

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21372  
Docket Number MW-21523

William G. Caples, Referee

**PARTIES TO DISPUTE:** ( Brotherhood of Maintenance of Way **Employes**  
(The Texas **and** Pacific Railway Company

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

(1) The dismissal of **Trackmen** J. R. Johnson and C. T. Lawson was without just and sufficient cause and on the basis of unproven charges (System File **K 310-125**).

(2) **Trackmen** J. R. Johnson and C. T. Lawson shall each be allowed eight (8) hours' pay for each regular work day and each holiday beginning May 20, 1974 **and** continuing until they are reinstated to service with seniority, pass and vacation rights unimpaired.

**OPINION OF BOARD:** The Claimants on **May 6**, 1974, and immediately prior, had been part of a tie gang engaged in replacing or renewing ties on the main track of the Carrier at Tioga, Texas. The **Carrier** had, prior to **May 6**, 1974, entered into a contract with Master Cash Distributors, Inc. for the sale and removal of used ties that had been **removed** from the track. The contract provides that adjoining property owners with property on both sides of the track could remove up to 50% of all used ties along their property for their own personal use; owners on one side of the track could remove up to 25% of the ties. The record shows ties had been removed from the property by persons other than the Contractor and, in at least one instance, hauled by employes with knowledge of a supervisor, in spite of instructions from supervisors that employes were not to remove or haul ties from the property.

The incidence on May 6, 1974, for which Claimants were dismissed, occurred when a farmer, whose property was adjacent to the track, advised the Claimants and another employe, not a party to these proceedings, that he could not load all of the ties by himself. The farmer then told the employe who is not a party to these proceedings,

"Why don't you pull your truck around here and **y'all** can have **my** other half of the ties. **\*\*\*** If you don't want them, throw them over to my side of the fence where no one will mess with them."

The Claimants, who were then on a lunch break, loaded sixteen ties on the other **employe's** truck. One of the Claimants, Johnson, testified "after I was told that the farmer had given us permission to load ties I asked the Assistant Foreman because I was further up the track and I asked

him if he knew for a fact that they had given them to us and he replied, yes, he had heard the farmer say that. **\*\*\* and \*\*\*** he would not get them if it was him but he did not state why he would not." When further questioned, the **following** exchange took place:

"Q. Is it your statement that Assistant Foreman Robinson gave you **permission to remove** second hand ties from company property?

A. He did not give us direct permission, but he did not say **not** to take them. He just used the personal **statement** he would not."

The only act of the Claimants was loading ties **on a fellow-employee's truck.**

It is the contention of the Carrier that failure or refusal to follow instructions is a very **serious** offense and frequently results in dismissal from service, citing Third Division **Awards** Numbers 8495, 9422, 10429, 10571 and others. This is a contention with which the Board agrees but the cases cited were gross violations of instructions which, because of their flagrance, amount to insubordination. The facts here indicate a failure to understand.

In a dismissal case it is well established that the burden of proof rests squarely upon the Carrier to demonstrate **convincingly that an employe** is guilty of the offense **upon which** the disciplinary penalty is based. (Third Division Award 20771, and others stated **in** that Award).

The Board **is** of the opinion that there was a failure to prove violation of instructions; failure to prove the fanner did not have ownership to the ties **and** the right to treat them as his property; or proving ownership in the Carrier and failure to prove removal of **any** Carrier property by Claimants from the property of the Carrier, or intent to commit theft. The burden of proof was not sustained.

**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 Agreement was violated.

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Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: *A.W. Pauls*  
Executive Secretary

Dated at Chicago, Illinois, this 28th day of January 1977.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 21372

DOCKET NO. MU-21523

NAME OF ORGANIZATION: Brotherhood of Maintenance of Way Employees

NAME OF CARRIER: Missouri Pacific Railroad Company  
(Former Texas & Pacific Railway Co.)

