

Award No. 3266

Docket No. 3090

2-NP-CM-'59

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Roscoe G. Hornbeck when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 7, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.—C. I. O. (Carmen)**

AND

NORTHERN PACIFIC RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement the Carrier unjustly dismissed Carman R. L. Flansburg from the service on April 5, 1958.

2. That accordingly the Carrier be ordered to restore him to service with all rights unimpaired and compensate him for all time lost retroactive to the aforementioned date.

EMPLOYEES' STATEMENT OF FACTS: Prior to April 5, 1958, R. L. Flansburg was employed as a carman at Brainerd Shops (Brainerd, Minnesota) having established a seniority date as such as of April 28, 1945. He started his employment with the carrier May 17, 1937.

On February 21, 1958, Shop Superintendent J. E. Vanni addressed the following letter to Mr. Flansburg:

"Brainerd, Minnesota
February 21, 1958

Mr. R. L. Flansburg,
Carman,
1201 Beech Street,
Brainerd, Minnesota

Dear Sir:

"You are hereby notified, in accordance with the rules of the Agreement between the Northern Pacific Railway Company and

System Federation No. 7, Railway Employees' Department A. F. of L. Schedule, to report at the Shop Superintendent's office, at 9:30 A. M., on February 25, 1958, for investigation covering the following matter:"

"You are charged with violation of Rule 705, of the Consolidated Code of Operating Rules and General Instructions and Safety Rules and Admonitions, Form 541, at Brainerd, Minnesota, at about 4:10 P. M., on February 14, 1958 in that you removed Railway Company's property from its shops and grounds without authority."

"Your attention is called to your right to be represented at this investigation in accordance with your schedule rules."

Very truly yours

/s/ J. E. Vanni
Shop Superintendent"

Pursuant to Shop Superintendent J. E. Vanni's letter of February 21, 1958 an investigation was held on February 25, 1958 which was continued on March 21, 1958. Submitted herewith as Exhibit A is transcript of the investigation held on those dates.

On April 4, 1958, Mr. Flansburg was advised by Shop Superintendent Vanni, he was discharged from the service of the railway company, effective April 5, 1958.

This dispute has been handled with all officers of the carrier designated to handle such disputes, including the highest designated officer of the carrier, all of whom have declined to make a satisfactory settlement. The agreement effective, July 1, 1955 is controlling.

POSITION OF EMPLOYEES: The record in this dispute does not support the carriers contentions that R. L. Flansburg, hereinafter referred to as the claimant, was guilty of violating Rule 705, of the Consolidated Code of Operating Rules and General Instructions, reading as follows:

"705, unless specifically authorized, employees must not use the railroad's credit and must neither receive nor pay out money on the railroad account. Property of the railroad must not be sold nor in any way disposed of without property authority. All articles of value found on railroad property must be cared for and promptly reported."

as charged by the carrier. Therefore, within the meaning of Rule 39 of the controlling agreement in pertinent part:

"If it found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired and shall be compensated for wages loss, if any, resulting from said suspension or dismissal."

Mr. Flansburg was unjustly discharged.

It is evident the charge against the claimant, that he violated Rule 705, of the Consolidated Code of Operating Rules and General Instructions, on February 14, 1958 in that he removed railway company's property from its

shops and grounds without authority, was based on an assumption that the two lengths of quarter inch chain which he had on his person when he left Brainerd Shops after the close of his shift on that date was the property of the railway company. In support of this charge the carrier has produced only prima facie evidence. The transcript in this case shows the two lengths of chain came into the possession of the claimant legally. Two witnesses, Kenneth O. Thomas and Ralph W. Larson, testified the chain was turned over to him on February 8, 1958 by Kenneth C. Thomas and this is affirmed by affidavit signed by Donald Latterner. In this affidavit, submitted herewith as Exhibit B, he further deposes he was the owner of the chain turned over to the claimant by Kenneth O. Thomas until he gave it to the latter. The testimony of Ralph W. Larson is affirmed by his sworn statement submitted herewith as Exhibit C. The transcript also shows through the testimony of two witnesses, Walter W. Gordon and Lawrence H. Roscoe that the claimant brought the chain with him when he came to work on the morning of February 14, 1958.

The employees submit that the record does not contain proof the chain in question is the property of the Railway Company. The fact that one-quarter inch proof coil chain manufactured by the S. G. Taylor Chain Company, Hammond, Indiana, can be purchased at wholesale by business establishments and at retail by individuals was not disputed.

As the carrier failed to prove the charge against the claimant, the employees respectfully request your Honorable Board to sustain the statement of claim in its entirety in justice to him.

CARRIER'S STATEMENT OF FACTS: Prior to April 5, 1958, R. L. Flansburg was employed as a carman in the shops at Brainerd, Minnesota. Mr. Flansburg had established a seniority date as a carman as of April 28, 1945.

On February 21, 1958, Mr. Flansburg was notified to report in the office of the shop superintendent at 9:30 A. M. on February 25, 1958, for an investigation covering the following matter:

"You are charged with violation of Rule 705, of the Consolidated Code of Operating Rules and General Instructions, and Safety Rules and Admonitions, Form 541, at Brainerd, Minnesota, at about 4:10 P. M., on February 14, 1958, in that you removed Railway Company's property from its shops and grounds without authority."

Copy of Shop Superintendent J. E. Vanni's letter of February 21, 1958, to Mr. Flansburg notifying him to report at 9:30 A. M. on February 25, 1958 for investigation is submitted as carrier's Exhibit A.

The investigation was conducted on February 25, 1958 but was not concluded on that date. Submitted as carrier's Exhibit B is a transcript of that portion of the investigation conducted on February 25, 1958.

On March 12, 1958, Mr. Flansburg was notified that the investigation commenced on February 25, 1958 would be resumed at 2:00 P. M. on March 21, 1958 in the office of shop superintendent, Brainerd, Minnesota. Submitted as carrier's Exhibit C is copy of Shop Superintendent J. E. Vanni's letter of March 12, 1958 to Mr. Flansburg. Pursuant to Mr. Flansburg's request, the resumption of the investigation was postponed until March 21, 1958.

The investigation was resumed on March 21, 1958. Submitted as carrier's Exhibit D is transcript of that portion of the investigation conducted on March 21, 1958.

On April 4, 1958, Mr. Flansburg was notified that he was discharged from the service of the railway company effective April 5, 1958. Submitted as carrier's Exhibit E is copy of Shop Superintendent J. E. Vanni's letter of April 4, 1958 to Mr. Flansburg, advising him of his discharge from the railway company.

