

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22863
Docket Number **MW-22862**

Paul C. Carter, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way **Employees**
(St. Louis-San Francisco Railway Company

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

(1) The dismissal of **Trackman** W. W. **Starks** and U. S. Dangerfield was without just **and** sufficient cause and wholly disproportionate to the offense with which charged (System File A-9110).

(2) The claimants shall now be allowed the benefits prescribed in Agreement Rule 91(b)(6), Article **11.**"

OPINION OF BOARD: Each of the claimants had been in the service of the Carrier about twenty-eight years. They were removed from service March 21, 1978 for their alleged responsibility in connection with the theft of cross ties at Antlers, Oklahoma. **Formal** investigation was conducted on April 13, 1978, and claimants were dismissed from Carrier's service on April 21, 1978. By agreement of the parties, the investigation was re-opened on September 27, 1978, to take additional testimony. A copy of all statements taken at the investigations has been made a part of the record.

The Board has carefully reviewed the transcripts of the investigations. There is no question that claimants removed the ties from Carrier's property and disposed of them. They testified in the original investigation of April 13, 1978, that another **trackman**, Mark Beason, told them that he had permission to remove the ties; that he asked the claimants to help him load the ties; that they loaded ties for Beason and then loaded about 56 on their **own** trucks and disposed of them. Each of them testified ~~that they~~ did not consider the ties re-usable, although the **Roadmaster** testified that some of the ties that claimants sold were re-usable. He estimated that about 70 per cent of the 56 ties sold by claimants were re-usable.

Trackman Beason was not present at the investigation conducted on April 13, 1978. The purpose of re-opening the investigation on September 27, 1978, was to obtain the testimony of Beason. In the re-opened investigation Beason testified that he had received proper permission to remove used ties from the Carrier's right-of-way at Antlers; that he did remove **some** ties and was assisted by claimants. He testified in part in answer to questions from the General Chairman:

"Q. Mr. **Beason**, you heard Mr. Starks testify that he did ask you and that he wanted to be sure that you did have permission before he helped you remove the ties. Do you remember that conversation?

A. Yes, I **remember**, but I had permission to get the ties.

Q. And you did know at the **time** that you removed the ties, that they were also **removing** some of them?

A. Y e s .

Q. There was at no time any discussion between you and Mr. Starks and Mr. Dangerfield about them **removing** the ties for their own use?

A. Well, we discussed it, that we were going to help each other.

Q. Is it apparent, in **your** opinion, that Mr. Dangerfield and Mr. Starks thought it was OK to remove the ties as you had obtained permission to remove the ties?

A. Yes sir."

As a **trackman**, **Beason** would have had no authority to actually give permission to claimants to remove Carrier property.

On the subject of employees disposing of cross ties, the Board has been referred to Third Division Awards Nos. 20636, 21372, Award 22 of Public **Law** Board No. 2363, and Award No. 2 of Public **Law** Board No. 1844.

Based upon our review of the entire record, the Board is of the considered opinion that claimants were subject to severe discipline for their actions. **However**, under the circumstances that existed, the time that they have been out of service should serve as **sufficient discipline**. We will award that they be restored to service with seniority and other rights unimpaired, without pay for time lost, provided that they can pass satisfactory return-to-work physical examinations. The claimants should understand, however, that the purpose of this award is to give them one last chance to become and continue as responsible employees for the Carrier and that further **major** infractions will result in the permanent termination of their services.

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 discipline imposed was excessive.

A W A R D

Claim sustained to the extent indicated in Opinion and Findings.

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

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 30th day of May 1980.