

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20636
Docket Number MW-20726

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Chicago and North Western Transportation Company

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

(1) The dismissal of Crane Operator Ray Nelson was excessive and wholly disproportionate to the offense with which charged (System File D-11-11-183).

(2) Claimant Ray Nelson be restored to service with all seniority and vacation rights unimpaired.

OPINION OF BOARD: Claimant, a Crane Operator, was hired on August 1, 1972. During the summer of 1973 he was assigned to a crew picking up ties and other material salvaged from the track and roadway of a line between Onawa and Ida Grove, Iowa which Carrier was abandoning. Claimant was dismissed from service effective October 26, 1973, after an investigation, charged with sale of Company property. Carrier alleged and established that Claimant had sold fifteen railroad ties as fence posts to a local farmer, for \$30.00,

The sole Issue before this Board is whether or not the penalty assessed was disproportionate to the offense with which Claimant was charged. Carrier states that there was substantial evidence to support its decision; by Claimant's own admission he took money for helping the farmer misappropriate Carrier's property. Carrier also argues that this Board has consistently recognized dishonesty in all its forms as a very serious offense which usually results in dismissal.

The Organization contends that based on the evidence of record It is not reasonable to conclude that Claimant intended to be dishonest; while admitting that Claimant helped the farmer load fifteen ties, which Claimant testified were left to rot as unusable, this act was at worst poor judgment. Petitioner argues that under all the circumstances of this case, the discipline imposed was excessive.

Carrier, during the time of the incident herein, was properly concerned about the loss of a substantial number of usable railroad ties, which were later discovered on a farm at Danbury. Nothing in this investigation, however, in any way ties Claimant into that loss. It is apparent that the gravamen of this dispute is the question of where Claimant found the ties in question. If he took the ties from a pile of salvaged usable ties and sold them to the farmer, there is not much question as to the

appropriateness of the discipline. If, however, the ties were taken from abandoned ties which were left to rot on the right of **way**, the issue is considerably different.

A study of the transcript of the investigation indicates that Carrier apparently relied on the testimony of its special agents as to what the farmer who "bought" the ties stated. The key questions included the location of the ties when they were selected, and the agents indicated that the farmer had said from Danbury. Claimant, on the contrary, indicated that the ties had been picked up from discarded ties on the Carrier's right-of-way three miles east of Mapleton. We note that the farmer **was** not called to testify nor were statements from him obtained by Carrier. It is clear that the testimony relied on by Carrier was hearsay and of little probative value compared to the direct testimony, unrefuted, by **Claimant**. This principle has been upheld in **many** prior disputes. For example in sustaining Award **12252** we said:

"As has been stated supra, none of the **Carrier's** representatives had personal knowledge of the incidents **alleged** to have occurred. **Their** testimony was **hearsay** and of no probative value. **Mrs. Contee** did not appear at the investigation and therefore her credibility could not be tested in the crucible of **cross-examination...**"

In spite of the lack of substantial probative evidence on a number of the important elements of this dispute, it is clear that Claimant was guilty of assisting the farmer in obtaining fifteen ties, probably abandoned, but which belonged to **Carrier**; for this service he was paid \$30.00 which can only reasonably be construed as **payment** for the ties,

It **is** not our practice to interfere with Carrier's discretion in matters of discipline in the absence of a clear showing that the action taken was arbitrary, capricious, or unreasonable; however we have reserved the right **to rectify** an assessment of penalty which is **clearly** excessive (**c.f.** Awards **4722, 18016** and Second Division Award **6485**). In Award **19037** we said:

"We do not condone the misappropriation of property. However, it is a practice which, **unfortunately, abounds**. **But** the discipline must be reasonable. **Thus**, the punishment for petty larceny was less than for grand **larceny**. The punishment must fit the crime."

A very similar situation involving the disposition of used ties was considered by Special **Board** of Adjustment **No. 541** in its Award **No. 54**. We believe that the reasoning 'expressed in that Award is applicable herein:

"**No** justification is perceived for setting aside Carrier's decision that substantial discipline is warranted since employees must realize that they are not free to dispose of company property without permission. On the other hand, we are not persuaded that the record is sufficiently clear to **provide** a sound basis for dismissal of employees with long service or a finding that they are dishonest."

In this dispute, even though Claimant had only one year of service, we too are not persuaded that the evidence of record is sufficiently clear to justify a **finding** of dishonesty. We regard Claimant's action **in** disposing of Carrier property, without permission, whether or not "left **to** rot on the **right-of-way**", a serious dereliction, but slightly removed from outright theft. For this reason, we find that approximately **a sixteen** month suspension is adequate penalty.

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 **Employees involved** in this dispute are respectively Carrier **and Employees 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 penalty imposed was excessive,

A W A R D

Claimant to be reinstated with seniority rights unimpaired but with **no** back pay.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **Third Division**

ATTEST: *A. W. Pauls*
Executive Secretary

Dated at Chicago, Illinois, this 7th **day of** March 1975.

CARRIER **MEMBERS'** DISSENT TO AWARD 20636, DOCKET MW-20726

(Referee **Lieberman**)

This award is not only erroneous, but **harmful** to the railroad industry as a whole, in reinstating a man who admittedly misappropriated company ties 'and took \$30.00 from a **farmer** for these ties. The permissive attitude of this referee, in drawing some nebulous distinction between theft and something "slightly **removed** from outright theft", will encourage the continuation of petty thefts which cumulate to millions of dollars a year.

We dissent.

W L Naylor
P. C. Carter
M. T. L...
H. F. M. Brindwood
G. M. Y...