Claim has been presented in behalf of Mr. Flansburg that he was unjustly dismissed from the service of the railway company effective April 5, 1958 and that he should be reinstated into the service of the railway company with seniority rights unimpaired and compensated for all time lost, which claim has been declined.

POSITION OF CARRIER: Mr. Flansburg was charged with removing property of the railway company from its premises at Brainerd, Minnesota, without authority on February 14, 1958, in violation of Rule 705 of the Consolidated Code of Operating Rules and General Instructions and Safety Rules and Admonitions, Form 541. Mr. Flansburg was accorded an investigation and following an investigation was discharged from the service of the railway company effective April 5, 1958.

The rules of the shop crafts agreement effective July 1, 1955 were complied with in the administration of the discharge of Mr. Flansburg; the charges preferred against Mr. Flansburg were sustained by the evidence developed at the investigation; it was the judgment of the officers of the railway company that Mr. Flansburg's dereliction warranted dismissal from the service of the railway company; and the assessment of a discharge measured up to the gravity of Mr. Flansburg's dereliction. Therefore, this Division is not now in position to supersede its judgment for that of the officers of the railway company and order the reinstatement of Mr. Flansburg into the service of the railway company under any conditions.

After Mr. Flansburg was discharged effective April 5, 1958, claim was presented in his behalf for reinstatement into the service of the railway company with seniority rights unimpaired and compensation for all time lost. On May 1, 1958, Vice Chairman William L. McComas of the carmen's local committee presented the claim in behalf of R. L. Flansburg to Shop Superintendent J. E. Vanni; on May 2, 1958, Mr. Vanni wrote Mr. McComas and declined this claim; on May 11, 1958, General Chairman Mark Houston appealed the claim of Mr. Flansburg to Superintendent Car Department H. E. Brakke; and on May 16, 1958, Mr. Brakke wrote Mr. Houston declining the claim of Mr. Flansburg.

On May 19, 1958, Mr. Houston appealed the claim of Mr. Flansburg to Chief of Labor Relations G. M. Hare. Mr. Houston in his letter of May 19, 1958 to Mr. Hare stated:

"An appeal from Mr. Brakke's decision is hereby made and attached hereto are statement made by Mr. Carl O. Satre, Blacksmith, Brainerd Shops, and sworn statements made by Mr. Ralph Larson, Carman, Brainerd Shops and Mr. Donald Letterner which are submitted as further evidence that Mr. Flansburg was unjustly dismissed."

Three statements that had not theretofore been made a part of the record in this dispute accompanied Mr. Houston's letter of May 19, 1958.

On May 22, 1958, Mr. Hare replied to Mr. Houston's letter of May 19 and advised him as follows in connection with the statements accompanying his letter of May 19:

"The statements referred to in the foregoing except from your letter of May 19, and which accompanied that letter, were not introduced at the hearing on February 25 and March 21, 1958 and consequently have not been made a part of the record of the evidence adduced at this hearing. Accordingly, the statements accompanying your letter of May 19 cannot now be considered."

It is the established rule of this Board that statements which formed no part of an investigation taken subsequent to an investigation are prejudicial and are of no value in determining the guilt or innocence of an employee. In Award No. 775 of the Third Division, rendered with Referee Frank M. Swacker participating, that Division said:

"The record discloses that the appellate officers, while appeal was pending, were furnished by their subordinate with highly prejudicial statements against petitioner which charges and statements formed no part of the investigation and which petitioner and his representative never had any opportunity to hear or refute. Such procedure is grossly improper and constitutes a denial of a fair and impartial hearing such as the rules contemplate should be given."

Additional leading awards enunciating this same principle are Nos. 1491, 3322, 4079, 5748, 6056, 7851 and 7857 of the Third Division.

In passing, the carrier might say that it has in its possession a statement neutralizing the statements accompanying Mr. Houston's letter of May 19, 1958, but has not made this statement a part of the record in his docket as it was not made a part of the record of the investigation conducted on February 25 and March 21, 1958. (Carrier's Exhibits B and D, respectively.)

Submitted herewith as carrier's Exhibit F are copies of the correspondence exchanged between the employes and the carrier covering the presentation, appeals and declinations of the claim of Mr. Flansburg, except the three statements which accompanied Mr. Houston's letter of May 19, 1958.

Vice Chairman William L. McComas of the carmen's local committee in his letter of May 1, 1958 to Shop Superintendent J. E. Vanni stipulated the basis for the claim presented in behalf of Mr. Flansburg in the following language (carrier's Exhibit F):

"We of the committee and the Carmen's organization feel that the witnesses introduced at the hearing cleared him of the charges."

General Chairman Mark Houston in his letter of May 11, 1958 to Superintendent Car Department H. E. Brakke (carrier's Exhibit F) restated the same basis for the appeal taken in this case in the following language:

"The Employes maintain the evidence adduced at the hearings held February 25 and March 21, 1958 did not sustain the charge made against Mr. Flansburg * * *."

Therefore, the sole issue created in this docket is whether the evidence adduced at the investigation on February 25 and March 21, 1958 (carrier's Exhibits B and D, respectively) sustained the charges preferred against Mr. Flansburg.

The employes do not charge that the rules of the shop crafts agreement were not complied with prior to discharging Mr. Flansburg; and neither do the employes allege that if the charges preferred against Mr. Flansburg were sustained by the evidence adduced at the investigation that discharge from the service of the railway company was incompatible with the charges preferred against Mr. Flansburg. As before stated, the only issue in this docket is whether the evidence adduced at the investigation sustained the charges preferred against Mr. Flansburg.

The carrier maintains that the evidenced developed at the investigation conducted on February 25, 1958 (carrier's Exhibit B) and at the investigation conducted on March 21, 1958 (carrier's Exhibit D) amply sustained the charges preferred against Mr. Flansburg, namely, that he removed property of the railway company from its premises without authority. Consequently the discharge of Mr. Flansburg was compatible with the offense committed.

Mr. Flansburg was employed as a carman in the shops at Brainerd, Minnesota, working from 7:00 A. M. to 4:00 P. M., Monday through Friday, with Saturday and Sunday as rest days. At about 4:10 P. M. on February 14, 1958 the shop watchman apprehended Mr. Flansburg as he was leaving the premises upon completion of his day's work. The shop watchman observed a piece of chain extending from underneath Mr. Flansburg's coat as he was walking through the gateway. Mr. Flansburg had two pieces of chain—one piece of chain 13'5" in length and the other piece of chain 25'4" in length, each 1/4" thick—wrapped around his body underneath his coat. Mr. Flansburg when apprehended by the shop watchman removed the chain from his body and gave the two pieces of chain to the shop watchman. Mr. Flansburg had no authority to remove these pieces of chain from the premises of the railway company.

