Award No. 18054
Docket No. MW-18594

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Reference

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

TEXAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The dismissal of B&B employe Gilbert R. Reyes from service as of June 11, 1969 for alleged "insubordinate by failure to carry out instructions of your Foreman, and that you were engaged in theft of material belonging to Chas. B. Jones Construction Company, while you were on duty April 7, 1969" was without just and sufficient cause and on the basis of unproven charges. (System File 013.293/TCT-27).

(2) Mr. Gilbert R. Reyes be reinstated to service with seniority, vacation and all other rights and fringe benefits unimpaired; his record cleared of the charges; and reimbursement be made for all wage loss suffered, all in accordance with Article XIII, Rule 4 of the Agreement.

(3) The Carrier shall also pay the claimant eight and one-half (8½) percent interest per annum compounded annually on the anniversary date of his dismissal.

OPINION OF BOARD: Claimant was dismissed from service on June 11, 1969 for failure to carry out instructions of his Foreman and because of an alleged theft of material belonging to Chas. B. Jones Construction Co., a customer of the Carrier.

An investigation was held on June 4, 1969. The transcript of the evidence taken at that hearing discloses that Claimant's Foreman came to work at 6:30 A. M. on April 7, 1969, fifteen to twenty minutes earlier than his usual reporting time because he had to attend a legislative breakfast at 7:00 A. M. He left a note in the Cab of the Bridge and Building pick-up truck outlining the work to be performed by employes under his supervision. In the absence of the Foreman, the Leadman was in charge. The Foreman's testimony that Claimant failed to carry out his instructions cannot be accepted. It is all based on hearsay. When he was asked if Mr. Rudolph Ramos, the driver of the pick-up truck received the note of instructions, he

replied, "Mr. Ramos told me he did see the note." He gave no evidence that he knew that Mr. Mucio Ramos, the Leadman, carried out his written instructions or that Claimant failed or refused to obey instructions from Mr. Mucio Ramos. The fact that Claimant may have been on Old Road 16 does not prove a failure to carry out any instructions.

Mr. Rudolph Ramos, the pick-up truck driver testified that he saw the Foreman's note on the steering wheel of the truck, that he read it, and that he gave it to Mr. Mucio Ramos, the Leadman. He did not hear anyone give work instructions to the Claimant.

The Leadman, Mucio Ramos, testified that he received the note, that he spoke to Claimant and Rudolph Ramos. When the Leadman asked Claimant to work with him Claimant said "he had to go with Mr. Bill Elliott over there and load some ties for him or something like that." And the Leadman admitted that loading ties is "routine, that happens almost every morning, that's routine." When the Claimant returned from loading ties he told the Leadman "that he was going to pick up a man from Bill and go pick up drift." The Leadman then testified: "I did not question him, because that has been work that is supposed to be done here at times and I didn't know whether anybody had changed orders or as seeing the job that I was going to do just as important, but at the same time I could carry on if that was a more essential job down here at the docks picking up drift." When asked whether there would be any drift around the Jones Construction Company area, this witness said, "Well at time, over there on those small docks there could be a possibility that you could pick up some drift around those small docks, Carbide and Pan American."

From the testimony of the Claimant and other witnesses, it is apparent that the Claimant took advantage of the Foreman's absence. Although he may not have violated any direct orders from the Leadman, he did disregard his request to work with him and proceeded to pick up drift when it could have been done at another time. In that respect only did the Claimant fail to perform work requested of him. While this may be insubordination, it does not deserve a penalty of dismissal.

The charge of theft is based upon two written statements from employes of Chas. B. Jones Construction Company. A driver of a Jones' truck said that as he was driving he saw an old winch truck parked along side the scrap pile in the Jones' parking lot. His statement says, "I looked over there and saw 2 medium built mexicans already had one battery up there on the truck that I recognized to be one of ours, and was picking up another large one." He then went on and reported the incident to his Foreman.

The Jones' Foreman stated that he stopped the red winch truck on the road and asked the driver (Claimant) if he picked up the batter from the Jones' scrap pile and the driver said he did. Claimant said he didn't know Jones wanted the battery. If he had known he would not have taken it. To which the Jones' Foreman replied, "I didn't accuse you of stealing or anything, but we do want the batteries." The battery was transferred to the Jones' truck.

There is no question that Claimant and his helper did pick up the battery from Jones' scrap pile. It is fairly evident from the record that the Claimant knew or certainly should have known that he took it from the

property of the Jones' Construction Company. But several questions remain unanswered: (1) It has not been shown by convincing evidence that the Claimant had intended to "steal" the battery. He had it in Carrier's truck when he returned it and the Jones' Foreman did not accuse him of stealing. (2) A scrap pile is generally an attractive nuisance. Any well meaning passerby may easily be attracted to an object which he knows is discarded for scrap. (3) Why did the Carrier wait from April 7, 1969 to May 9, 1969 to prefer charges and schedule an investigation? This remains unanswered. (4) Certainly, the alleged loss of another battery cannot be attributed to the Claimant. This alleged loss of a second battery was not presented at the investigation other than the conclusion in Mr. Saulter's statement made a month after the alleged theft took place. There is no convincing evidence in the record that the Claimant was guilty of a premediated theft. Under these circumstances, the penalty of discharge is too severe for an employe with twenty-five years of service. While long years of service is no defense to a charge of theft, and while acts of thievery should not be condoned by reduced penalties, it is a consideration where, as here, there is some doubt whether there was a premeditated theft.

More than a year has elapsed since the acts charged took place and since the Claimant was dismissed. There is good reason for a disciplinary penalty based upon some degree of insubordination and for being on property other than the Carrier's. For this reason, the Board concludes that the Claimant shall be reinstated without back pay.

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

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the Agreement.

AWARD

Claimant shall forthwith be reinstated as an employe of the Carrier with all seniority unimpaired and other rights preserved. He shall, however, be entitled to no compensation for loss of earnings for the period he has been held out of service.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of July 1970.

Keenan Printing Co., Chicago, Ill. Printed in U. S. A.