

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 30759  
Docket No. CL-31132  
95-3-93-3-145

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when the award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International  
( Union  
(  
(Delaware and Hudson Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the  
Brotherhood (GL-10937) that:

The following claim is hereby presented to the Company in  
behalf of Claimant K. Fletcher. (92-DH023D)

(a) Carrier violated the Clerks' Rules Agreement effective September 26, 1990, particularly Rules 28-1, 28-2, and other Rules, when on February 14, 1992 the Carrier acted in an arbitrary and capricious manner by unjustly removing Claimant [K.] Fletcher from service and subsequently notifying him by notice (Form 104) dated March 11, 1992 that he was "dismissed him from Company Service . . . "

(b) Claimant Fletcher should now be allowed eight (8) hours pay based on the pro-rata hourly rate of \$13.64 commencing February 14, 1992 and continuing for each and every workday thereonafter, on account of this violation.

(c) Claimant's regular position was General Clerk, symbol #15 location Delaware and Hudson Locomotive Shop, Binghamton, New York.

(d) That in order to terminate this claim, Claimant must be restored to active service and the Carrier must expunge any and all references to said discipline being shown on the Claimant's record.

(e) This claim has been presented in accordance with Rules 28-1 and 28-2, and should be allowed."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 was employed by the Carrier as a Stores Clerk at its Binghamton, New York shops. He had 23 1/2 years of seniority at the time of his dismissal. He had no prior discipline. Claimant's responsibilities included sale of scrap belonging to the Carrier and maintenance of a petty cash fund.

The Carrier ordered Claimant to attend an Investigation held on February 24, 1992, to determine the facts concerning his "... alleged theft of Company funds received from the sale of brass sold to a local scrap dealer, which occurred between the dates of February 6, and February 14, 1992."

At the Hearing, the Carrier presented testimony and evidence that on February 6, 1992, Claimant took 1,500 pounds of scrap brass belonging to the Carrier to a local scrap dealer and sold it for \$630.40. At his request, he received a check made out in his name, which he cashed.

Mr. L. V. Vagliardo, the Shop's acting manager, testified that on February 6, he noticed the scrap brass crate empty and asked Claimant what had happened to it, to which Claimant replied that he had taken the brass to the scrap dealer and that a check made out to the Carrier had been sent to Albany (the Carrier's headquarters). Mr. Vagliardo testified that he later advised Mr. H. Buchanan, Chief Mechanical Officer, that the brass had been sold and asked that the funds be credited to the shop account, to which Mr. Buchanan agreed.

When no check was received by February 10, Mr. Buchanan attempted to find out what had happened. He testified that he approached Claimant, who responded that the brass had been sold to Weisman, a scrap dealer, on February 6, that no receipt had been obtained, and that the check had been sent to Albany. The Carrier took a statement from Claimant on February 14 in which he confirmed that he had told the scrap dealer to send the check for the proceeds of the sale to Albany.

Mr. Buchanan testified that he inquired of Claimant how scrap sales had been handled, to which Claimant responded that he had sold the scrap, obtained cash, and placed the proceeds in a petty cash fund for use by the shop to buy small parts, but that practice had ended when CP Rail took over the Carrier in August 1990. He produced a log documenting scrap transactions, but it ended in August 1990.

Mr. A. Marquis, Manager Mechanical Administration, testified that the procedure for the disposal of scrap was that checks were to be made out to the Carrier and that Claimant had been advised of the procedure.

Mr. Buchanan testified that he determined to go with Claimant to Weisman to get the matter straightened out, but Claimant informed him on the way there that the February 6 transaction had been with Greenblott. The two went to Greenblott. Mr. Buchanan testified that, upon arrival, Claimant ran ahead of him and talked with one of the Greenblott employees. Claimant asked the employee if the check had been sent to Albany. It appeared to Mr. Buchanan that the employee did not know what Claimant was talking about and, although Greenblott searched its records while they were there, no such check was found. Later that day, Greenblott found a receipt for purchase of the brass and a check stub indicating payment to Claimant. It notified the Carrier.

Carrier Police Officer Theophila arrested Claimant on February 14 and charged him with larceny under New York State law. He was also suspended from service at that time, pending investigation, was required to leave the premises, and his belongings confiscated. According to the testimony of Carrier Police Officer Theophila no cash proceeds were found in Claimant's effects or office. Mr. Buchanan and Officer Theophila both testified that they interviewed Claimant at that time and that he admitted that he had the money from the sale of the scrap and that it was in his personal account.

