CORRECTED

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 4647
FOURTH DIVISION Docket No. 4652
88-4-87-4-56

The Fourth Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (United Transportation Union - Yardmasters Department
(
(Burlington Northern Railroad

STATEMENT OF CLAIM:

Yardmaster L. W. Dornheim is claiming reinstatement with full seniority rights and compensation for all time lost. Carrier violated Rule 22(a) by failure to timely hold an investigation within the agreed time limits. Carrier failed to support his dismissal with evidence of probative value.

FINDINGS:

The Fourth 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 employes 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.

In March 1985 one of Carrier's Special Agents began an investigation concerning three missing payroll checks. One of these checks had been cashed at the East Grand Forks, Minnesota, American Legion Post. In the early stages of his investigation the Special Agent secured a number of handwriting samples from various individuals, including Claimant, which he turned over to Minnesota authorities for analysis as part of their criminal investigation. Over a year later, in May of 1986, Claimant mentioned to Carrier's Terminal Manager at Grand Forks, North Dakota, that he was a suspect in the State investigation of the check cashed at the Legion Post. Later that month Claimant was arrested. On February 2, 1987, Claimant, through his Attorney, entered a plea of guilty to misdemeanor theft and was found by the Court to be guilty of possession of stolen property of a value of less than $250.00. The next day he was cited, by Carrier, to attend an investigation for the purpose of:

> "...ascertaining the facts and determining your responsibility, if any, for the alleged theft of payroll check No. BN 2623726 dated January 25, 1985 in the amount of $239.28 made out to Joel L. Ketch while you were employed by the Burlington Northern Railroad as a yardmaster in Grand Forks, North Dakota."

Following the investigation, at which Claimant admitted that his Attorney had entered a plea of guilty to the charge of misdemeanor theft, Claimant was terminated.

Before this Board the Organization seeks to have the termination rescinded on several bases. Among these are contentions that the investigation was not timely under the parties Agreement, that the investigation was procedurally flawed because the officer of the Carrier that signed the termination letter also participated in the hearing as a witness; and probative evidence as to Claimant's guilt on the charge was not conclusively established. The Organization also challenges certain of Carrier's exhibits as not being made a part of the record while this matter was being handled on the property.

Carrier contends that the investigation was timely held under the Rule. It also argues that the matter of having an officer testify and also sign the termination letter did not jeopardize the fairness of the investigation. This testimony, too, was not critical to a determination of Claimant's guilt on the charge. Moreover, this specific issue was never raised while the matter was being handled on the property, thus it must be considered waived and it cannot now be considered by the Board. On the matter of Claimant's guilt, Carrier contends that this has been established by his own testimony.

Rule 22 A. of the Agreement provides in part:

> "A. A Yardmaster charged with an offense involving discipline will be advised the nature of such offense in writing and no yardmaster will be discharged, demoted, suspended or given record suspension without an investigation within ten days from date of knowledge of such offense by the superintendent or proper supervisory officer."

This language controls our threshold issue of whether or not the investigation was timely. On this record we are made aware of only two possible instances of "knowledge" which may have occurred outside the time structure of the Rule, one involving the Special Agent's initial investigation and the other about a year later involving the Terminal Manager. It is clear that any "knowledge" that the Special Agent may have had of the matter, at any time, would not affect timeliness, under the Rule, because special agents

would not be a yardmaster's "superintendent or proper supervisory officer" as contemplated in the Rule. Thus, the only question for us is, did the remarks Claimant made to Carrier's Terminal Manager create a condition of "knowledge of such offense" so as to trigger the clock, provided in the Rule? We are not persuaded that these remarks did.

We are not privileged with an abundance of information concerning the scope and details, or purpose, of Claimant's conversation with the Terminal Manager, except that it occurred and was probably conducted over the telephone. It is clear to us, though, that at the time, Claimant had not been arrested and it is highly unlikely that he was then admitting any specific involvement other than that he was a suspect. Claimant, from time to time, had other conversations with Carrier supervisors on a variety of personal problems and harassment from outsiders at home and on the job. He testified that when he mentioned that he was a suspect in the missing check matter the Supervisor told him to take a couple of days off to get his wits back.

A single episode standing alone, consisting of a call from Claimant to the Terminal Manager, mentioning that he was suspected of being involved in a missing check matter, which had occurred over a year earlier, without something more of substance, can hardly be deemed "knowledge of ... (an) offense" sufficient to start time limits running for holding an investigation under Rule 22 A. The phrase "knowledge of such offense," as used in the Rule, in our judgment, requires more than mere mention by a yardmaster to a supervisor that he was a suspect in a year old municipal police investigation. On this record we are unable to find an adequate showing that any "superintendent or proper supervisory officer" had any "knowledge" of the theft of Payroll Check BN 2623726 before February 2, 1987, the date Claimant's Attorney entered a guilty plea in the matter. Accordingly, it is our view that the investigation was timely held.

The next item to consider concerns the matter of the individual that signed the termination letter also testifying in the investigation. For this issue to be properly before us it must have first been raised while the matter was being handled on the property. Carrier has challenged our consideration of this issue on this basis and we do not have any information to suggest that its challenge is not factual. The Awards of this Division, as well as those of the other Divisions, uniformly hold that only issues raised during the handling on the property may properly be considered by the Board. If they are not discussed in the handling on the property they are deemed to have been waived. Accordingly, we may not consider this issue. (See Third Division Award 20468.)

The third matter for our consideration concerns the contention of the Organization that certain material included with Carrier's brief, particularly court documents and East Grand Forks Police Department investigation reports, were not furnished the Organization. The Carrier contends that we have license to take judicial notice of court records even when they have not been submitted on the property. We do note that the court documents are referenced

in Carrier's first denial letter and they should have been made available to the Organization at that time rather than waiting until filing with this Board. But, as we look at this matter, our consideration or nonconsideration of this material, does not affect the end result. Claimant, at his investigation, admitted that he had his Attorney enter a guilty plea on his behalf on a charge of misdemeanor theft of another employee's paycheck. This admission is sufficient to establish misconduct on his part.

The Organization's final point alleges a lack of probative evidence to support the charge. Again we cannot agree. Claimant admitted in his investigation, that a plea of guilty was entered on his behalf. This plea resulted from negotiations between the State and Claimant through his Attorney. Such pleas, made in open court, ought not be allowed to be repudiated in a subsequent railroad disciplinary investigation on the basis of a misconceived notion that the charged employee never personally testified in open court or otherwise admitted to any culpability in the matter. Nor should such pleas be dismissed as expedient alternatives to avoid potential long term incarcerations for felonious conduct. We know of no rule, or other prohibition, barring their consideration as evidence as to the truth of the matter under investigation in railroad discipline cases.

Accordingly, it is our view that Claimant's admission in his investigation that he, through his Attorney, pled guilty to possessing a stolen Burlington Northern paycheck is adequate probative evidence that he was guilty of the charges placed against him.

On the level of discipline assessed in this matter, termination, this Board has held that theft is a dismissal offense. In Second Division Award 10180, that Division stated:

> "It is undisputed that the claimant has committed the very serious offense of theft of the Carrier's property. An instance of theft such as this, even in the case of a long-term employe, is clearly a dischargeable offense."

The conclusion in Award 10180 is appropriate here.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 17th day of November 1988.