The investigation was commenced on February 25, 1958 (carrier's Exhibit B) and concluded on March 21, 1958 (carrier's Exhibit D).

On pages 2, 3 and 4 of the transcript of the investigation conducted on February 25, 1958 (carrier's Exhibit B), Shop Watchman Alfred Simons testified as follows:

"Q. Mr. Simons, will you give your full name, occupation and length of service?

A. Alfred Simons, Shop Watchman. I have approximately three years of service.

Q. Where were you stationed at about 4:00 P. M. on February 14th?

A. At the 18th Street gate.

Q. Were you standing or sitting in a car or where were you?

A. I was sitting in my truck.

Q. Did you observe the employes going through the gate?

A. Yes.

Q. While stationed at the gate, did you observe Mr. Flansburg?

A. Yes.

Q. How was he dressed at the time?

A. He had on a heavy green coat with a parka that zips down the back.

Q. Did he carry anything in his hands?

A. He had his lunch pail under his arm.

Q. Did you observe anything unusual about him?

A. I noticed three lengths of chain hanging beneath his coat.

Q. When you observed this chain hanging under his coat, where was Mr. Flansburg at that time?

A. Approximately in front of the 18th Street gate.

Q. Will you tell us just exactly what occurred from there on in connection with Mr. Flansburg when you saw him with the chain?

A. I saw the chain hanging beneath his coat when he walked out the gate. I got out of the truck and came around; by the time I caught up to him he was on the south side of Laurel Street.

I asked him what he had under his coat. He said, 'A small piece of tow chain.' I asked him if it was worth jeopardizing his job for; he said, 'No.'

He said no one saw him take the chain and asked if it would be all right if he took the chain back and let him go. I said no, that it was too late for that and he had all day to change his mind about taking the chain.

I then took him to the roundhouse to try to contact Sgt. Hagen. However, I was unable to contact Sgt. Hagen. I then took him back to the 18th Street gate. We got in the truck and drove around, trying to locate the Shop Watchman, Art Johnson. I couldn't locate him. I then released Mr. Flansburg at the 13th Street gate. I took the chain and I had the chain. Later, about quarter to six, I turned the chain over to Sgt. Hagen. I labeled the chain with the date and time. . . .

Q. Then what happened?

A. Then I released Mr. Flansburg. I gave the chain to Sgt. Hagen. Sgt. Hagen measured the chain.

Q. Did you remove the chain from Mr. Flansburg?

A. No.

Q. Did he remove the chain himself?

A. Yes, he removed the chain himself.

Q. This was in the roundhouse where he removed the chain? Was that the time that Mr. Flansburg told you—or asked you—if he could return the chain and forget about it?

A. No, he asked me at the 18th Street gate if he could take the chain back, not in the roundhouse."

On page 4 of the transcript of the investigation conducted on February 25, 1958, the two pieces of chain that Mr. Flansburg attempted to remove from the premises of the railway company on February 14, 1958 were introduced as evidence.

Shop Watchman Alfred Simons examined the two pieces of chain introduced at the investigation and testified as follows on page 4 of the investigation conducted on February 25, 1958:

"Q. Mr. Simons, will you examine the chain and tell us if that was the chain that Mr. Flansburg had on him?

(Mr. Simons examines the chain.)

A. That is the chain.

Q. How do you identify it?

A. I tagged it and labeled it and signature is on it and everything. It is the same chain.

Q. Are the tags on yet?

A. Yes.

Q. You are certain that this is the chain?

A. I am positive that this is the same chain."

On pages 4 and 5 of the transcript of the investigation conducted on February 25, 1958, Sgt. Melvin Hagen testified as follows in connection with the chain that Mr. Flansburg had attempted to remove from the premises on February 14, 1958:

"Q. Mr. Simons has identified the chain that Mr. Flansburg had on him at the time he was detained at the 18th Street gate, February 14. When did Mr. Simons deliver you the chain?

A. February 14.

Q. And what did you do with them?

A. I took them up to my locker.

Q. You have had the chain ever since then?

A. Yes.

Q. In your mind, there is no question that this is the same chain?

A. No, he labeled the chains."

On page 5 of the transcript of the investigation conducted on February 25, 1958, District Storekeeper W. E. Smith examined the chain that Mr. Flansburg had attempted to remove from the premises of the railway company on February 14, 1958, and after this examination concluded that it was similar to the chain handled by the store department. Mr. Smith testified as follows on pages 5 and 6 of the transcript of the investigation conducted on February 25, 1958:

"Q. Mr. Smith, you have heard the two witnesses describe the chain. Does the Northern Pacific buy chain of this type?

A. We do.

Q. Will you examine the chain, Mr. Smith?

(Mr. Smith examines the chain.)

Would you say that this is similar to what the Store is regularly handling?

A. It is.

Q. Has this chain got a code number by which it is ordered?

A. It has.

Q. What company sells this chain to you?

A. This particular lot of chain was purchased from Farwell, Ozman, Kirk Company, I am quite sure.

Q. Does the Store Department deliver chains on orders to the Car Department?

A. We do.

Q. Is this chain kept regularly in stock in the Store?

A. We do keep it in stock.

Q. Do we have chain of this particular type in stock now?

A. We have.

Q. After having examined these chains, is it your opinion that this could be a part of the lot of chain purchased for the Northern Pacific to be used in the car shop?

A. It is my opinion that it is a similar chain."

Mr. R. L. Flansburg also examined the chain introduced at the investigation conducted on February 25, 1958. Following an examination of this chain, Mr. Flansburg testified that it appeared to be the same chain that he attempted to remove from the premises of the railway company on February 14, 1958. On page 17 of the transcript of the investigation conducted on February 25, 1958, Mr. Flansburg testified:

“Q. Mr. Flansburg, will you go up to Mr. Vanni’s desk and observe the chain he has in the box?

A. It looks like the same chain I had. I had two pieces of chain. I never measured them.

Q. Will you remove the chain to see if there are two pieces; in fact, I have never seen two pieces.

A. (Mr. Flansburg looks at chain.) It looks like the two pieces of chain.”

A brief summary of the evidence and testimony developed at the investigation conducted on February 25, 1958 was that Mr. Flansburg attempted to remove two pieces of chain from the premises of the railway company on February 14, 1958; that he was apprehended by Shop Watchman Simons; that Mr. Flansburg gave the two pieces of chain to Mr. Simons; that the two pieces of chain were introduced at the investigation and identified as the pieces of chain that Mr. Flansburg attempted to remove from the premises; and that District Storekeeper Smith testified that the chain which Mr. Flansburg attempted to remove from the premises was similar to chain carried in stock by the railway company.

