

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6423**

John C. Fletcher, Chairman & Neutral Member
Kendall F. Koff, Carrier Member
Dale L. McPherson, Employee Member

**BROTHERHOOD OF LOCOMOTIVE ENGINEERS
CPR-US/METRA/IMRL**

and

I & M RAIL LINK, LLC

**Award No. 6
Case No. 6
Claimant D. A. Paquette**

Date of Hearing-September 5, 2001

Date of Award-February 10, 2002

Statement of the Issue

The Chairman and Neutral Member, after review of the entire record, has determined that the issue before this Board is:

Was Carrier justified in dismissing Claimant Engineer D. A. Paquette in connection with the disappearance of a locomotive radio on September 14, 2000?

FINDINGS:

Public Law Board No. 6423, upon the whole record and all of the evidence, finds and holds that the Employee(s) and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute(s) herein.

Claimant was assigned as engineer to Local Job 827 at Carrier's Nahant Yard. On September 14, 2000, Claimant went on duty at 1500 hours, and departed with two locomotives, CEFX 3029 and IMRL 120. About thirty minutes into his trip, Claimant

reported that the standard removable two-way radio in the lead unit was not working properly, and the Foreman of Job 827 was accordingly issued a replacement radio at the Roundhouse with instructions to return the bad ordered radio when the crew tied up for the day. The record establishes, however, that when the engine consist was returned to the Roundhouse, the original radio was on neither the CEFX 3029 nor the IMRL 120. The trainmaster on duty questioned Claimant and his crew about the missing radio, and all three employees denied knowing what had happened to it. During the course of the ensuing two-hour search, the trainmaster re-interviewed each crew member privately, and promised that "no one would get fired" if the radio was returned. Claimant eventually admitted that he "placed it in the weeds" adjacent to an outlying industry track, intending to retrieve it later and fix it himself.¹

Claimant was subsequently directed to attend a formal investigation in connection with his alleged violation of the following pertinent General Operating Rules:

- Rule 1.2.7 – Employees must not withhold information, or fail to give all the facts to those authorized to receive information regarding unusual events, accidents, personal injuries, or rule violations.
- Rule 1.6(4) – Employees must not be dishonest.
- Rule 1.19 – Employees are responsible for properly using and caring for railroad property. Employees must return the property when the proper authority requests them to do so. Employees must not use railroad property for their personal use.

An evidentiary hearing into the matter was held on September 25, 2000, during which Claimant took sole responsibility for the whereabouts of the missing radio. However, he refuted Trainmaster Burington's assertion that he had "placed it in the weeds at Cargill", testifying instead that he merely "disposed of it" by throwing it out the window of the locomotive before returning to the Roundhouse.²

Carrier dismissed Claimant on October 16, 2000, citing the above three General Operating Rules as the basis for its action. In due course, the instant time claim was presented, and as the dispute could not be resolved on the property, it was submitted to the Board for disposition.

¹ Claimant told the Trainmaster that this particular radio had been reported "bad-order" on several prior occasions, but had never been repaired. There is no corroborating evidence to that effect in the record before the Board.

² The Foreman of Job 827 later testified that he heard Claimant tell Trainmaster Burington he had hidden the radio at Cargill intending to retrieve it and take it home for repairs.

Carrier argues that the charges were proven and the discipline assessed was warranted. Initially, Carrier points out that Claimant was well aware of the whereabouts of the missing radio, yet he allowed a lengthy (and intrusive) search and investigation to go forward without speaking up. Moreover, Carrier accuses Claimant of changing his story at the hearing, admitting to the "lesser offense" of destroying Carrier property in order to avoid a conviction of theft and inevitable dismissal. Carrier asserts that Claimant's actions demonstrated his premeditated attempt to steal the radio, noting that he was eventually able to find it in the dark with ease, even though it was hidden in tall weeds. As such, according to Carrier, his explanation that he threw it out the window of the locomotive to dispose of it was entirely implausible and self-serving. In any event, argues Carrier, Claimant was repeatedly dishonest "no matter what story one believes", and dismissal under the circumstances was therefore appropriate.

Before the Board, the Organization argues that Trainmaster Burrington "made [Claimant] a deal" in exchange for return of the radio, and now accuses Carrier of denying his managerial discretion to do so (Organization submission at page 3). The Organization asserts, therefore, that because Claimant came forward with the understanding that he "would not get fired" if he returned radio, dismissal was unduly harsh because he "admitted his wrongdoing and took action to do what was right" (Organization submission at page 4). On that basis, the Organization urges the Board to sustain the instant claim.

Upon the whole of the record, the Board is convinced that Carrier was justified in assessing severe discipline in this matter. As Carrier points out, it is a well-established arbitral principle that theft or dishonesty of any substance constitutes a serious breach of the employee/employer relationship. In this case, the record establishes manifest evidence of the latter, and strongly insinuates the former. Claimant knew the precise location of the radio the instant questioning as to its whereabouts began, yet he remained silent. Carrier then initiated an exhaustive search for the radio, which the record shows involved search of his fellow crew members' personal luggage and vehicles, and Claimant still remained silent. Finally, and only after he had been promised "immunity" from discharge, Claimant came forward and revealed the exact location of the radio. As if that were not enough, Claimant offered one explanation for his action at the time of the incident, and another even more bizarre one during the hearing. The Board need look no further to find Claimant guilty of violating General Rules 1.2.7 and 1.6 (4).

As to the issue of whether or not Claimant's indiscretion warranted permanent dismissal, the Board finds that it did not. There is no question that, Claimant willfully discarded valuable Carrier property, that is if we are to believe the story he promulgated during the hearing. At worst, and far more likely, Claimant took covert possession of the radio with express intent to remove it from the property without Carrier's knowledge or consent. In the opinion of the Board, this was tantamount to theft. Normally, dismissal would be the appropriate penalty imposed in such circumstances. Here though, Claimant

and the members of his crew were promised that "no one would get fired" by the Trainmaster. Whether the Trainmaster was blessed with the authority to make this promise is not relevant. The promise was made, yet Claimant was fired. The Carrier, in circumstances where it is able to do so, is obligated to honor promises made by its agents and officers. After the Trainmaster promised that "no one would get fired" Carrier could discipline Claimant with a suspension, but it could not fire him. Accordingly, the Board is forced to convert Claimant's discharge to a 12-month disciplinary suspension. Claimant is to be made whole for all wage losses that exceeded a 12-month suspension.

AWARD

The issue before the Board:

Was Carrier justified in dismissing Claimant Engineer D. A. Paquette in connection with the disappearance of a locomotive radio on September 14, 2000?

is answered "No". The dismissal is converted to a 12-month suspension. Claimant is to be made whole for all losses beyond a 12-month suspension.

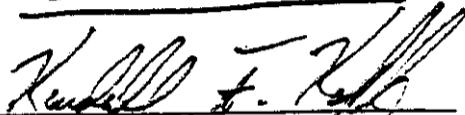
ORDER

Carrier is directed to comply with the award herein and return Claimant to service and make any payments due within 30 days to the date indicated below.



John C. Fletcher, Chairman and Neutral Member

I DISSENT



Kendall F. Koff, Carrier Member



Dale L. McPherson, Employee Member

Dated at Mount Prospect, Illinois, February 2, 2002