

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)

) Case No. 23

)

) Award No. 22

)

Martin H. Malin. Chairman & Neutral Member

D. D. Bartholomay. Employee Member

D. A. Ring, Carrier Member

Hearing Date: March 2, 2001

STATEMENT OF CLAIM:

1. The dismissal of Foreman W. R. Breeden for his alleged theft of Company property was without just and sufficient cause and based on unproven charges (System File R-9948-103/1210125).
2. Foreman W. R. Breeden shall now be reinstated to service with seniority and all other rights unimpaired, and compensated for all wage loss suffered.

FINDINGS:

Public Law Board No. 6302. upon the whole record and all the evidence. finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On June 16, 1999, Carrier notified Claimant to appear for an investigation on June 23, 1999, concerning his alleged involvement in the theft of Carrier property recovered at a self storage facility and his alleged unauthorized use of a company vehicle. Following two postponements, the hearing was held on July 12, 1999. On July 27, 1999, Claimant was notified that he had been found guilty of the charges and dismissed from service.

The Organization contends that Carrier failed to comply with Rule 48(a) because it removed Claimant from service prior to the hearing and with Rule 48(c) by failing to advise Claimant of the precise nature of the charges. The Organization further contends that Carrier failed to prove Claimant guilty of the charges. In particular, the Organization maintains that Carrier failed to prove that the property at issue was Carrier's property. The Organization relies on Third Division Award No. 33612. Carrier maintains that it provided Claimant with appropriate notice of the charges, that it acted properly in removing Claimant from service and that it proved the charges by substantial evidence.

We shall address the due process issues first. We find no violation of the Agreement in Carrier's removal of Claimant from service prior to the hearing. Rule 48(o) allows Carrier to remove an employee from service pending investigation where the charges involve flagrant or serious violations. Certainly, theft of Carrier property is a flagrant and serious violation. Carrier acted appropriately in removing Claimant from service pending investigation.

We further find that Carrier provided Claimant with a sufficiently precise enumeration of the charges. Carrier identified the property that was allegedly stolen and the location where it was recovered. Claimant had sufficient details to enable him to prepare a defense. There was no violation of Rule 48(c).

The record reflects that a Carrier Special Agent received a voice mail message that new railroad ties had been found at a self storage facility. On June 10, 1999, the Special Agent, a Cheyenne Police Detective and others recovered several pieces of Carrier property at the self storage facility. Another employee admitted to taking all of the property except a 100 gallon fuel tank and the cylinder for a speed swing. The other employee resigned from Carrier's service. Claimant was a business partner of the other employee.

There is no dispute that a 100 gallon fuel tank and a cylinder for a speed swing were recovered from the self storage facility used by Claimant and the other employee. The crucial issue is whether Carrier proved that the fuel tank and cylinder were Carrier's property. Claimant testified that he owned the fuel tank and cylinder and that they were not taken from Carrier.

There was substantial evidence, however, that the fuel tank and cylinder were Carrier's property and were taken by Claimant. Particularly compelling was the testimony of the Police Detective. He testified that he interviewed Claimant and that Claimant admitted taking the fuel tank and cylinder from Carrier's premises. According to the Detective, Claimant attempted to justify his actions by claiming that the fuel tank and cylinder had been discarded by Carrier. At the investigation, however, Claimant changed his story and maintained that the fuel tank and cylinder were his. Carrier chose to credit the Detective's testimony over Claimant's and we see no reason to depart from our general policy of deferring to credibility determinations made on the property.

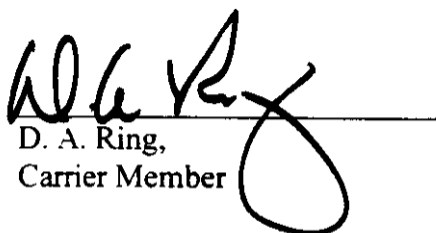
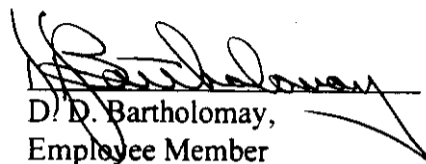
We have reviewed Third Division Award No. 33612 carefully. We find it inapplicable to the instant case. In Award No. 33612, the carrier charged the claimant with theft. The key

evidence against the claimant consisted of statements by an employee of a salvage yard identifying the claimant as the individual who sold carrier property to the yard. However, the employee did not testify and the Board held that Carrier could not prove its case with her hearsay statements. In the instant case, however, the Police Detective testified and was subject to cross examination concerning Claimant's admissions. The Detective's testimony withstood cross examination and was credited over Claimant's denials. There was no primary reliance on hearsay. Accordingly, we hold that Carrier proved the charge of theft of Carrier property by substantial evidence.

On the other hand, we find absolutely no evidence in the record supporting the charge of misuse of a Carrier vehicle. Thus, the question becomes whether the charge of theft of Carrier property, standing alone, justified Claimant's dismissal. Theft is an extremely serious offense and, in most cases, absent highly unusual circumstances, justifies dismissal. In the instant case, Claimant was short term (1½-year) employee and there are no unusual circumstances that might conceivably mitigate against the extreme seriousness of the offense. The penalty imposed was neither arbitrary nor capricious nor excessive.

AWARD

Claim denied.


Martin H. Malin, Chairman
D. A. Ring,
Carrier Member
D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, April 30, 2001.