At the investigation conducted on February 25, 1958 (carrier’s Exhibit B) three witnesses, namely, Carmen Walter Gordon, Lourence Roscoe and Elmer Reichert, testified in behalf of Mr. Flansburg. Mr. Gordon testified that at about 6:50 A. M. on February 14, 1958, while accompanying Mr. Flansburg to work, he heard “a rattle that sounded like a chain” underneath Mr. Flansburg’s coat (page 14, carrier’s Exhibit B); Mr. Roscoe testified that as he was entering the shops on the morning of February 14, 1958 he heard “something rattle” underneath Mr. Flansburg’s coat (page 16, carrier’s Exhibit B); and Mr. Reichert testified that Mr. Flansburg left a chain in one of the lockers in the welding room the morning of February 15, 1958 (page 16, carrier’s Exhibit B). Mr. Flansburg was not charged with having removed chain from the premises of the railway company on some date prior to February 14, 1958 and then returning the chain to the premises on February 14, 1958, but was charged with removing the chain from the premises on February 14, 1958.

During the course of the investigation conducted on February 25, 1958, Mr. Flansburg, through his representative and witnesses, alleged that on February 8, 1958, Donald Letterner of Letterner Brothers in the presence of Mr. Flansburg gave Kenneth Thomas, a general contractor, two pieces of chain to be used in clearing land; that Mr. Thomas in turn gave these two pieces of chain to Mr. Flansburg for the purpose of having the two chains welded together and a hook and a ring attached to the ends of the chain.

Mr. Flansburg, through his representative, also introduced two pieces of chain taken from chain alleged to be carried in stock by Letterner Brothers, as evidence to show that the chain found on Mr. Flansburg on February 14, 1958 was identical to the chain carried in stock by Letterner Brothers. On

page 11 of the transcript of the investigation conducted on February 25, 1958, Kenneth Thomas, upon being questioned by Mr. Flansburg's representative, G. C. Gamst, testified as follows:

"Q. Can you produce any evidence showing that you have access to such chain or that Mr. Letterner has in his possession similar chain?

A. Yes, I can.

Q. Will you produce such evidence?

A. I hold here a receipt made out to Letterner Brothers—one of the brothers being Donald Letterner—showing purchase of that chain. He has more of that chain, by the way, at his place of business, and I brought samples with me cut from it."

Mr. Gamst then addressed the following statement to Shop Superintendent J. E. Vanni, which appears on page 12 of the transcript of the investigation conducted on February 25, 1958:

"Q. Mr. Vanni, we wish to produce two pieces of chain here as evidence of the chain that Mr. Thomas has had in his possession at the time that he gave the chain to Mr. Flansburg is identical chain that we have here as sample chain."

Prior to closing the investigation conducted on February 25, 1958, Mr. Flansburg, through his representative, requested an opportunity to have an analysis made of the chain carried in stock by the railway company and of the chain that Mr. Flansburg attempted to remove from the premises on February 14, 1958. The shop superintendent likewise expressed a desire to have an analysis made of the several sections of chain referred to during the course of the investigation. On page 24 of the transcript of the investigation conducted on February 25, 1958, Mr. Flansburg's representative, G. C. Gamst, addressed the following statement to Shop Superintendent J. E. Vanni:

"Mr. Vanni, I would like before we close the investigation, I would like to get a piece of this chain that you have here and a piece of the company chain that you have in stock, so that we can have it analyzed."

Shop Superintendent J. E. Vanni on this same page also addressed the following statement to Messrs. Flansburg and Thomas:

"If you will give Mr. Keppers a section of that chain so that he can have it analyzed, and Mr. Keppers will also have some company chain analyzed, the company will do likewise."

The investigation conducted on February 25, 1958 was adjourned with the understanding that both parties would have an analysis made of the several pieces of chain introduced during the course of that investigation.

The carrier proposed to resume the investigation at 2:00 P. M. on March 20, 1958 (carrier's Exhibit C), but pursuant to Mr. Flansburg's request and in order to give him an opportunity to have his representative available, the resumption of the investigation was postponed until 2:00 P. M. on March 21, 1958.

The investigation was resumed and concluded on March 21, 1958. Transcript of this investigation has been submitted as carrier's Exhibit D.

On pages 3 and 4 of the transcript of the investigation conducted on March 21, 1958, the pieces of chain furnished to the employes and the carrier, respectively, during the course of the investigation conducted on February 25, 1958 were identified as follows:

Sections of Chain Furnished Representative G. C. Gamst:

Seal No. L-310773—Sample of chain carried in stock by Railway Company.

Seal No. L-310770—Sample of chain found on R. L. Flansburg on February 14, 1958.

Seal No. L-310769—Sample of chain alleged to have been carried in stock by Letterner Brothers.

Sections of Chain Furnished Special Agent L. M. Keppers:

Seal No. L-310772—Sample of chain carried in stock by Railway Company.

Seal No. L-310771—Sample of chain found on R. L. Flansburg on February 14, 1958.

Seal No. L-310768—Sample of chain alleged to have been carried in stock by Letterner Brothers.

The employes had submitted the three sections of chain to the Twin City Testing and Engineering Laboratory, Inc. On March 7, 1958, representative G. C. Gamst addressed a letter to Shop Superintendent J. E. Vanni, together with the report of the Twin City Testing and Engineering Laboratory, Inc. Mr. Gamst's letter of March 7, 1958, together with report of the Twin City Testing and Engineering Laboratory, Inc., appear on pages 4, 5, and 6 of the transcript of the investigation conducted on March 21, 1958.

Neither Representative G. C. Gamst nor R. L. Flansburg had any comment or statement to make in connection with the test conducted by the Twin City Testing and Engineering Laboratory, Inc. See pages 6 and 7 of the transcript of the investigation conducted on March 21, 1958.

Assistant General Mechanical Superintendent W. R. Shannon prior to March 21, 1958 had examined Mr. Gamst's letter of March 7, 1958 and the report of the Twin City Testing and Engineering Laboratory, Inc. Mr. Shannon testified that he had examined Mr. Gamst's letter of March 7, 1958 and the report of the Twin City Testing and Engineering Laboratory, Inc., and that he had arrived at certain conclusions in connection with the tests made by this firm. Mr. Shannon testified as follows on page 8 of the transcript of the investigation conducted on March 21, 1958:

"Mr. Vanni: What is your opinion with respect to the test submitted by Mr. Gamst with his letter of March 7, 1958, bearing in mind in particular that the purpose of this test was to establish the relationship of the three pieces of chain hereinabove described?

