

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20771
Docket Number MW-20947

Louis Norris, Referee

(Brotherhood of Maintenance of Way **Employees**
PARTIES TO DISPUTE: (The **Kansas** city Southern Railway **Company**

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

(1) The dismissal of Section **Foreman** Ira L. **Toland** **was** without just **and** sufficient cause and on the basis of unproven and **disproven** charges (Carrier's File 013.31-148).

(2) Claimant Ira L. **Toland** "shall be reinstated and compensated for the wage loss . . . suffered by him" (**Rule** 13.2).

OPINION OF BOARD: Prior to October 30, 1973, Claimant was employed by Carrier as a Section For-, having been in Carrier's employ for a period of five years. At a formal investigation held on October 18, 1973, Claimant was charged "with unauthorized sale of wheat, soybeans and corn" to a named feed **company**, in **18** instances, "while employed as Section For- at **Joplin**, Missouri." Carrier found that the charge against Claimant had been sustained, and on October 30, 1973, he was dismissed from service.

Petitioner's claim is that such dismissal **was** without just and sufficient cause, and demand is made for reinstatement of Claimant and that he be "compensated for the wage loss."

Initially, Petitioner contends **that** the nature of the charge in the Notice of Hearing is markedly different from that in the Notice of Dismissal, in that the latter has been expanded in scope **from** "unauthorized sale" to, in effect, "removal, sale and retention of proceeds."

These issues, regardless of how worded, are substantially similar in impact. Additionally, under **the** facts and circumstances of this case, particularly the admissions of both sides contained in the testimony, We consider this objection to be rather minor in nature. We are not of the opinion, therefore, that **we** are thereby precluded from **reviewing** this dispute on its merits. Accordingly, this objection is not sustained.

The Carrier, on the other hand, raises the objection that the instant claim differs from that handled on the property, in that the "**wage** loss" claim is not similarly worded. This Board has held in numerous past Awards that in the event a claim is sustained the relief **granted** will be consistent with the agreement between the parties. In this case, the pertinent provision is **Rule** 13-2, quoted at Record Page 14, and is binding on both parties. This objection, therefore, is not sustained.

The hearing **was** fairly and properly conducted, with full opportunity to both sides to present such evidence and testimony as they deemed pertinent. **Two** aspects **of** the investigation, however, require further **comment**:

1) Testimony **was** introduced by Carrier **relating** to **whether Claimant** was acting "in the best interest of the Company." (**rp 44,45**). Further reference is made to this issue in Mr. Ferrer's letter of February 27, 1974 to Mr. Arnold, in which, after s-rising certain portions of the testimony, it is stated that such testimony "**clearly** substantiates Carrier's charge and disciplinary action taken as Claimant created a very poor **image** of the Company . . ." (**rp 6 through 12**). It must be emphasized that this **was** not the "**charge**" against Claimant and that the **issues of** the Company's 'best interest' or Claimant's "poor image" are entirely irrelevant to the actual charge upon **which** Claimant **was** brought to investigation, and have no bearing upon his guilt or innocence.

2) In the **course** of his testimony Claimant was asked "what was done with the proceeds of these sales." **Claimant** refused to answer and claimed the "**FIFTH AMENDMENT**." (**rp 45**). On this basis, Carrier urges that such refusal to testify is tantamount to an admission of guilt and cites several prior Awards in support of such contention. We do not disagree with these Awards, but they are not controlling here. For, **Claimant** did in fact answer fully all relevant questions put to him. This is quite evident in record pages 41 and 42. Claimant's "refusal to testify" related to only one question - "what was done with the proceeds." This question **was irrelevant** to the charge, and Claimant's refusal to **answer** this single question did not carry with it any admission **of** guilt. We find no basis in the testimony upon which to conclude otherwise.

Limiting ourselves, therefore, solely to the facts on the record, we address ourselves on the merits to the specific issue here involved. In essence, that issue is whether Claimant had authority to **remove** the grain in question and treat it as his own. Assumedly, if that be so, he had authority to sell the grain and retain the proceeds.

The principle is well established in prior Awards of this Board that in discipline **cases** the burden of proof **rests** squarely upon the Carrier to demonstrate convincingly that an employee is guilty of the offense **upon which his disciplinary penalty is based**. See Award Nos. 20471 (**Anrod**), First Division, 14120 (**Harr**) and **many cases** cited **therein**, 20245 (**Lieberman**) and 20252 (**Sickles**).

Obviously, this principle is particularly applicable to cases where the **commission** of a crime is charged. Here, it is apparent on the record that, regardless of how worded, "theft" is being charged against **Claimant**.

