

PUBLIC LAW BOARD NO. 6102

Award No. 4

Case No. 4

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees
and
Burlington Northern Santa Fe Railway
(Former St Louis - San Francisco Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when on November 3, 1995, the Carrier dismissed Mr. L. J. Loman for alleged theft of Carrier property.
2. As a consequence of the Carrier's violation referred to above, Claimant should be reinstated to service, paid for all time lost, and the discipline shall be removed from his record." [Carrier's File MWC 96-03-04AA. Organization's File B-1326-2].

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction over the dispute herein.

On November 3, 1995, the Claimant, Mr. L. J. Loman, a Rail Gang Mechanic with 23 years' service with the Carrier, was removed from service by Work Equipment Supervisor S. E. Logan, for alleged theft of Carrier property. The Organization's General Chairman, Mr. E. R. Spears, the same day, requested an investigation, and advice of the precise charge against the Claimant, in accordance with the Discipline Rule in the Parties' Agreement. The Agreement permits an employee to be disciplined without an investigation; however, if an investigation is timely requested, it must be afforded, and a precise statement of the charges must be provided in writing.

An investigation was set for November 15, 1995, "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with the alleged theft of company property." By mutual agreement, the investigation was postponed until December 1, 1995.

Following the lengthy investigation, the Claimant was advised on December 13, 1995, that he was dismissed for theft of Company property. An appeal was timely filed, and the issues have been progressed to this Board.

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GENERAL CHAIRMAN

The charge had its inception in an inquiry as to the disposition of a damaged welding machine which had been attached to a Carrier-operated truck, totalled in a wreck in May, 1995. When the machine was unaccounted for some five months later, a Carrier special agent (police officer) began a probe which led to the Claimant. The Claimant initially denied knowledge of the machine, but when confronted with the information that employees of a wrecker service had assisted him in removing the machine from the wrecked truck and loading it on his own Company-operated truck, the Claimant admitted he removed it.

The Claimant, on November 3, 1995, gave the special agent a written statement to the effect that he removed the welding machine because the welding machine on his assigned truck needed repairs, and he thought he could use parts off the machine from the wrecked truck. He further stated he carried it in his truck for about a month, then unloaded it at his home where he removed its cover to see whether he could obtain parts for his own assigned welding machine. He added that it was again loaded on his truck and hauled around for a period of time, until unloaded the previous Monday afternoon (October 30) at the tool house assigned Maintenance of Way Welder D. L. Bullington, in Tulsa.

When asked whether he had other Carrier property at his home, the Claimant admitted possession of a used rail saw he said he had been given to repair. When the special agent entered the Claimant's garage to obtain the rail saw, he also noticed a track jack, which the Claimant admitted was Carrier property. The serial number plate was missing from the rail saw. Also on the Claimant's premises were a case of paper towels and a case of lantern batteries, which admittedly were Carrier property.

At that point, the Claimant was removed from service by the Carrier's Work Equipment Supervisor, Mr. S. E. Logan, who drove the Carrier truck assigned to the Claimant from Claimant's home to the Carrier's yard in Tulsa, Oklahoma. An inventory of its equipment disclosed a new rail saw, which also was missing its serial number plate.

The focal point of the investigation afforded the Claimant on December 1, 1995, was Carrier's General Rule No. 19, reading in pertinent part as follows:

- "Theft or vandalism shall be considered sufficient cause for dismissal from railroad service. . . . Unauthorized possession of railroad tools, equipment and materials including commodities in transit, is prohibited."

It was the Carrier's position that the Claimant had in his possession, without authority, property valued in excess of \$3,500, consisting of one track jack, one case of paper towels, one case of lantern batteries, one used rail saw, one welding machine, and one new rail saw. The Claimant asserted that he used the equipment and supplies in his work, or they had been given him to repair, and that their possession was authorized.

There was conflicting testimony concerning the Claimant's authority to remove the welding machine from the wrecked truck. Work Equipment Supervisor D. N. Warburton asserted that he had directed the Claimant to remove certain specified equipment from the wrecked truck, but to leave other attached equipment, such as the welding machine, for later detachment. The Claimant denied that he was told to leave the welding machine on the truck. The Board is persuaded that Mr. Warburton's account is more credible. If the Claimant was authorized to remove the welding machine and have it in his possession, there would be no point in his initial denial to the special agent that he had had it, nor in the surreptitious manner of its return to the Carrier's premises, discussed below.

The circumstances of its removal from the Claimant's home to Mr. Bullington's tool house in Tulsa also raise questions of credibility. While the Claimant asserts he unloaded the machine at Mr. Bullington's tool house on Monday, October 30, Mr. Bullington's statement that it was not there on Thursday, but was found on Friday, November 3, and the circumstantial evidence of tire tracks matching the Claimant's assigned truck found after a rain on Thursday morning indicate the machine was unloaded no earlier than Thursday afternoon, November 2.