The Carrier presented an affidavit from Mr. Greenblott, confirming the transaction as described, above, and that, when Claimant came up to him on February 14, he told Greenblott to "follow my lead."

Claimant testified that he had maintained a petty cash fund for the Carrier for a number of years. Because of the Carrier's ongoing financial difficulties, banks would not cash the Carrier's checks, so it was the practice in the shop to take the shop's scrap brass and batteries to the dealer, sell them, have a check made out to Claimant, have him cash the check and place the proceeds in the petty cash account.

Claimant testified that he had sold the brass on February 6 at the instruction of Mr. Vagliardo and that he had, consistent with the practice, placed the proceeds of the transaction in the petty cash fund. He denied placing the proceeds in his personal checking account. He conceded that, when confronted, he had offered to write a check to return the monies, but stated that he had done so only because the cash proceeds of the February 6 transaction were in his office and had been confiscated with his belongings.

Claimant testified, further, that he was told by Mr. Larry Hines on February 13 that he should take batteries to the scrap dealer for sale and have a check made out to the Carrier and delivered to Mr. Vagliardo for deposit into the proper account. He stated that he realized, as a result of that instruction, that there was a change in the policy; and he determined that he should return the cash proceeds of the February 6 transaction to the dealer and get a check made out to the Carrier. He denied knowledge of any change from the pre-CP practice prior to that time.

Claimant testified that on February 14, as he was assembling the batteries to take them to the dealer, Mr. H. Buchanan, the Carrier's Chief Mechanical Officer, came to his office and asked how Claimant handled the scrap and where the proceeds were. Claimant conceded that he told Mr. Buchanan that a check was being sent to Albany because that is what he intended to do. He testified that he was intimidated by Mr. Buchanan, implying that he was afraid to tell him the actual status of the proceeds.

On February 18, Claimant brought the scrap dealer \$630.40 in cash and had the dealer prepare a check in like amount, payable to the Carrier. Claimant mailed the check to the Carrier.

Following the Hearing, Claimant was dismissed from service for theft of brass belonging to the Carrier and selling the brass for personal gain. The penalty was assessed by Mr. T. F. Waver, the Carrier's General Manager for Operations and Maintenance.

The Organization protested the Carrier's action. At the direction of the Carrier, it was required to submit the claim to Mr. H. A. Notro, Assistant Manager, CATS, an officer subordinate to Mr. Waver. The Carrier denied the claim; and the Organization was required to appeal the claim to Mr. Waver who - not surprisingly - denied the request to overturn his prior decision. The dispute was brought to this Board.

The Carrier argues that Claimant's guilt of theft is established by substantial evidence. It urges that the existence of conflicting evidence from Claimant does not diminish the substantiality of the evidence. The Carrier argues that Claimant's blatant deception and conversion of Carrier property constitutes clear grounds for dismissal.

The Carrier argues that the seriousness of Claimant's offense made him a detriment to the Carrier and warranted suspending him from service, pending Hearing. It denies that its suspension constituted prejudgment.

The Carrier argues that its conduct of the Hearing was proper and reasonable in utilizing an affidavit, in lieu of live testimony, from Mr. Greenblott, a non-employee witness, that it was not required to adjourn the Hearing because of the complexity of the charges or the pendency of the related criminal charges.

The Carrier denies that its use of Mr. Waver as both assessing and reviewing official violated the Agreement. It asserts that Mr. Waver is the Carrier's highest designated Carrier Officer for purposes of Rule 28-2 and the Act at Level II of the Rule and that submission to Mr. Notro at Level I ensured fair and reasonable review.

The Carrier denies that the dismissal notice must be identical to the original charge. It asserts that Claimant's deception was ongoing during the period covered by the charge and that the charge was sufficiently specific. The Carrier denies that the investigation it undertook on February 14 was an Investigation as contemplated by Rule 28-1, but was, instead, a proper inquiry by management to ascertain the status of scrap disposal. It denies withholding the names of witnesses and asserts, in any event, that the Organization failed to raise that issue at Step I of the negotiated procedure.

The Carrier urges that the claim be denied.

The Organization argues that the Carrier's action must be overturned because the assessing officer, Mr. Waver, served also as the reviewing officer on the appeal and the Carrier required the initial claim to be directed to a subordinate of Mr. Waiver, thereby violating Claimant's right to independent review and

decision at each step of the appeal process. It asserts that the Carrier's procedure violated Claimant's right to due process and contravened established Board precedent.