Basically, Claimant contended that he **was** "authorized" to **re-move** the grain and **treat** it as his **own**. **Roadmaster Phillips** denied that he **gave** Claimant such authority (rp 53). Claimant, on the other hand, stated:

"I had authority by **Roadmaster Phillips** to sell the grain and pick it up..."(rp 46)

Again on record page 42 "I was authorized **twice** by **Roadmaster Phillips** once on December 16 at a derailment site, a spillage of soybeans, and we asked permission to pick up and sell it and he **gave** his permission stating that he would rather that we would sell it then leave it there to rot. Also on March 11, 1973 . . ." etc. The latter date is a reference to a radio conversation between Claimant and Mr. Phillips, in which the latter is stated to have said "again he stated to go on about our business that the **Company** didn't care who picked up the grain **along** the tracks . . ." (see also rp 43).

Witness Levis testified similarly and fully corroborated Claimant (rp 47). Specifically, he stated:

"Q. who do you say authorized you to pick this grain up at Saginaw and Joplin?

A. Dale Phillips - he said the Company would rather we picked it up than it go to waste and everybody in the depot at Joplin heard him when we called him on the radio.

Q. Did you personally hear or were you present **when** Mr. **Toland** was authorized to pick up this grain?

A. Yes, I was sitting in the front cab of the truck."

Claimant was further corroborated as to his "being authorized" by the written statement of Dennis **Helton** submitted by Claimant. (rp 55). There **was** further corroboration to the same effect in testimony of other **witnesses**. See rp 48, 49 (**Mapes**), rp 47 (**Lewis**) and rp 50 (**Creekmore**).

The testimony of Special Agent **Hell**, although generally denying such authority, is of **particular significance** in the following respect:

"Q. Have you personally authorized **any removal** of grain from the **property**?

A. Not **from** derailment **sites**." (rp 40)

The inference **is** clear that under other circumstances "**removal** of grain from the property" **was** authorized. He stated further (rp 40):

"I have given **permission** in the North Yard area to pick up spillage from a leak in the box car, which **was** usually a small **amount**."

On this question of "small **amounts**" and the nature of the grain here involved, there was testimony by these employees that they picked up "**small** amounts of waste grain mixed with rock" (rp 50, 51), that they picked it up "**from** the ground only" (rp 41), that they made their **own sifter** "**and** sifted it themselves" (rp 51), that they did it openly (rp 44), and that where large amounts were involved, it **was** "bagged for the Company" (rp 52). Further, that "**it was** common **knowledge** that everybody was picking it up and if there **was** the slightest chance that anybody could be fired nobody would **have touched** it" (rp 50, 54).

The testimony of these witnesses **was** not shaken on cross **examination** and the only complete negation of "**authority** to r-e the **grain**" came from Mr. **Phillips**.

Carrier cites a number of prior **Awards** dealing with incidents of theft and dishonesty, but in only one of these **was** the question of "**authority**" involved. These **cases** therefore are **not** deemed pertinent to the issues involved in this record. In the case cited by Carrier which is **in** point, Award No. 20409, Claimant **was** charged with removal of 20 sheets of plywood from **company** stores. In that case it **was** held that Carrier had not made out a **prima facie** case "that Claimant **was** not told that the plywood **was** scrap and **that** he could **have** it for his own use."

Upon full review of the testimony it becomes increasingly apparent that there **was** **knowledge** on the part of the Carrier that grain was being picked up on the property by **employees** and others, and retained by them. The testimony is clear that employees, including Claimant, had **authorization, actual** and implied, to do so, albeit with certain proscriptions. This being so, they had the right to sell the grain and retain the proceeds. **These** conclusions are supported by **the testimony** of all the employees and the testimony of Mr. Hell. Only **Mr. Phillips** denies completely that any such **authorization was** given. Such denial is insufficient when viewed in the light of all the **evidence**.

Upon the entire record, therefore, we are not able to conclude that Carrier has, on **balance**, submitted evidence preponderating to its benefit. In short, it has failed to sustain the burden of proof required of it by past precedents in similar cases, some of which are cited above. The Carrier **has** failed to prove by substantial probative evidence "that the Claimant had no authority to pick up the grain." Nor did it convincingly establish **any** intent to **commit theft**. The evidence is to the contrary.

We art cognizant of the principle enunciated in many prior Awards that this Board will not substitute Its judgment for that of the carrier, in evaluating the evidence, provided, however, that substantial probative evidence is presented in the record supporting the charge against Claimant. See Award Nos. 20245 and 6387 (Lieberman) Second Division, 19487 (Brent), 17914 (Quinn) and 15574 (Ives). Such substantial evidence is not present in this record.