Upon application of the representatives of the Carrier involved in the above Award, that this Division interpret the same in the 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:

Initially, we are inclined to remind the parties that the purpose of an Interpretation is to clarify the Award. The Board has no authority to alter, change or modify the extent of an Award under the cloak of an interpretation thereto. The Board is limited to interpreting an Award in light of the circumstances that existed when the Award was rendered.

The Award was dated at Chicago, Illinois, the 20th day of January, 1977 and the usual Division compliance order accompanied the Award, setting compliance by March 15, 1977.

The pertinent part of the Opinion of the Board held:

"In a dismissal case it is well established that the burden of proof rests squarely upon the Carrier to demonstrate convincingly that an employe is guilty of the offense upon which the disciplinary penalty is based. (Third Division Award No. 20771, and others stated in that Award.)

The Board is of the opinion that there was a failure to prove violation of instructions; failure to prove the farmer did not have ownership to the ties and the right to treat them as his property; or proving ownership in the Carrier and failure to prove removal of any Carrier property by Claimants from the property of the Carrier, or intent to commit theft. The burden of proof was not sustained."

The Findings of the Division in the above Award was:

\* \* \* \* \*

"That the-Agreement was violated."

The Award of the Division in the above case was:

"Claim sustained."

The Claim which was sustained in Award No. 21372 reads in the part for which interpretation is asked as follows:

"(2) Trackmen J. R. Johnson and C. T. Lawson shall each be allowed eight (8) hours' pay for each regular workday and each holiday beginning May 20, 1974 and continuing until they are reinstated to service with seniority, pass and vacation rights unimpaired.!"

In brief, trackmen Johnson and Lawson had been dismissed in violation of the agreement between the Carrier and the Organization and from May 20, 1974 until they were in fact restored to service on March 21, 1977 the Claimants were under the Award entitled to the compensation for wages lost to them as set forth in claim as set forth above.

The petitioning Carrier has asked that Claimants furnish to it "proof of all outside earnings for the period in which dismissed," [Carrier's Exhibit A), i.e., any earnings received for any source between March 20, 1974 and March 21, 1977. It is the contention of the Carrier that it "has the right pursuant to Rule 12(1)(e) of the Agreement between the parties to deduct from Award No. 21372 all outside income received by Claimants during the period of their dismissal."

The Organization contends Carrier did not in the handling of the case on the property cite Rule 12(1)(e) as a basis of relief and in fact in the Record before this Board took **exception** to Carrier's belated contention damages be limited to a deduction of income from other employment (Record P79) and the request could not be raised before this Board.

In our Award we did not consider or rule on the applicability, or lack of it, of Rule 12(1)(e), in the consideration of this claim because it was not a matter under consideration on the property.

Many decisions have been cited by both Carrier and Organization to guide us in our interpretation which we have carefully reviewed but it appears to us that established precedent is sufficient to guide us. It appears the language in Serial No. 273, an Interpretation to Award No. 20534 is equally applicable in this matter:

"In its initial claim as presented on the property, the Organization specified the extent of its claim and, in fact, appraised (sic) the *Carrier* of the basis for the claim. At no time, while the matter was under consideration on the property, did the Carrier challenge the basis for the claim, or make any inquiry seeking clarification. \* \* \*

"The Board sustained the claim as it was, handled on the property and presented to the Board. The Award is clear and it is not ambiguous. Thus, the question raised by *Carrier* in its request to us is not subject to interpretation."

Had the Carrier raised the issue before us on the property we would have afforded it utmost consideration but it is clear Carrier cannot raise the issue at this late date, in shorf seeking anew Award under the guise of an Interpretation. After careful review of the petition of the Carrier for an Interpretation of Award No. 21372 and the Organization's response, we find the Carrier's understanding of the intent of the Award is erroneous, .

Claimants are entitled to eight (8) hours' pay for each regular workday and each holiday beginning May 20, 1974 until March 21, 1977.

Referee William G. Caples, who sat with the Division as a neutral member when Award No. 21372 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: *A. W. Pauls*  
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1978.