

Referee Irwin M. Lieberman

PARTIES TO DISPUTE: American Railway Supervisors Association  
The Long Island Rail Road Company

STATEMENT OF CLAIM: It is the Claim and request of the Petitioning Organization that:

1. Respondent Carrier violated Rule 6 of the Agreement when on October 3, 1974, following a Trial, Carrier Assessed a discipline of dismissal against Mr. Charles Vogel, Assistant Foreman at Richmond Hill.
2. Carrier shall be required to reinstate Mr. Charles Vogel to his position of Assistant Foreman with all his Health and Welfare Benefits, Seniority and Vacation Rights unimpaired, Clear his Record and pay Mr. Vogel the Assistant Foreman's Salary denied to him as a result of Carrier's violative action.

OPINION OF BOARD: Claimant herein, an assistant foreman, was discharged following an investigation in which he was found guilty of:

"Conduct unbecoming an employe in that on September 1, 1974, you were arrested by the Long Island Railroad Police on the charges of possession of stolen property and conspiracy 4th degree after it having been observed that company-owned gasoline was put into your privately owned automobile with your consent, and without company authorization."

Petitioner's position essentially is that the Carrier failed to prove the charges against Claimant; additionally it is asserted that the charges were not proper and that Carrier prejudged the case by bulletining the position prior to the conclusion of the case.

It is noted that the Organization bases its assertion that the charge was improper on the grounds that the charge in the criminal case was different than that in Carrier's charge and disciplinary handling. It is evident that the Carrier may bring whatever charges it wishes and those charges have no required consonance with any criminal action involving the same incident; therefore this procedural allegation is without merit.

Additionally, the charge of prejudging based on the bulletining of the position as a temporary vacancy is without merit. The Carrier knew that Claimant was held out of service and would be until the disciplinary proceeding ended; it was entirely consistent for the Carrier under that circumstance to bulletin the position as a temporary vacancy and such action cannot be construed to constitute prejudgement.

The principle problem in this dispute is whether or not Carrier perfected its case, met its burden of proof, with respect to Claimant. In substance, Claimant denied that he had authorized the placing of the gas in his truck or had any foreknowledge it would be done. One Police Officer testified that he witnessed the gas being put in the truck by Claimant's subordinate (but not in Claimant's presence); another Police Officer testified that Claimant had admitted to him on the scene of the incident that he was aware that his subordinate was going to put some of the gas in his truck. This latter admission was heard by the second Officer present, but later denied by Claimant.

We are confronted with a matter of circumstantial evidence and with a credibility question. First it would seem rather difficult to assume that gas was placed in Claimant's vehicle without his knowledge or consent by one of his subordinates; a possible but rather bizarre hypothesis. More importantly it has been long established by this Board (and on all the Divisions of the National Railroad Adjustment Board) that it is not our function to resolve questions of credibility in discipline disputes; findings in such cases should not be disturbed when they are supported by substantial, though controverted, evidence. The trier of the facts is vested with the exclusive authority to resolve conflicts of testimony. (See for example, Awards 2349, 2702, 2903 and 3227).

Petitioner also relies in part on the fact that in the criminal proceeding Claimant was not found guilty of any crime. We note that Claimant accepted an Adjournment in Contemplation of Dismissal in the court. That plea does not establish either guilt or innocence but in any event is not binding on Carrier. It is well established that the Courts may not pre-empt Carrier's right to discipline employes and further the court's disposition of criminal charges may or may not be relevant to the disciplinary handling by Carrier, but in no event is controlling.

Since the Carrier's conclusion was supported by substantial evidence we cannot disturb it; the penalty assessed was neither harsh nor capricious in view of the seriousness of dishonesty, particularly by a supervisor.

## FINDINGS:

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

The carrier and the 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.

The parties to said dispute waived right of appearance at hearing, but were granted privilege of appearing before the Division with Referee sitting as a member thereof, to present oral argument.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Fourth Division

ATTEST:

Executive Secretary  
National Railroad Adjustment Board

By: *Lawrence J. Cleaver*  
Assistant Executive Secretary

Dated at Chicago, Illinois, this 11th day of December 1975