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 Employ-ees 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 Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 16th day of July 1975.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 20771

DOCKET NO. MW-20947

NAME OF ORGANIZATION: Brotherhood of Maintenance of Way Rmployes

NAME OF CARRIER: The KansasCity Southern Railway Company

Upon application of the representatives of the Rmployes **involved** in the above Award, that this Division interpret the same in light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First (**m**) of the Railway-Labor Act, as **approved** June 21, 1934, the **following** interpretation is made:

The record documents subsequent to the date of issuance of the Award in this dispute indicate that a dispute has arisen with respect to what payment is to be made to Claimant by virtue of the Award which sustained the claim that:

"(1) The dismissal of Section Foreman **Ira L. Toland** was without just and sufficient **cause** and on the basis of unproven and disproven charges.

(2) Claimant **Ira L. Toland** 'shall be reinstated and compensated for the wage loss --- suffered by him' (Rule **13.2**)."

Carrier has taken the **position**, for reasons detailed hereafter, that no compensation is due Claimant. The Organization, therefore, requests interpretation of the Award, particularly with respect to the following:

"(a) May the Carrier properly and validly refuse any payment to the Claimant thereunder because of an **on-duty** injury sustained by the Claimant on July 24, 1973 and, if so,

(b) For what period of time between the date of his discharge (10-30-73) and the date he resumed service (**10-6-75**) is the Carrier obligated to compensate the Claimant for wage loss **suffered** by him?"

Basically, it is Carrier's contention that the wage loss suffered by Claimant is not attributable to his dismissal upon which the claim was based; that in view of his injury sustained on July 25, 1973, **Claimant** was incapable of resuming his **normal** work functions; that Carrier was mt timely or properly notified that Claimant was able to return to work; and that his

wage loss is attributable, not to his **dismissal**, but to his **injury**. Accordingly, that he suffered no wage loss as a result **of** the dismissal and is entitled to no compensation by virtue of this Award.

The Organization responds that the issue of whether Claimant's injury affected his wage loss **was** never **raised** by **Carrier previously**, and, accordingly, that this constitutes a new issue not now properly before the **Board as a proper subject** of this **interpretation**. Furthermore, that in any event Claimant was physically "able to return to **work**" on April 10, 1974, as evidenced by his doctor's statement, and that at the very least he should be **compensated** "for **all wage** loss **suffered from** April 10, 1974 to October 6, 1975."

The general principle has **been** well established, and is amply supported by precedent, that this **Division** has **no** authority **under the** guise of an interpretation to amend, **modify** or expand the scope of an Award and can only explain and interpret it in light of the circumstances that existed when the Award **was** rendered.

See, for example, Serial No. **203**, Interpretation No. 1 to Award **10878** (Hall); and Serial No. 228, **Interpretation** No. 2 to Award **11798** (Dolnick), **among** others.

Nevertheless, Serial No. 283, **Int.** No. 1 to Award **20033** (**Eischen**) (**cited** by Carrier) did sustain the contention, **not** previously raised, that "outside earnings" should be **deducted** from the "**wage** loss" of the Award. To hold **otherwise**, the interpretation stated, would "give Claimant a windfall over and above compensation for his loss." See, also, Interpretations **cited therein**.

To the contrary, several Interpretations cited by the Organization have held that deductions for "outside **earnings**" could **not** be **allowed** as an offset account not raised by Carrier as an issue when the Award was made.

See, for example, Serial No. **91**, **Int.** to Award **4607** (Whiting); and **Serial** No. 175, **Int.** to Award **7409** (**McMahon**), among others.

Thus, prior Interpretations are **not** consistent on the latter issue. **However**, we do not consider these precedents directly **controlling** upon this dispute. **For**, in none of these is the Issue raised **as to** whether an Interpretation can properly consider "**wage** loss" resulting from an injury disability as an offset against an Award for **wage** loss resulting from a dismissal found to be unjust.

Consequently, insofar as the relevance of **the** cited precedents to the specific issue here involved is concerned, the instant dispute **appears** to be one of first impression. **This** is not to **say** that we **intend to deviate** from the General Rule cited above, **with which** we do **not disagree**, as to the

purpose **and** scope of **an** Interpretation to **an** Award. We do intend, however, to interpret this **Award specifically** on the basis of the precise claim which was "sustained".

