

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33612
Docket No. MW-34476
99-3-98-3-100

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline of J. L. Sanders (removal from service and subsequent dismissal) for alleged violation of CSXT Operating Rule 501 in connection with the charges of dishonesty, conduct unbecoming an employee and unauthorized possession, removal, theft and subsequent sale of Company material on April 4, 7, 11 and 16, 1997 was arbitrary, capricious on the basis of unproven charges and exceedingly harsh [System File 3(4) (97)/12 (97-1149) LNR].
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with seniority and all other rights unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

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 were given due notice of hearing thereon.

This case involves the dismissal of Claimant J. L. Sanders following an Investigation held on April 24, 1997 in connection with the charges of theft and subsequent sale of various railroad materials, signal equipment and track tools.

The evidence adduced at the Hearing shows that, in the course of investigating an entirely different matter, Carrier Special Agent Marshall interviewed an employee at City Salvage and Recycling in Hopkinsville, Kentucky. The employee of the salvage yard, Ms. Barker, told the Special Agent that railroad material had been sold to their company by an unidentified source. A few days later, on April 11, 1997, more railroad material was sold to City Salvage. This time Ms. Barker obtained the license plate number of the vehicle driven by the person who sold the materials and wrote it on the original invoice of the sale.

A license plate check revealed that the vehicle identified by Ms. Barker, a red Mazda truck, was registered in the name of the Claimant's wife. Accordingly, on April 16, 1996, Special Agents Marshall and Young questioned the Claimant at his home in connection with the sale of the railroad materials. According to Special Agent Young's testimony, the Claimant admitted that on two occasions he sold railroad material to City Salvage that he had picked up at various locations on CSX, including Pembroke, Kentucky, and from the old IC railroad in Hopkinsville. Before leaving the Claimant's home, Special Agent Young took a photograph of the Claimant and the red Mazda truck parked in the Claimant's driveway.

The next morning, Special Agent Marshall received a message from Ms. Barker that the same person had delivered and sold another load of railroad material the previous day at approximately 3:40 P.M., just prior to the time the Special Agents had questioned the Claimant at his home. Roadmaster Sullivan was called to inspect the railroad materials that had been sold to City Salvage on April 16, 1997. He testified that the lot consisted of knuckles from railroad cars, angle bars, rail, part of a hot-box detector, a welding pot, and a set of crossing board squeezers. The crossing board squeezers had been custom built in 1988 and the Roadmaster was therefore able to positively identify them as belonging to the Carrier. Signal Supervisor Milburn

inspected the hot box detector at City Salvage and stated that it was the same one that was missing from the Carrier's property at Guthrie, Kentucky.

Special Agents Marshall and Young returned to City Salvage on April 18, 1997 with a photographic lineup. According to the testimony of the Special Agents, three of the City Salvage employees who were questioned, including Ms. Barker, identified the Claimant as the person who sold the railroad material on April 16, 1997 and on previous days. Although Ms. Barker submitted a written statement, neither she nor either of the other salvage employees testified at the Hearing.

The Claimant, a Sectionman with 19 years of unblemished service, flatly denied any improper or dishonest conduct in connection with the charges leveled against him. He testified that he did not steal or sell the Carrier's property on any of the dates he was charged. He further testified that he had sold iron scrap material at City Salvage several times during the past five years and that such materials consisted of iron scrap tie plates removed from the former IC Railroad property and a minimal amount of scrap metal that was the byproduct of rail grinding operations.

The Organization contends that it is apparent that the Carrier failed to meet the considerable evidentiary burden it must bear in cases where theft and dishonesty are alleged. After careful review of the record in its entirety, the Board agrees with the Organization. Theft and misappropriation of property are serious offenses warranting summary dismissal. Therefore, the evidence required to substantiate such charges must be of a convincing nature. See Third Division Award 23976.

In the instant matter, the core of the Carrier's case hinges on the hearsay account of Ms. Barker, the salvage yard employee. The evidence subsequently relied upon by the Carrier as evidence of Claimant's guilt - the identification of the license plate of the car, the photo lineup, and the materials identified as Carrier property - all flow from Ms. Barker's account. Although the hearsay evidence was properly admitted in evidence at the Hearing, one must always bear in mind the inherent weaknesses of such evidence, particularly in discipline cases where the Carrier has the burden of proof.

The Carrier contended that it does not have subpoena power and therefore could not compel Ms. Barker to testify. However, that does not outweigh the fact that this witness, the Claimant's primary accuser, failed to appear at the Hearing to face the Claimant and test her account against cross-examination. Without this individual's

testimony, the Board cannot ascertain whether there was motive to falsely accuse the Claimant, whether there was misperception or error in her account, or whether her account was otherwise unreliable. Her unsworn statement and the hearsay statements given to the Carrier's Special Agents cannot be relied upon under these circumstances because, as it developed, the matters contained therein were too important to deprive the Organization of its right to cross-examination.

In short, there had to be some residuum of non-hearsay evidence on the record that independently established the misconduct alleged. The Claimant's so-called "admission" does not provide the necessary corroborative evidence. The Claimant's statements to the Special Agents, even if fully credited, suggest that he sold materials that truly were scrap and not the items specifically identified by the Carrier's witnesses. Having delineated the Carrier's failure to meet its burden of proving the charges leveled against the Claimant, the claim must be sustained.

AWARD

Claim sustained.

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 16th day of November 1999.