Mr. Shannon: Well, the breaking strength for AAR specification chain M 301 provides that it would have a minimum breakage strength of 3400 lbs. for $\frac{1}{4}$ " chain. These tests by the Twin City Testing and Engineering Laboratories indicate that all three pieces of chain would comply with that portion of the specification. Further, this report would indicate that this chain is composed of the same material and the same cross section. There is only a difference of 250 lbs., or $4\frac{1}{4}\%$, between the high and the low readings on this breaking load. This report would indicate, in other words, that these three samples of chain are identical."

Mr. Shannon expressed the opinion that based on the tests conducted by the Twin City Testing & Engineering Laboratory, Inc., the section of chain carried in stock by the railway company, the chain which Mr. Flansburg attempted to remove from the premises on February 14, 1958, and the chain which Letterner Brothers purportedly carried in stock were identical.

Mr. Shannon had also been instructed by General Mechanical Superintendent J. A. Cannon to arrange for an analysis and tests of the three sections of chain that were tendered to Special Agent L. M. Keppers during the course of the investigation conducted on February 25, 1958. On page 8 of the transcript of the investigation conducted on March 21, 1958 Mr. Shannon testified:

"Mr. Vanni: Mr. Shannon, were you instructed by Mr. Cannon to arrange for an analysis and tests of the three pieces of chain that were tendered to the representatives of the Management during the proceedings on February 25, 1958, hereinafter identified?

Mr. Shannon: That is correct."

Mr. Shannon arranged for tests by the Engineer of Tests, Northern Pacific Railway Company.

Mr. Shannon then explained the results of the analysis and tests of the sections of chain tendered to Special Agent L. M. Keppers during the course of the investigation on February 25, 1958. Mr. Shannon's explanation of the results of the analysis and tests appear on pages 8, 9, 10 and 11 of the transcript of the investigation conducted on March 21, 1958. Mr. Shannon testified as follows:

"Mr. Vanni: And has an analysis and tests of the three pieces of chain been made under your direction and are you now prepared to introduce the results of those tests?

Mr. Shannon: Yes.

Mr. Vanni: Will you please explain the results of the analysis and tests?

Mr. Shannon: The three pieces of chain that were marked with seals referred to in the previous part of this investigation were taken to our laboratory at Como shop. There pieces of chain were turned over to Mr. Hanson, and in the presence of Mr. Keppers and myself, two links on each section of chain were carefully marked by an electric etcher to show the same serial numbers. Mr. L. O. Hanson is Engineer of Tests and he works directly under my jurisdiction.

After these links of chain had been carefully marked, we arranged for photographs to show any distinctive markings.

Mr. Vanni: Have you photographs of these tests on sample chains?

Mr. Shannon: That is correct. We have the contact size photographs that show very clearly the marks left on each link in the process of manufacturing, together with the seals from which we can identify each piece of chain and we also have an enlargement that shows in detail the characteristic markings of this particular brand of $\frac{1}{4}$ " chain. This is Exhibit 'A', which shows, as I mentioned before, the very distinctive markings left by the link forming machine that the Taylor Company uses, because marks are identical on each link and also on each type of chain.

Exhibit 'B' shows the seal numbers. It was not practical to show the entire length of seal because of the enlarging process, but you can cross-reference the two photographs.

Mr. Gamst: Mr. Shannon, these three chains that have been photographed—what is the purpose of the test here?

Mr. Shannon: The purpose of that is to show that the identifying marks on each chain are similar.

Mr. Gamst: You state that the identification marks on each of the three chains are the same?

Mr. Shannon: That is correct, which would then indicate that they were made by the same manufacturer.

Mr. Vanni: Mr. Shannon, have you anything further in connection with the test and the analysis of the three pieces of chain tendered to the Management on February 25?

Mr. Shannon: I have an Engineer's Test Report No. 89015 dated March 18, 1958, which makes further reference to photographs 'A' and 'B' (which were referred to as Exhibits 'A' and 'B'). We have made a complete analysis of the chemical composition of the representative links from the three pieces of chain. In addition, we have made photomicrographs of microspecimens and we have also subjected portions of each of the three chains to tension tests to determine their ultimate strength or breaking load.

As I mentioned previously, two links on each end of each chain were etched with a Martindale etcher to indicate the seal number on that particular length of chain.

The laboratory sawed a cross-sectional piece out of one link on each of the three chains and I will go into that further: Pieces of chain were sawed to produce fine particles and these were analyzed chemically to determine their chemical composition in percentage of carbon, manganese, phosphorus, sulphur and silicon. Two representative samples were taken and analyzed in order to provide a check. As a result of these chemical tests we have determined that samples from all three chains that have been referred to previously in the

investigation—that is, the pieces of chain which were removed from Mr. Flansburg and identified by seal L-310771, the sample taken from Northern Pacific store stock at Brainerd, seal L-310772, and the piece of chain introduced by Mr. Gamst, identified by seal L-310768—are all composed of the same material as indicated by almost identical chemical composition.

* * * * *

Further, sections taken from link on each of the three chains were etched and photomicrographed and these photomicrographs of the microspecimens have been enlarged one hundred times revealing the grain structure. This further substantiates our position that the material is identical in that these photomicrographs show that the material consists of fine grained structure of very low carbon steel and there is similarity in the grain structure.

The chains were further subject to dimensional measurement and tabulation of this information on page 2 of Engineer of Tests Report No. 89015 shows further that this chain is of similar construction and manufacture. There are, however, some slight variances, due to the fact that this is Proof Coil Chain—quarter-inch chain which has a working load limit of 850 pounds is subjected to a 'proof-test' of 1750 pounds, and in so doing, some of the length and width of the links are slightly distorted. I understand that is a manufacturing procedure or manufacturing test.

Finally, the laboratory personnel took link sections composed of three links from each chain and these samples were placed in our tensile testing machine in the Como laboratory and pulled in 'Test to Destruction.' Actual breaking load is as follows:

Chain taken from Mr. Flansburg, identified by seal L-310771, 5880 pounds.

Piece of chain representing Northern Pacific store stock at Brainerd, identified by seal L-310772, 5740 pounds.

Chain with seal L-310768, introduced by Mr. Thomas, 5740 pounds.

These tests indicate that the chain is well in excess of the specification minimum breaking test load and also further indicate that the chains are of similar material and cross-sectional area in order to produce breaking loads that are so close to being similar.

This is a copy of Engineer of Tests Report that will be referred to as 'Exhibit C'."

During the course of his testimony, Mr. Shannon introduced the following exhibits:

Exhibit "A"—Large photograph of the three pieces of chain.

Exhibit "B"—Small photograph of the three pieces of chain.

Exhibit "C"—Report No. 89015 submitted by the Engineer of Tests.