Accordingly, **based** on our **analysis** of the Submissions of the principals in this Interpretation request, **and** the documentary exhibits **and** docket references contained therein, we reach the following conclusions and findings:

1. The **language** of the Award "CLAIM SUSTAINED" was not rendered in a **vacuum**. It related **specifically** to the claim presented by the Organization, which, **paraphrased**, consisted of two **parts**. Firstly, that the dismissal of Claimant, "**was** without just **and** sufficient **cause**"; and, secondly, that Claimant "**Shall be reinstated and compensated for the wage loss** suffered by him". The two assertions are inseparable, **and** the second hinges upon the first. Our **Award** found the Claimant to **have** been dismissed unjustly **and** sustained the claim. Claimant thereby became entitled to the "wage loss suffered by him" as a direct result of the dismissal. This **was** the precise nature of the claim presented by him.

2. Claimant sustained **an** on-duty injury on **July 24, 1973**, as a result of which he **was** disabled **and** unable to resume his **normal** work functions from **that** date **until** April 10, 1974, as evidenced by Dr. Roy E. Kenney's written statement of **August 30, 1975**. **The** latter indicates that **Claimant's** injury was sufficiently serious to require **hospitalization and** constant, medical treatment from August 13, 1973 to April 10, 1974, at which time "he was dismissed from care to return to work." **His** medical case was "**closed**" on April 10, 1974, **and** the doctor stated "**He is, in my opinion, able to resume work**".

During such period of **disability**, therefore, any "**wage loss**" suffered by **Claimant** is **directly** attributable to his injury **and** disability, **and** is **not attributable** to his dismissal by Carrier. Accordingly, he is entitled to no compensation by virtue of the Award for any "**wage loss**" suffered by him prior to **April 10, 1974**.

3. For **the** period from April 10, **1974** to **October 6, 1975**, the date he resumed service, Claimant's **wage loss** is directly attributable to his unjust **dismissal and** he should be so compensated by **Carrier**.

4. We acknowledge Carrier's contention that **Claimant** testified on June **25, 1975**, in his deposition in the **law** suit then pending, that he was "not able to do physical work". However, **this was** a self-serving statement to which we give little credence, **particularly in** view of Dr. Kenney's statement referred to **above**.

5. We are aware of Carrier's claim, which is not denied, that Dr. **Kenney's** letter is dated August 30, 1975 **and that** Carrier was **not advised** of its contents until some time in **May** or June, 1976. In short, that

Carrier was **not** properly notified that Claimant was "able to **resume** work" as of April 10, 1974. However, the issue of such notification is of peripheral relevancy; such notice, in **any** event, would have constituted a **vain** and useless gesture. Obviously, **in** view of the dismissal, it would have had no effect and would not have resulted in **Claimant's** reinstatement. In the context of this dispute, therefore, the more important **factual** issue is the date when Claimant **was** able to resume work. Here, Dr. **Kenney's** written statement, which we **have** no reason to disbelieve **and** which is not controverted in the record before us, **is controlling** on this factual issue. There is no evidence before us indicating the contrary.

6. Although the original record does contain various references to Claimant's on-duty injury, we take cognizance of the **Organization's** contention **that** Carrier did not prior hereto **specifically** **raise** the issue of offset **against** "wage loss" **occasioned** by **Claimant's** disability. We do not, however, consider this **8s** a "**new issue**" not properly before the **Board** on this Interpretation. This Interpretation is **based** specifically on the original Award and the very language of the **claim** itself. Accordingly, on that basis we have interpreted the Award, in **accordance** with the foregoing findings, by limiting it **to any wage loss** Suffered by **Claimant** **8s** **8** direct result of his dismissal.

7. We are not of the opinion as urged by Carrier, that in rendering this Interpretation this **Board is "making 8 decision involving 8 contro-** versy pending before another tribunal", the latter reference obviously referring to the pending litigation between **Claimant** and Carrier. Our original Award and the dispute **upon** which it **was** based, **8s** well **as** this **Interpretation, are** matters clearly within the province of the **Board's** authority **as** set forth in the Railway **Labor** Act. We concern ourselves solely with the issues in this dispute. We do **mt** concern ourselves, nor can we, with the **litigation issues** involved **in** the Court proceeding.

We conclude, therefore, by **reaffirming** Award No. 20771, but limiting Claimant's recovery for **wage loss** suffered by him **as 8** result of the dismissal to the period from April 10, 1974 to October **6, 1975**.

Referee Louis **Norris**, who **sat** with the Division as **8** neutral member when Award 20771 **was adopted**, also **participated** with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A.W. Paulson*
Executive Secretary

Dated at Chicago, **Illinois**, this **15th** day of October 1976.