The Organization also complains that the charge was not specific, failed to give a date for the alleged offense, and did not state the Rule, policy or instruction alleged to have been violated. It also protests that the dismissal notice was amended from the original charge. The Organization argues that the Carrier violated Claimant's due process rights because it investigated him twice, first on February 14, without giving him advance notice of the charge or notice of his right to union representation and that it further violated Claimant's right to a fair hearing because the Carrier failed to list all of its witnesses in the Notice of Investigation in violation of Rule 28-1 (d) (v) and, at the Hearing, refused to grant a further postponement. It also protests the Carrier's use of hearsay evidence, since it denied Claimant the right to cross examine the maker of the statement.

The Organization argues, in addition, that the Carrier improperly held Claimant out of service, pending Hearing, in light of his long and unblemished record and the lack of proven wrongful intent. It contends that the Carrier's action constitutes prejudgment of Claimant's guilt.

The Organization urges, therefore, that the claim be sustained.

The record clearly establishes Claimant's guilt of selling Carrier property and converting the proceeds to his own use. Indeed, his conduct included several attempts to cover up his activities and mislead Carrier officials as to what had happened. We conclude that Claimant's explanations for his actions are implausible and unconvincing. The Board concludes that the Carrier met its burden of proof.

The Board also concludes that the penalty of dismissal was appropriate to the seriousness of the type of offense he committed and would not be arbitrary or excessive. Claimant's conduct represents a fundamental breach of his responsibilities as an employee and effectively destroyed the trust necessary to the employment relationship.

Of the Organization's various arguments that Claimant was deprived of due process and fair Hearing, the Board finds all but one unpersuasive. We conclude that the Carrier's February 14 inquiry and that the use of its results in the Investigation was proper, that the charges against Claimant were sufficiently clear and that citation to specific Rules, policies or instructions was not required in light of the nature of the offense charged, that use of the affidavit of the outside witness did not violate

Claimant's due process and that, in any event, that witness testimony was not required to establish Claimant's guilt.

Of the Carrier's argument that Claimant was improperly held out of service pending the Investigation, the Board is not persuaded. Rule 28-1 allows employees to be held out of service, pending Investigation only when retention would be "... detrimental to himself, another person or the Company." Claimant stole from the Carrier in the very area with which he had been entrusted. The scope of his wrongdoing was not known when he was suspended. Claimant's course of conduct, which included attempts to involve outside vendors and to cover up his actions, gave the Carrier a reasonable basis to believe that his retention would be detrimental to it. The Board agrees.

However, it is basic to the due process and usual manner of handling claims on the property which is required under the Act that claimants who have been the subject of discipline receive independent review of their claims. That right is violated when the same person assesses the discipline and then reviews his decision on appeal. Numerous Awards of this Board have so held. See, e.g., Third Division Awards 28567, 25361, 24547, 24476, 23427, 17314, 14031, 9832, 8431 and 7021. Award 24476 is particularly instructive of the Board's concern:

"The independent review and decision at each successive appellate level, whether it is two or three step appeals process, is plainly lacking when the same person judges the discipline he initially assessed. It is a contradiction in terms, which nullifies the hierarchal review process."

Of the Carrier's argument that Rule 28-2 required Mr. Waver's participation as the reviewing officer because he is the highest designated official, the Board is not persuaded. The Carrier could have had the assessment of discipline made by another officer or, at the least, having used Mr. Waver to assess the discipline determined, could have recused him from the appeal process. It was the Carrier's obligation to make determinations concerning assignments of decisional and appellate responsibilities so as to avoid violating Claimant's right of independent review. It clearly failed to do so and thereby violated Claimant's rights in that regard.

The dispute places the process and the parties in a difficult position where neither Claimant's guilt nor the Carrier's violations of Claimant's due process may be ignored. We conclude

that the Carrier's action is fatally flawed and cannot stand; but we are also persuaded, in light of the serious nature of Claimant's offense, that it would be unfair to make the Carrier responsible for the financial consequences of Claimant's termination. The Award reflects the Board's conclusions on this difficult issue.

The Claim is sustained in part and denied in part. Claimant is guilty of the offense with which he was charged, but the Carrier violated Claimant's Agreement due process rights. Claimant's dismissal shall be rescinded and he shall be reinstated to such service as his seniority and qualifications entitle him with all rights unimpaired; however, the period Claimant was held out of service shall be treated as a disciplinary suspension and he shall not be compensated for wages or benefits lost. Claimant's records shall be amended to reflect the reduction.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of February 1995.