

SPECIAL BOARD OF ADJUSTMENT NO. 924

Award No. 100
Docket No. 114

PARTIES: Brotherhood of Maintenance of Way Employees
TO :
DISPUTE: Chicago and North Western Transportation Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of R.R. Deerberg for alleged theft of Carrier property was without just and sufficient cause and on the basis of unproven charges. [Organization File 4SW-1082D; Carrier File 81-86-73]
- (2) The appeal presented by the General Chairman on February 7, 1986, to Assistant Vice President and Division Manager G.F. Maybee is allowable as presented because said claim was not disallowed by Mr. Maybee in accordance with Rule 21.
- (3) Because of (1) and/or (2) above, R.R. Deerberg shall be reinstated with seniority and all other rights unimpaired and compensated for all lost wages suffered."

FINDINGS:

This Board, upon the whole record and all the evidence, finds and holds that the employees and the Carrier involved are respectively employees and Carrier within the meaning of the Railway Labor Act as amended and that the Board has jurisdiction over the dispute herein.

On December 13, 1985, two Carrier investigators contacted Claimant about allegations that Claimant had cut wood for personal use during Carrier time and with Carrier tools, and that Claimant had Carrier-owned items at his residence. Claimant agreed to let the investigators search his residence; the investigators found Carrier-owned equipment during their search. Claimant subsequently was directed to attend a formal investigation of the charge:

Your responsibility for theft of Company property which was discovered at your residence on December 13, 1985.

The investigation was held as scheduled, and a copy of the transcript has been made a part of the record. We find that the investigation

was conducted in a fair and impartial manner.

The Organization contends that under Rule 21 of the controlling agreement, Carrier must, within 60 days of the date that a claim is filed, notify the person (either the employee or the employee's representative) who filed the claim of the disallowance of the claim; the rule specifies that if no such notice is given, then the claim shall be allowed. The Organization asserts that Carrier failed to notify the General Chairman, who filed the instant claim, within the time limit that the claim was disallowed. Moreover, Carrier's duty under Rule 21 is not fulfilled by sending notice to the wrong office. The Organization therefore contends that if this Board determines that Claimant is innocent of the charge, Carrier's liability extends until Claimant is reinstated; if this Board determines that Claimant is guilty, then Carrier's liability terminates on the date that the late denial was filed.

The Organization further argues that Claimant is not guilty of theft. Carrier did not contradict Claimant's explanation of the presence of Carrier equipment at his residence; although Claimant's testimony was self-serving, his credibility was not impeached. Moreover, Claimant's demeanor and willingness to cooperate with the Carrier investigators support Claimant's innocence. The Organization argues that Carrier failed to show any intent to steal, and offered only an anonymous letter as evidence of the alleged theft. The Organization asserts that the anonymous letter lacks credibility and should not be admissible because it is hearsay. The Organization also argues that the record does not support Claimant's dismissal. Claimant has a long and distinguished service record; dismissal in

this case is inconsistent with principle of remedial, progressive discipline. The Organization therefore asserts that the claim should be sustained.

Carrier contends that record establishes that Claimant is guilty of the charge. Claimant acknowledged that he had Carrier property at his home. Moreover, there is no indication that Claimant made this equipment available to his own crew, and Claimant had no authority to keep this equipment away from other employees. Carrier asserts that this Board repeatedly has held that such conducts warrants dismissal. Carrier therefore contends that Claimant's dismissal should be upheld.

Carrier also argues that it satisfied Rule 21's time limit by sending notice of disallowance of this claim to the vice chairman; the notice constitutes notice to Claimant's representative, the Organization. Carrier contends that even if it violated the time limit, such a violation does not require that the claim be sustained in its entirety. Carrier asserts that its liability should be limited to payment only for the time period until Carrier sent a letter to the General Chairman; the portion of the claim relating to reinstatement and other time lost should be handled on the merits. Carrier therefore contends that the claim should either be denied in its entirety or sustained only to the extent of awarding pay for time lost until May 22, 1986.

This Board has reviewed the evidence and testimony in this case, and we find, based on the procedural defects pointed out by the Organization, that the claim must be sustained in part.

Rule 21 is clear. It states, in part:

. . . Should any such claim or grievance be disallowed, the Company shall, within 60 days from the date same as filed, notify whoever filed the claim or grievance (the employee or his

representative), in writing, of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be a precedent or waiver of the content of the contentions of the Company as to other similar claims or grievances.

The original claim in this case was filed on February 7, 1986, by General Chairman S. W. Waldeier, objecting to the December 27, 1985, dismissal of the Claimant. No response to that claim was served on Waldeier, the Claimant, or the proper representative. Only after a follow-up letter by Waldeier on May 16, 1986, did the Carrier produce a copy of a March 24, 1986, letter to one L. R. Fenhaus, the vice chairman who was located in Wakonda, South Dakota. The Carrier admitted that the letter was addressed and mailed in error to Fenhaus, but contended that the Carrier was not obligated to reinstate the Claimant for that reason alone.

It is clear that the Carrier has not complied with the requirements of Rule 21. However, the Carrier did, within 60 days, respond to the claim to a member of the Organization, which is the Claimant's representative. The Carrier is aware that it did not respond to the appropriate person within the Organization, and that error shall entitle the Claimant to back pay for the period from his discharge on December 27, 1985, until May 22, 1986, when the Carrier properly responded to Waldeier relating to the claim that he filed in February 1986.

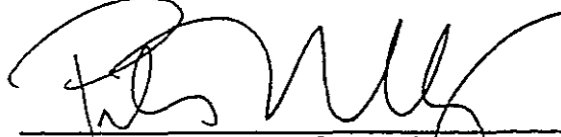
With respect to the merits of the claim, this Board has reviewed the evidence and testimony in the record; and we find that the Claimant was properly found guilty of having Company property in his possession on his own property at his residence as charged in the investigation. However, the Carrier has not proven that the Claimant intended to convert that property to his own use; and there is no

showing of an intent to steal. In our opinion, the termination of a 17-year employee cannot be based upon an anonymous letter; and there just are not sufficient facts to support the dismissal of the Claimant.


Based upon the record as a whole, this Board finds that the Claimant should be reinstated to service, but with back pay only for the period from December 27, 1985, until May 22, 1986. The balance of the time should be considered a lengthy suspension to indicate to the Claimant that he should not have kept Company property at his residence and that future behavior of that type may result in termination of his employment.

Award:

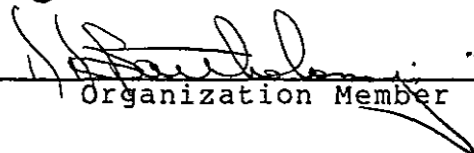
Claim sustained in part as outlined in the above decision.



Neutral Member



Carrier Member



Organization Member

Date: February 4, 1988