The essence of Mr. Shannon's testimony is that the three pieces of chain were of similar construction and manufacture and were identical. Mr. Shannon elaborated on Report No. 89015 of the engineer of tests. However, the results of that report are significant.

Report No. 89015, dated March 18, 1958, submitted by the engineer of tests and introduced as Exhibit C by Mr. Shannon during the investigation on March 21, 1958, shows the following conclusions:

Chemical composition of chain: "The chemical composition resulting from each of the three samples indicates the material in all three chains to be identical."

Dimensions of links: "The links in the three pieces of chain were free of injurious defects and had a workmanship appearance with a sound electric weld. The links in the three pieces of chain were free of paint or other coating and all links showed the same characteristic markings as shown on attached photographs."

Tests to Destruction: "All three chains broke similarly by failure of an inside end of one of the outer links."

The tests conducted by the engineer of tests show that the three sections of chain, namely, the section of chain carried in stock by the railway company, the section of chain that R. L. Flansburg attempted to remove from the premises on February 14, 1958, and the chain which Letterner Brothers purportedly carried in stock were identical.

This Board has held many times that disciplinary action must be based on evidence introduced at an investigation, but that there need not be such a preponderance of evidence in support of a charge to satisfy the requirements of a strictly legal proceeding. In Award No. 232, rendered by the Third Division with Referee Lloyd K. Garrison participating, that Division enunciated this principle in the following statement:

"We think, however, that this much may fairly be read into the rule as an implied condition, namely, that the carrier must not act arbitrarily or in bad faith, or dismiss employees at will without any evidence at all. The provision for a full hearing and for a decision thereafter necessarily implies that there must be some basis of evidence upon which such a decision can be rendered, and that this evidence will be fairly considered by the carrier. But to say that under the rule management is required to act in good faith and with some basis of evidence to go on and not arbitrarily, is quite a different matter from saying that where there is such a basis for action and the management has proceeded in good faith, the rule requires such a preponderance of evidence in support of the charge as would satisfy the requirements of a strictly legal proceeding. To read the rule in such a legalistic fashion and to insert into it such requirements of proof would be quite unjustified by the language of the rule, and would fetter the judgment of the management beyond what can have been contemplated when the rule was agreed to. The only question for our determination, therefore, is whether the management acted arbitrarily or in bad faith or without any basis of evidence to go on."

In Award No. 1294, rendered by the Third Division with Referee Herbert B. Rudolph participating, that Division again restated this principle in the following language:

"It is a well established rule of this Board that the action of carrier in dismissing an employe will be sustained unless it is arbitrary and without some basis of evidence. The rules do not require that there should be such a preponderance of evidence in support of the charge as would satisfy the requirements of a strictly legal proceeding. Cf. Award 232. However, the rules do contemplate a fair and impartial hearing where evidence in support of the charges should be adduced. Cf. Awards 135, 232, 431, 562, and 775. The rules do not specify the type of evidence that should be adduced, but that the rules require evidence of some kind to support the charge we believe to be implicit in the very rule which provides for the hearing."

Award No. 7139, rendered by the Third Division with Referee H. Raymond Cluster participating, dealt with this question in the following language:

"The evidence of Elbert and McKamey, if believed, provides substantial support for the Carrier's conclusion that the charge was sustained; and, as has been held many times, this is as far as the Board can go in looking into the evidence. It cannot resolve the conflicting statements, nor can it substitute its judgment for the judgment of the Carrier."

During the course of the investigation conducted on February 25, 1958 (carrier's Exhibit B), Mr. Flansburg attempted to explain his actions in removing the two pieces of chain from the premises on February 14, 1958. Mr. Flansburg alleged that on Saturday, February 8, 1958, Donald Letterner had given the two pieces of chain to Kenneth Thomas to be used in removing trees from certain property; that Mr. Thomas gave these two pieces of chain to Mr. Flansburg for the purpose of welding them together and placing a hook on one end and a ring on the other end; that on the morning of February 14, 1958 Mr. Flansburg concealed these two pieces of chain under his coat and brought them into Brainerd Shops. (Page 6 of the transcript of the investigation conducted on February 25, 1958, carrier's Exhibit B.)

Mr. Flansburg also testified that during the course of the day on February 14, 1958 he decided not to repair the two pieces of chain because "If I got caught I had violated the rules." (Page 7 of the transcript of the investigation conducted on February 25, 1958, carrier's Exhibit B.)

Mr. Flansburg upon being questioned by his representative G. C. Gamst, further testified as follows (page 19 of the transcript of the investigation conducted on February 25, 1958, carrier's Exhibit B):

"Q. (Mr. Gamst.) Then, as local chairman and over a long period of time and representing other employes, in your opinion during the course of the day, did you think it improper to have such work done on company property?

A. (Mr. Flansburg.) I started to think about it and decided it was improper and decided not to do it."

Mr. Flansburg also concealed the two pieces of chain under his coat upon leaving the premises of the railway company at the close of his tour of duty

on February 14, 1958. (Page 8 of the transcript of the investigation conducted on February 25, 1958, carrier's Exhibit B.)

Mr. Flansburg said he brought the two pieces of chain into the shops concealed under his coat with the specific intention of repairing it with tools of the railway company during regular working hours; that during the day on February 14, 1958 he gave some thought to his intentions; that he decided it would not be proper to repair the chain with tools of the railway company during regular hours; and that he concealed the chain under his coat and attempted to remove it from the premises upon completion of his tour of duty on February 14, 1958. This is the testimony of Mr. R. L. Flansburg, who had some fourteen years' seniority as a carman and who served in the capacity of local chairman of the Brotherhood Railway Carmen of America.

Mr. Thomas testified that Letterner Brothers carried chain in stock similar to that alleged to have been given to Mr. Flansburg; that this chain had been purchased from the A&A Saw Company and a receipt dated December 28, 1957 was introduced at the investigation showing that Letterner Brothers had purchased chain from the A&A Saw Company. (Page 12 of the transcript of the investigation conducted on February 25, 1958, carrier's Exhibit B.)

Special Agent L. M. Keppers, following an adjournment of the investigation conducted on February 25, 1958, investigated the veracity of the receipt submitted at the investigation conducted on that date and introduced in support of R. L. Flansburg. (Page 13, carrier's Exhibit D.)

Mr. Keppers first interviewed representatives of S. G. Taylor Chain Company, Hammond, Indiana. The representatives of the S. G. Taylor Chain Company identified the three samples of chain turned over to Mr. Keppers at the close of the investigation conducted on February 25, 1958 as chain manufactured by that company in its Hammond, Indiana, plant (Page 14, carrier's Exhibit D) and the representatives of S. G. Taylor Chain Company advised that it distributed its product in Minnesota through Farwell, Ozman, Kirk & Company, Marshall-Wells Company, Williams Hardware Company and General Trading Company (page 14, carrier's Exhibit D).