The Claimant's whereabouts on November 2 raise some doubt as to his precise movements. When asked by Mr. Logan to meet with him on November 3, for the purpose of determining exactly what disposition had been made of the missing welding machine, the Claimant declined, "because he thought he was getting sick," according to Mr. Logan's account. Mr. Logan and the special agent then began a search for the Claimant. He was not at work at Oklahoma City, his work site on that date. He was not at home; his wife stated he was in Oklahoma City. He was not at the motel where he customarily stayed when working away from home, in Sapulpa, Oklahoma, nor did he have a reservation. He could not be contacted by the radio with which his assigned truck was equipped. At the investigation, the Claimant presented two inconclusive accounts of his whereabouts on November 2: He was sick and/or he was having his truck serviced.

Even more troubling are the equipment serial numbers. A used rail saw might have lost its number plate while in use, by accident or wear. But the absence of a serial number plate from the new rail saw as well, strains plausibility as well as probability. Further, the welding machine had evidence that its serial number, stamped into the machine itself, had recently been partially defaced. These circumstances, taken together, point to a systematic effort to conceal identification and ownership of the equipment.

The Claimant asserted that the track jack was used in his work from time to time, and was kept in his garage at home for easy access when needed. While this explanation is plausible, discretion suggests that a supervisor's permission should be sought to store such equipment in one's personal garage, rather than in the assigned truck or on Carrier's

premises. He said the used rail saw had been given him by Roadmaster Emberg for repair. Mr. Emberg denied having given it to him, and testified that such repair work had been contracted out for several years.

The Claimant also stated that the new rail saw had come into his possession some three years before, having been left by Gang Roadmaster Lamel Traylor, to whom the Carrier's records indicate it was originally issued on May 20, 1992. He said he was holding it until Mr. Traylor's gang returned to work in the Tulsa area. According to Roadmaster Emberg, the Claimant had told him on or about November 1, 1995, that he had found a power head (motor) for a rail saw and was going to give it to him.

Since this case involves the dismissal of an employee with long service, and a good record for many years, the Board has examined the evidence in the Claimant's best possible light. The evidence is largely circumstantial, but the web of circumstances in their totality supports the Carrier's disciplinary decision.

The Claimant's mysterious movements on November 2, after he learned he was to be interviewed concerning the missing welding machine, warrant suspicion that he was probably involved in moving the machine from his home to Carrier premises. The sudden appearance of the machine at Mr. Bullington's tool house on Friday afternoon, coupled with Bullington's certainty it had not been there on Thursday morning, and the evidence of fresh tire tracks matching those on the Claimant's truck, following a Thursday morning rain which would have obliterated earlier tracks, circumstantially point to unloading of the welding machine at the tool house on Thursday evening.

If the welding machine had been returned on Monday, October 30, as the Claimant asserted, one may question whether a safer and more secure and protected location would not have been its resting place. To leave a \$2,000 machine (according to Carrier's estimate) exposed to theft and soil dampness is irresponsible. The circumstances point to a hasty act.

The missing and effaced serial numbers are further culpable circumstances. One missing serial number plate on an old rail saw may be plausible. Two missing plates, together with a partially effaced serial number on the welding machine, strains credulity.

Carrying a new rail saw around for three years also raises questions. Giving the Claimant the benefit of the doubt, recognizing that as a Rail Gang Mechanic with his own assigned Carrier vehicle, he is allowed a considerable degree of independence and autonomy in carrying out his work assignments, the possession of a new rail saw for three years without seeking the counsel of a supervisory officer about its disposition raises doubts about the honesty of his intentions.

The Claimant asserts that he removed the welding machine from the wrecked truck because his own assigned welding machine was defective (an undisputed fact), and he hoped to use parts off the damaged machine to replace or repair his own defective machine. Granting that this account is true, the initial denials and the furtive disposition of the machine are circumstances which again raise doubts about his credibility.

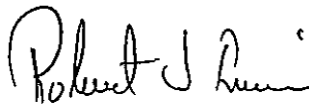
The Board ascribes less significance to the Claimant's possession of the paper towels and lantern batteries. It is noted that the Claimant was authorized to drive his assigned Carrier vehicle to his home at night. He was often called upon to leave at an early hour and report directly to his work site. These are expendable supplies which should be readily available, but storage of such supplies at his home, rather than on his vehicle, leaves him vulnerable to suspicion of misappropriation.

Finally, the Claimant attributed his initial denial of knowledge about the missing welding machine, and his vacillating narration to confusion and nervousness generated by his illness: dizziness, severe headaches, temporal lobe left brain shunt [sic], a tumor behind his left eye, and impending life-threatening brain surgery. Putting that information, for his benefit, in the best possible light, the Board is still faced by the entire chain of circumstances which point to unauthorized possession of Carrier property and tools by the Claimant.

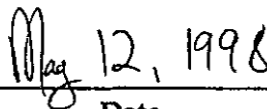
The Board finds there was compliance with the applicable provisions of Rule 91, the Discipline Rule, of the Agreement between the Parties. Substantial evidence was adduced at the investigation to prove the charges. The Claimant's record has been free of discipline for 18 years. But this is not an instance of mere carelessness in handling tools and equipment. The effaced serial number on the welding machine and the absence of number plates on both the rail saws lead to the inescapable conclusion that the Claimant was purposefully less than honest in his acts and intentions. The discipline is not excessive, given the circumstances of this case.

AWARD

- Claim denied.



Robert J. Irvin, Referee



Date