

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30057
Docket No. MW-30343
94-3-92-3-96

The Third Division consisted of the regular members and in addition Referee Robert T. Simmelkjaer when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(CSX Transportation, Inc. (former Louisville
(and Nashville Railroad Company)

STATEMENT OF CLAIM:

"1. Dismissal of R. C. Henderson for conduct unbecoming an employee, disloyalty, theft of company equipment, unauthorized use of a company vehicle and being absent without permission."

FINDINGS:

The Third 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 waived right of appearance at hearing thereon.

Claimant, a Welder, was dismissed on June 12, 1991, following a formal Investigation held on May 21, 1991, which found him guilty of conduct unbecoming an employee, disloyalty, theft of company equipment valued at \$784.66, unauthorized use of a company vehicle and being absent without authority on May 3 and 6, 1991.

Claimant admitted he was guilty, as charged, except for the aspect dealing with the theft of company equipment. Claimant, after first denying the tool box belonged to the Carrier, subsequently testified that he had the tool box and tools at his home for "about a year and a half." Claimant's account was contradicted by the testimony of a Special Agent who testified that he tape recorded an interview with Claimant's wife at the time he confiscated the company material from Claimant's home. She stated that Claimant had the tool box and tools "...about a month, month and a half, maybe as much as two months."

In further support of the Carrier's finding, the Roadmaster testified that the last time he saw the tool box prior to seeing it at Claimant's house "...was about six weeks earlier in the tool car there at Gurthie." In addition, the testimony of a Welder Helper indicates Claimant's complicity in the theft of the tool box as follows:

"The box went on the truck last at Gurthie. So at Springfield it was the first thing to come off. We set it on the ground to finish unloading the truck, we left it outside. To honestly say that I was instructed to, not that I recall, no sir."

Given Claimant's guilty plea, the Board is persuaded to uphold the Carrier's determination by prior Awards such as Second Division Award 2787 which have held that "no appeal from a guilty plea is permitted, on the theory that no error could have been committed where the accused has, in effect, convicted himself." Claimant acknowledged that he was satisfied that the Investigation was conducted in accordance with the Agreement.

Although Claimant admitted to unauthorized use of a company vehicle and absence without permission on May 3 and 6, 1991, the crux of the Carrier's case and its imposition of the penalty of dismissal derives from the theft charge. With respect to the charge of theft, the Board finds the Carrier has provided substantial evidence that Claimant was guilty of unauthorized possession of company property.

The testimony of the Roadmaster identifying the tool box, through its color, a master lock "nobody had a key for and kinda orange lettering on the front of it, spelled Knaack" combined with the absence of Claimant's evidence of ownership reinforced Claimant's culpability. Moreover, it was more than a coincidence that a tool box with the foregoing characteristics would also contain the exact items missing from the Carrier's property. Although not discernible in the instant case, conflicts in the credibility of the witnesses remains a matter to be determined by the Hearing Officer on the property.

Numerous Awards have established that theft of company equipment is a very serious charge, one which irrevocably undermines the employer/employee relationship and barring an abuse of managerial discretion warrants dismissal from service. As noted in Third Division Award 24567, "[d]ishonesty in any form is a serious offense and theft or embezzlement has long been considered a dismissal offense." It was similarly held in Second Division Award 7570 that "the Carrier has the right to expect honest

employees and has no obligation to retain in its service those who by their own admission, are not."

It has been held that an employee's length of service cannot be the basis for mitigation of penalty unless some doubt exists as to the proof of guilt. In the instant case, Claimant's unblemished record of 18 years cannot overcome the substantial evidence adduced by the Carrier. Finally, the Board, in its appellate function, is precluded from dispensing leniency. See Second Division Award 9140.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: *Catherine Loughrin*
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 17th day of February 1994.