Special Agent Keppers next interviewed the Minnesota distributors of the chain manufactured by the S. G. Taylor Chain Company for the purpose of ascertaining whether any chain manufactured by that company had been sold to the A&A Saw Company.

The Farwell, Ozman, Kirk & Company does not sell chain manufactured by the S. G. Taylor Chain Company to retail dealers (page 15, carrier's Exhibit D); the Williams Hardware Company made no sale of chain to the A&A Saw Company (page 16, carrier's Exhibit D); the General Trading Company made no sale of chain to the A&A Saw Company (page 16, carrier's Exhibit D); and the Marshall-Wells Company had no record of the sale of chain to the A&A Saw Company (page 16, carrier's Exhibit D).

Special Agent L. M. Keppers next interviewed the A&A Saw Company for the purpose of determining whether that company had sold chain to Letterner Brothers and also for the purpose of investigating the receipt that had been introduced at the February 25, 1958 investigation. Mr. Keppers' report covering the interview with the A&A Saw Company appears on pages 16, 17, 18, and 19 of the transcript of the investigation conducted on March 21, 1958 (carrier's Exhibit D).

Significantly, Kenneth Jaeger, of the A&A Saw Company, through his attorney made the following statement concerning the receipt introduced at the February 25, 1958 investigation:

"Mr. Gill (Kenneth Jaeger's attorney) stated, as did Mr. Jaeger confirm, that unbeknown to his partners, he had made out this receipt to his brother-in-law, Ralph Flansburg, at the request of Ralph Flansburg, who had informed him that he had gotten into a little trouble." (Page 27, carrier's Exhibit D.)

Mr. Kenneth Jaeger of the A&A Saw Company also made the following statement when being interrogated by members of the Minneapolis Police Department:

"He (Ralph Flansburg) approached me for a slip, sales slip for some chain to clear a friend of his who was in some minor trouble, and I only did this once because there was relationship involved." (Page 28, carrier's Exhibit D.)

Special Agent L. M. Keppers next interviewed Donald Letterner of Letterner Brothers. The report of this interview appears on page 20 of carrier's Exhibit D, and the salient features of that interview are that:

"He (Donald Letterner) also made the statement to the effect that he had never purchased any chain from the A & A Saw Company."

The foregoing record shows that the three sections of chain tendered to Special Agent L. M. Keppers immediately prior to the close of the investigation on February 25, 1958 were manufactured by the S. G. Taylor Chain Company; that the S. G. Taylor Chain Company distributes its product through four companies in Minnesota; that none of the four companies sold chain similar to that which Mr. Flansburg attempted to remove from the premises on February 14, 1958 to the A&A Saw Company; that the A&A Saw Company had not in fact sold the chain to Letterner Brothers; and that a fictitious receipt had been issued by the A&A Saw Company to Letterner Brothers.

On page 26 of the transcript of the investigation conducted on March 21, 1958, Rule 705 of the Consolidated Code of Operating Rules and General Instructions and Safety Rules and Admonitions, Form 541, is quoted. This rule, among other things, prohibits disposing of property of the railway company without authority. While Mr. Flansburg denied removing two pieces of chain from the premises of the railway company on February 14, 1958, without authority, in violation of Rule 705, the evidence sustains these charges.

The evidence developed during the course of the investigations conducted on February 25, 1958 (carrier's Exhibit B) and on March 21, 1958 (carrier's Exhibit D) clearly sustains the charges preferred against Mr. Flansburg. This evidence and facts may be summarized as follows:

1. R. L. Flansburg was working as a carman in Brainerd Shops on February 14, 1958.
2. R. L. Flansburg was apprehended at approximately 4:10 P. M. on February 14, 1958, while leaving the premises with two pieces of chain concealed under his coat.

3. The two pieces of chain that Mr. Flansburg attempted to remove from the premises on February 14, 1958 were from outward appearances similar to chain carried in stock by the railway company.

4. The breaking test conducted by Twin City Testing & Engineering Laboratory, Inc., showed that the section of chain that Mr. Flansburg attempted to remove from the premises on February 14, 1958 and the chain carried in stock by the railway company were similar.

5. The analysis and test conducted by the engineer of tests showed that the chain that Mr. Flansburg attempted to remove from the premises on February 14, 1958 and the chain carried in stock by the railway company were identical.

6. R. L. Flansburg had no authority to remove chain from the premises of the railway company on February 14, 1958.

7. Rule 705 prohibits disposition of the property of the railway company without authority.

8. Mr. Flansburg in removing chain from the premises of the railway company on February 14, 1958, without authority, was in violation of Rule 705.

Based on these facts and evidence, the conclusion is inescapable that the two pieces of chain that Mr. Flansburg attempted to remove from the premises on February 14, 1958 were the property of the railway company.

The basis upon which the employes have presented a claim in behalf of Mr. Flansburg, namely, that the evidence adduced at the hearings did not sustain the charges preferred against Mr. Flansburg, is untenable. The undisputed fact as developed at the investigation is that Mr. Flansburg attempted to remove two pieces of chain from the premises of the railway company on February 14, 1958 in a surreptitious manner. The two pieces of chain which Mr. Flansburg attempted to remove from the premises on February 14, 1958 were introduced as evidence during the course of the investigation conducted on February 25, 1958. These two pieces of chain are similar to chain carried in stock by the railway company. Consequently, the charges preferred against Mr. Flansburg were sustained by the evidence developed at the investigations conducted on February 25, 1958, and March 21, 1958.

This Division is firmly committed to the proposition that it will not interfere with disciplinary action taken unless it can be shown that the discipline administered was unjust, unreasonable or excessive or that the rules of the agreement were not complied with in administering the discipline.

In Award No. 993, rendered by this Division with Referee I. L. Sharfman participating, this principle was enunciated in the following language:

"While it is sound doctrine that the Division should not substitute its judgment for that of the management in disciplinary matters, it is essential that employes be protected against abuse of discretion. Such abuse of discretion may be reflected in the measure of discipline applied, in relation to the offense involved, as well as in the grounds upon which discipline is based."

In Award No. 1041, rendered by this Division with Referee Herbert B. Rudolph sitting as a member thereof, this Division reiterated the principle that disciplinary action will not be disturbed unless the carrier acted arbitrarily, without just cause, or in bad faith. This Division said:

"It is well established that the action of the carrier in discipline cases will not be disturbed unless the carrier has acted arbitrarily, without just cause or in bad faith."

