs Labor Board 305 U.S. 197, 229). It must be in this light, therefore, that the Board must examine separately each of the issues on which the Claimant's discharge is based.

The first issue deals with whether the Claimant was guilty of theft because he took the used switch from the company on "...August 24 or 25, 1981". Evidence that the Claimant did so is based uniquely on his own admission. In view of this it is immaterial whether such switch was found or not at the Claimant's home when his shop was searched by officers from the Security Department on August 26, 1981. Such would have been unnecessary corraborating evidence. With respect to the issue of theft it must also be ascertained, however, if the used switch had any value, and what company policy was with respect to used parts. The record establishes that the used switch came from a hydraspiker, or a "spike driver" as it is called in the record, and that the switch was a used part. The Claimant referred to the switch, during the hearing, as "junk". Although this is not disputed by the Carrier, the Foreman testified that the switch nevertheless had some scrap value. Such scrap could be sold by the Carrier at 8¢ a pound. At 2 pounds, the used switch had a value of 16¢. Further, it was not Carrier policy to permit employees to purloin parts, new or used, for their own personal use.

In railroad arbitration it has long been established precedent that the value of Carrier property is of lesser importance than the principle that such must not be treated by employees as if it was personal unless there is a company policy to the contrary (Second

Division 6214, 6615; Public Law Board No. 3897, Award 17; Public Law Board No. 3982, Award No. 1). Such company policy might be one whereby various Carriers permit employees to take, for their personal use, used railroad ties. In the instant case, however, the record shows that the Claimant admits that he did not have permission to take the used switch, irrespective of its value, and that supervision did not grant such permission. It is ultimately of little importance, with respect to the deliberations of this forum, that the Claimant testified that he could not remember what he even did with the switch after he took it and that he only took it, apparently out of curosity, in order to "...break it open and see what was inside". According to the Foreman, such switches are sealed units and "...cannot be disassembled". The Claimant's motives here are of lesser importance, however, than the fact that the Claimant took company property, in violation of company policy. Dishonesty by employees has always been considered a serious offense by arbitral forums in the railroad industry (Second Division 7519, 7570, 7575). On merits, the Claimant was in violation of the Carrier's Rules at bar with respect to this first point.

The second point deals with whether the Claimant was guilty of theft of Carrier property because a new switch was found in his lunch pail in the utility box of his motorcycle on August 26, 1981. Although such can be logically deduced, it has never been factually established, in the record, that the switch at bar was Carrier property. Both the Foreman and the Security officer testified that they assumed the switch belonged to the Carrier. The logical reasons why the switch may have been Carrier property are that it was a very specialized one used only on hydraspikers, and its serial numbers matched those of a number of similar switches in inventory at the shop. The Carrier, however, had no other inventory control system at this shop than that new parts were ordered, apparently, when the supply of them, on shelf, was exhausted. Although the Carrier could have presented such evidence, this Board can surmise, by means of pay vouchers from the shop in question the fact is that its inventory control system was

so loose, as evidenced by the testimony by the Foreman, that it was never factually established that this shop was missing the particular part in question from its shelf on August 26, 1981. It is only on logical grounds, therefore, that the Board can conclude, which is is willing to do here on the record taken as a whole, that the switch came from the shop's inventory in the first place.

The evidence presented by the Carrier in support of its disciplinary action against the Claimant relative to this point is that the Claimant was seen on August 26, 1986 putting the switch in his lunch box by an anonymous witness, and the fact of its discovery by the investigating officers on his motorcycle. Absent contrary evidence arbitral forums have concluded that possession creates an inference that the person in possession stole the property in question if they are accused of theft (Second Division 3834, 8342; Public Law Board No. 3986, Award 10). Such precedent has debatable application to the instant case, however, for a number of reasons. First of all, the Claimant simply denies that he took the switch. While arbitral precedent does recognize that "...it is not unusual in cases where a person is...charged...to adduce no evidence other than to deny that" what was alleged was not done (Third Division 13240), the denial of the Claimant in the instant case has considerable corraborating support. The Claimant explicitly testified during the hearing, after offering no resistance to supervision nor to the investigating officers on August 26, 1981 when they requested to examine his motorcycle, that he found his lunch box open (with the new part in it), and that the straps holding the motorcycle carrier box were tied differently than he usually tied them to keep them from flapping in the wind because the box had no lock. These details were neither pursued nor questioned by the hearing officer at the investigation. The Claimant was clearly implying, by means of detailed testimony, that his motorcycle had been tampered with on the day in question before it was examined, after lunch, by supervision and the investigating officers. Such inference is further corraborated by evidence presented by the Organization by fellow employees of the Claimant who offered statements to the effect that they saw a fellow employee near the Claimant's motorcycle prior to its search after lunch on August 26, 1987. The fellow employee in question

