

PUBLIC LAW BOARD NO. 6392

AWARD NO. 33

CASE NO. 33
Carrier File: 16C(01-0063)

PARTIES TO
THE DISPUTE:

Brotherhood of Railway Carmen Division of
Transportation Communications Union

vs.

CSX Transportation, Inc.
(former Baltimore and Ohio Railroad Company)

ARBITRATOR: Gerald E. Wallin

DECISION: Claim denied

STATEMENT OF CLAIM:

- “1. The Carrier violated Rule 32 of the Controlling Agreement, when on May 18, 2001, the Carrier erroneously dismissed Carman J. R. Wells, without a fair hearing.
2. Accordingly, the Carrier should now be required to reinstate Carman J. R. Wells (ID# 560123), with all seniority rights unimpaired and compensate him for all time lost during the period resulting from his dismissal and continuing until he is reinstated with each day being accredited to a specific calendar date. Furthermore, Mr. Wells should be compensated for all other benefits accruing to all other employees as a condition of employment, including but not limited to holiday pay, vacation time, plus health and welfare benefits now in effect.”

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Following an anonymous tip, the Carrier hired an outside investigation firm to conduct surveillance of certain second shift car employees at its Queensgate Yard in Cincinnati, Ohio. The surveillance was conducted during the period March 14-25, 2001. As a result of the surveillance, Claimant was charged with five forms of misconduct: Unauthorized possession and removal of company material, also known as “scrapping,” on two dates, abandoning his position prior to the end of his tour and absenting himself from his assignment without permission on six dates, violation of safety rules arising out of his failure to wear his hard hat and safety glasses on two dates, fraud and falsification of company records on one date, and failure to devote himself to his assigned duties on two dates. Claimant was dismissed as a result of the investigation into these charges.

Although the Organization raised certain procedural objections to the disciplinary action, our

review of the record does not reveal any such irregularities of significance. The Organization cited Award No. 1 of Public Law Board No. 6191 in support of its contention that the timing of the investigation violated Rule 32 of the Agreement. The rule requires a “prompt” hearing when an employee is removed from service in advance of a disciplinary investigation. In that case, which involved the failure to blue flag and take other safety precautions on a section of track, a time span of fourteen days between the notice and investigation was found to violate Rule 32. The instant dispute involved some twenty-one days between the notice and the investigation due to the unavailability of the hearing officer.

The Carrier responded with citations to other awards that did not find periods of twenty-one and twenty-eight days to violate Rule 32. See Second Division Award No. 10697 and Award No. 25 of the instant Board.

We find the awards cited by the Carrier to represent the better view. Rule 32 does not define what is meant by the word “prompt.” Moreover, it does not contain a negotiated penalty for non-compliance. As a result, there is no proper basis for concluding that invalidating discipline *ab initio* was the sanction intended by the parties for lack of promptness. See Third Division Award No. 21289. In addition, given the fact that Award No. 1 of Public Law Board No. 6191 does not explain its reasoning for sustaining the claim, it does not constitute persuasive precedent. The opposing awards cited by the Carrier do contain sound reasoning. Accordingly, we do not find the Carrier’s action to be in violation of Rule 32.

The Organization also objected to the Carrier’s covert use of video-taping equipment to capture Claimant’s activities. The Organization contended that federal law prohibited such use of hidden video cameras. It went on to maintain that nothing in the Agreement provided the Carrier with permission to secretly video tape employee activities. The Organization’s contentions, in this regard, are in the nature of affirmative defenses to the Carrier’s discipline. As such, the Organization bears the sole burden of proof to establish each element of the defenses. The Organization did not produce a citation to or a copy of the alleged federal law. Moreover, it is undisputed that the Agreement does not contain an explicit restriction that prohibited the Carrier from using video surveillance. Under the circumstances, therefore, we must reject the Organization’s objection to the consideration of the video tape evidence.

Turning to the merits of the dispute, we note that the surveillance video tape and the investigator’s accompanying reports were properly introduced into the record. The record also contained live testimony by the investigator that observed many of Claimant’s activities and took much of the video footage. We have also viewed the video tape and noted the dates, times and activities depicted thereon.

In disputes of this kind, it is appropriate to explain the limited nature of this Board’s role. We do not sit to weigh the evidence and make our own decisions about Claimant’s guilt or innocence. Instead, our role is appellate in nature. It is limited to reviewing the evidence to determine whether it is substantial enough to have allowed the Carrier’s decision-maker to reach the conclusions he did. If such substantial evidence is found to exist, we may not substitute our judgment for that of the Carrier’s decision-maker even though we may have interpreted the evidence differently.

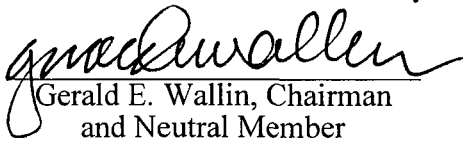
Despite Claimant’s denials of wrongdoing, our careful review of the record reveals it to

contain substantial evidence in support of all but one of the Carrier's determinations. The charge of unauthorized possession and removal of company property on March 14 is not supported by substantial evidence. According to the testimony of the investigator, the nature of the material Claimant transferred from his Kawasaki scooter to his pickup truck on that date could not be identified. Per Claimant's undisputed testimony, the material was the remainder of his lunch and a soiled flannel shirt he owned.

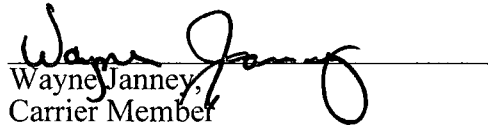
Given the nature of the remaining misconduct established by the evidence, which involved unauthorized possession and removal of Carrier property, claiming pay for time not worked, record falsification, and violations of safety rules, we do not find the disciplinary penalty of dismissal to be unreasonable. Accordingly, we have no proper basis for disturbing the Carrier's action.

AWARD:

The Claim is denied.


Gerald E. Wallin, Chairman
and Neutral Member

I Dissent
Gerald Gray,
Organization Member


Wayne Janney,
Carrier Member

Date: November 3, 2003