In Award No. 1109 of this Division, rendered with Referee Sidney St. F. Thaxter participating, this Division said:

"This Board is loathe to interfere in cases of discipline if there is any reasonable ground on which it can be justified."

In Award No. 1157, also rendered with Referee Sidney St. F. Thaxter participating, this Division again restated the general principle enunciated in Award No. 993 in the following language:

"The general rule is that the imposition of discipline is the prerogative of management and this Division will not review a decision for which there is a reasonable basis."

In Award No. 1323, rendered with Referee J. Glenn Donaldson participating, this Division restated in the following language the basic principle that has been repeatedly epitomized by this Division in its several awards involving disciplinary cases:

"Be that as it may, it has become axiomatic that it is not the function of the National Railroad Adjustment Board to substitute its judgment for that of the carrier's in disciplinary matters, unless the carrier's action be so arbitrary, capricious or fraught with bad faith as to amount to an abuse of discretion."

The record in this docket establishes the conclusion that the provisions of Rule 39 of the July 1, 1955 Shop Crafts Agreement were complied with prior to meting out the discipline to Mr. Flansburg. The discipline administered Mr. Flansburg was not tainted with bias but was rendered in good faith, compatible with Mr. Flansburg's dereliction. The discipline administered, namely, discharge from the service of the railway company, was the only measure of discipline that could be assessed an employe who removed property of the railway company from its premises without authority.

Should this Division find in spite of the evidence in this docket that Mr. Flansburg has been unjustly dismissed from the service, the compensation for wage loss is the difference between the amount Mr. Flansburg would have received had he remained in the service of the railway company and the amount earned by this employe in outside employment subsequent to his discharge. Rule 39 of the July 1, 1955 Shop Crafts Agreement by the use of the phrase "shall be compensated for wage loss, if any," recognizes that there may be varying degrees of loss in wages extending from a complete loss in wages to an absence of any loss in wages. In connection with compensating a discharged employe for alleged wage loss, see Award No. 1817 of this Division and the awards cited therein in the position of the carrier, and Awards Nos. 1605, 1638, 1676, 1821, 362, 1215, 1308, 1309 and 1310 of this Division.

Rule 39 of the July 1, 1955 Shop Crafts Agreement relating to discipline reads:

“Rule 39. An employe who has been in the service more than sixty (60) calendar days will not be disciplined or discharged without first being given a hearing by a designated officer of the Railway Company. Suspension pending a hearing which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing the employe will be apprised of the purpose for which the hearing is to be held, and shall have a reasonable opportunity to secure the presence of necessary witnesses. The employe, or his duly authorized committee, shall, if the employe is disciplined or dismissed, be furnished a copy of the transcript of the investigation. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired and shall be compensated for wage loss, if any, resulting from said suspension or dismissal. The provisions of Rule 38 shall be applicable in connection with appeals and time within which appeals shall be made in cases involving discipline or discharge, and cases not presented and appealed within the time limits specified in Rule 38 shall not be considered.”

Particular attention is directed to that provision in Rule 39 which states that if it is found that an employe has been unjustly dismissed from the service he will be reinstated with seniority rights unimpaired and compensated for wage loss, if any, resulting from said dismissal. Based on the evidence developed at the investigation, Mr. Flansburg cannot be found to have been unjustly dismissed from the service. Therefore, Mr. Flansburg is not entitled to reinstatement under the plain provisions of Rule 39.

The carrier has shown that Mr. Flansburg removed property of the railway company from its premises on February 14, 1958 without authority. The discipline administered to Mr. Flansburg measured up to this man's dereliction. Rule 39 of the shop crafts agreement effective July 1, 1955 was complied with in meting out the discipline to Mr. Flansburg. This Division in awards without number has consistently adhered to the principle that it will not interfere in disciplinary matters unless the carrier's action was arbitrary and the employe failed to secure a fair and impartial investigation. The record in this docket makes it abundantly clear that Mr. Flansburg was accorded a fair and impartial investigation; that the rules of the applicable agreement were complied with in discharging this man; that the evidence sustained the charges; and that the discipline administered was rendered in good faith and was not tainted with bias. Consequently this Division should not superimpose its judgment upon that of the management and order the reinstatement of Mr. Flansburg. The claim covered by this docket should be denied in its entirety.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Awards of this and other Divisions of this Board are definite and uniform as to the prerogative of the carrier and degree of proof required to support a finding against an employe who has been charged with an infraction of rules of his company or of a controlling agreement.

Typical of these awards is No. 2207, Referee Carter sitting with the Second Division:

"It is not the function of this Board to weigh the evidence as in an original hearing."

"If the evidence is sufficient, if believed, to sustain the carrier's findings, the carrier's action must be sustained."

It is within the province of the representative of the carrier who presides at the hearing to determine the credibility of those who testify and to weigh and evaluate their testimony. If upon so doing, it is probable that the charge is proven and the representative so finds, this Board may not disturb that finding unless it is manifestly unsupported by the evidence.

Proof beyond a reasonable doubt, as required to convict in criminal prosecutions in Courts of Law, does not apply.

It is admitted that Mr. Flansburg took two pieces of quarter inch chain, one 25 feet 4 inches long, the other 13 feet 5 inches long, from the property of the company on the evening of February 14, 1958. It is probable that he also took the chain into the property when he went to work on the morning of that day. He was apprehended as he left the company property and concealed under his coat were the chains.

The company claims that the chain removed was its property. This Mr. Flansburg denies and offers proof that the chain was owned by a Mr. Thomas, who had given it to him for the purpose of welding and putting a hook and ring on either end.

The material and determinative issue, as developed, was the ownership of the chain.

Some of the expert evidence tended to support the contention of Mr. Flansburg.

That of the company to establish that all of the chain produced at the hearing was manufactured by the same company.

It was inferable that all of the chain had come from the carrier's stock, although no issue was made as to any of it except that found in the possession of Mr. Flansburg.

In this rather uncertain state of expert evidence as to the identity of the chains, the charge had to be resolved, largely, on other developments.

Some of these, which the trier of the facts had the right to believe and which were harmful to Mr. Flansburg's theory of the matter, were the concealment of the chain, his failure when apprehended to assert his right to have its possession, as he did at the hearing; his offer, according to the statement of the officer who apprehended him, to take the chain back as no one seen him take it, if the officer would let him go. The strong inference that the chain

found on Mr. Flansburg was not purchased from the firm as claimed by him; that a receipt purporting to cover the purchase price of the disputed chain had been fabricated and that Mr. Flansburg was a party to this deception.

Upon the whole record, it does not appear that the finding and action of the carrier in discharging Mr. Flansburg was unjustified.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 24th day of June 1959.