was one who, according to additional corraborating evidence, had made threats to the Claimant to the effect that "...if (this employee) ever had the chance to get (the Claimant) fired he would do it and not think twice about it". Most disturbing to the Board, however, is that the Carrier never permitted the Claimant to confront the anonymous employee or employees who informed the Carrier that he (or they) saw the Claimant put the switch into his lunch box. The Carrier knew who these employees were since they were interviewed, on August 26, 1981, by the investigating officers. In correspondence on property the Carrier states that the eye-witness [1/] "...for obvious reasons chose not to sign a statement (that the Claimant was seen taking the switch) or to appear at the investigation". This Board, as prior arbitration Awards in this industry have concluded, finds such reasoning to be insufficient to warrant the Claimant's accusers exclusion from the investigation. In this respect it is both appropriate and applicable to quote, for the record, the conclusions of both Award No. 25 of Public Law Board No. 2960, and Award No. 6395 of the Second Division of the National Railroad Adjustment Board. The former states the following:

> The fact that employees who were eye witnesses were not called (at the investigation) distracts from and casts significant doubt on the nature of the evidence. In the face of contradictory and conflicting evidence the hearing officer failed to utilize available evidence that would have in most probability shed light on what really happened. Without the testimony of these employees we cannot come to any meaningful conclusion as to what really happened...

1/ Carrier's correspondence dated September 24, 1982 refers to "an employee" as anonymous source of information with respect to the theft of the switch. The transcript of the hearing, however, has the Foreman testifying that the security officers "...interviewed a couple of the guys (who) were witnesses to the event...". Likewise one of the security officers testified at the investigation that "...the two (who) gave him the information...wished to remain anonymous".

The latter Award states:

> (Since)(t)here is nothing in the record to show that any effort whatsoever was taken (by the hearing officer) to secure...the presence (of the accuser(s)) at the hearing at which they would (have been) subject to proper examination...(such)...absence...is a fatal defect going to the very essence of the Carrier's case.

In face of the Claimant's denial that he put the switch in his lunch pail, which is supported by reasonable corraborating evidence of record, it was the evidentiary responsibility of the Carrier, as moving party, to prove him wrong. It had the means to do so by producing his accuser or accusers at the investigation. It failed to do so. In its correspondence to the Organization dated May 26, 1982 the Carrier states it was not possible for the Carrier to produce such witnesses because such persons remained anonymous. Such is not credible since the security officers interviewed these same persons, as the transcript shows.On merits this part of the claim must be sustained because the Carrier, as moving party, has failed to sufficiently bear its burden of proof.

In view of the findings by this Board in the foregoing it must address the issue of the quantum of discipline. The Claimant is herein found guilty only of taking for his personal use a used switch on or about August 24 or 25, 1981. Numerous Awards emanating from the National Railroad Adjustment Board precedentially establish that a Claimant's past record should be considered when considering the appropriateness of discipline assessed (Second Division 6632, 5790; Third Division 21043, 22320 inter alia). At the time of his discharge in 1981 the Claimant was a long-term employee with some 34 years of seniority. During that time he had received one suspension of 10 days and a prior discharge in 1979, with reinstatement in 1980. Given this past record, as well as the minimal value of the property of the Carrier which the Claimant took on August 24 or 25, 1981 the reasonable discipline should have been a ninety (90) day suspension.

Public Law Board No. 4161 (Award No. 8; Case No. 9)

AWARD

The Claimant shall be reinstated to his prior position with full back pay, minus a ninety (90) calendar day suspension from August 28, 1981 which is the day on which he received the first notice of investigation and from which day he was "...withheld from service pending results of (the) investigation". Total payment due to the Claimant shall be made in accordance with the principles laid out by this Public Law Board in Award No. 1. Claimant's reinstatement shall be with seniority unimpaired. The Claimant shall be notified of his reinstatement rights, and of this Award in its other details within thirty (30) days of the date of the Award. The Claimant is ordered to cooperate fully with both his Organizational representative and the Carrier in providing all appropriate information to the Carrier in order that the Carrier might be able to properly calculate what is due the Claimant.

Claim sustained only to the extent outlined in the foregoing.

Edward L. Suntrup, Neutral Member

B. W. Potter, Carrier Member

Karl P. Knutsen, Employee Member

Date: March 9, 1987