

AWARD NO. 227  
CASE NO. 314

**SPECIAL BOARD OF ADJUSTMENT NO. 280**

**PARTIES     )  BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES  
TO            )  
DISPUTE     )  ST. LOUIS SOUTHWESTERN RAILWAY COMPANY**

**AWARD**

**STATEMENT OF CLAIM:**

"1.     Carrier violated the effective Agreement when Mr. H. J. Krause was unjustly dismissed from service.

2.     Claimant Krause shall now be reinstated to service with all seniority rights unimpaired and paid for all lost wages and his record cleared of all charges." (55 W-D-1251)

**OPINION OF BOARD:**

As a result of charges dated January 28, 1987, investigation eventually held on February 12, 1987 and by letter dated February 20, 1987, Claimant, a Machine Operator employed by the Carrier since March 1981, was dismissed from service for violation of Rule 607 (dishonesty).

The evidence adduced during the investigation in this matter shows that an investigation conducted by the Reno County, Kansas Sheriff's Department concerning Claimant's alleged theft of fuel from the Carrier disclosed that on January 28, 1987, Claimant was found between 3 and 4 a.m. in the vicinity of the Carrier's equipment parked near Langdon, Kansas. Claimant's truck, according to the Sheriff's report, had two empty fuel cans and two full five gallon cans of diesel fuel on its bed. One of the filled cans had a small amount of diesel fuel on the outside portion of the can. Two cans on the right of way also had diesel fuel on the tops of the cans. Further, the report discloses that Claimant had an odor of diesel fuel about him.

Further evidence offered by other employees showed that the Carrier's tamper was filled on January 27, 1987 to a point between one-half to two-thirds full. The work performed that day would not have emptied the fuel tank on the tamper. On the day following the incident, however, the fuel tank gauge on the tamper indicated that the tamper's tank was empty.

Claimant denies stealing the fuel. Claimant testified that he was having problems with his vehicle and parked his truck to permit it to cool off. Claimant also testified that he was at the crossing at that time and was walking around on the tracks because he noticed two fuel cans along the right of way. Claimant testified that the Deputy Sheriff then drove up. According to Claimant, the filled fuel cans in the truck were his. Claimant testified that he carries extra fuel because only one of the fuel tanks on his truck works. Claimant explains the smell of fuel as a result of recently changing his filter and purchasing fuel.

Claimant was arrested and charged with misdemeanor theft. However, Claimant was subsequently acquitted of the charges.

We find that substantial evidence in the record supports the Carrier's conclusion that Claimant took the fuel in violation of Rule 607 which prohibits dishonesty. We are quite cognizant that much of the Carrier's case was presented from the Sheriff's report, a hearsay document. However, close examination of this record shows that Claimant does not deny the basic substance of the report and indeed, he testified consistent with the basic material assertions contained in the report. Specifically, Claimant admitted that he was in the vicinity of the Carrier's equipment in the middle of the night at a time when he was not authorized to be on Carrier property and was found near the equipment in question with full fuel cans on the back of his vehicle and further had the odor of diesel fuel about him. Because Claimant has agreed with those basic underlying facts, this is not a situation where all of the evidence against Claimant came from a hearsay document or a statement which

could not be cross examined thereby leading to a conclusion that Claimant was deprived of a fair hearing. See PLB 3558, Award No. 60. Further, other independent evidence was presented through testimony of witnesses that was subjected to cross examination. Specifically, the employees testified that the tamper was filled with fuel on the previous day and the amount of fuel used did not correspond to the empty level that was found after Claimant was arrested.

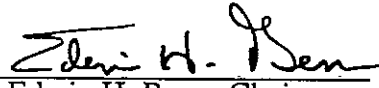
The standard of review is the ascertainment of substantial evidence in the record. We do not review the evidence on a *de novo* basis. Considering the facts adduced in this record, under that standard, the Carrier could come to the conclusion that Claimant appropriated the fuel and hence engaged in dishonest conduct. The fact that Claimant was acquitted in the criminal proceeding does not change the result since that kind of proceeding uses a much more rigorous "beyond a reasonable doubt" standard, whereas our limited review capacity is confined to the determination of the existence of substantial evidence in the record. See Third Division Award 26780 ("The standard of proof in criminal proceedings and proceedings before this Board are substantially different.").


The numeric calculations relied upon by the Organization concerning the lack of correspondence between the amount of fuel left in the tamper and the amount of fuel found on Claimant's truck and near Claimant also does not change the result. It is not necessary for the Carrier to demonstrate such a precise correlation as argued by the Organization. The fact remains that the tamper's fuel level was found on January 28, 1987 to be substantially below the level it should have been as the result of the work performed on January 27, 1987 and that fact is but one element to be considered with the other evidence.

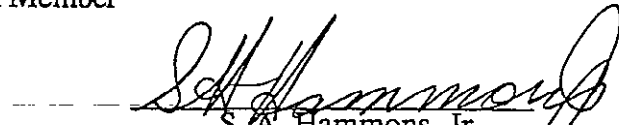
Finally, in light of the conduct involved in this matter, we cannot say that dismissal was arbitrary or capricious.

**AWARD:**

Claim denied.

  
Edwin H. Benn, Chairman  
and Neutral Member

  
R. O. Naylor  
Carrier Member

  
S. A. Hammons, Jr.  
Organization Member

Houston, Texas  
June 30, 1988