

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number **23098**
Docket Number **M-23168**

A. Robert Lowry, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way **Employees**
(Consolidated Bail Corporation

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

(1) The dismissal of Work Equipment Operator G. G. **Morin** was without just and sufficient cause and on the basis of unproven charges (System Docket 474).

(2) G. G. **Morin** shall be reinstated with **seniority**, vacation and all other rights unimpaired and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: On September 11, 1978 Mr. L. **E. Houser**, Assistant Track Supervisor, received an anonymous telephone call stating that the caller had seen **claimant Morin** with ties **in** the back of a pick-up truck and that he was **using** the ties to build a bridge at Schwartz **Road** to **get** to his property. The following day D. A. Fletcher, Supervisor of Track and **Houser** made an investigation and discovered 56 ties to be missing from the derailment site at **Avilla**, Indiana. After repeated efforts Sgt. J. Swygart of **the** Carrier's Police Department was notified on September 28, 1978 of the missing ties and was requested to investigate. On October 4, 1978, Fletcher and **Houser** accompanied Sgt. Swygart and Sgt. **Boomershiner** of the State Police Department to Schwartz **Road** and inspected the bridge that was built over a **drainage** ditch leading to **claimant Morin's** property. The result of this investigation revealed the bridge to have been constructed with 44 new ties, 80 to **90%** clearly bearing the Conrail **markings** which normally appear on its ties. They also **found** a 20 foot length of 24" culvert **drain** pipe bearing the same identifying markings and size of Conrail pipe **missing** from the Carrier's M.W. Yard at Fort Wayne, Indiana.

Claimant was held out of service **commencing** October 6, 1978 and a trial (formal investigation) was held in accordance with the **Rules** Agreement on December 4, 1978 after a delay requested by the Organization. A copy of the transcript of the trial has been made a part of the record. **Following** the trial the claimant was notified of his dismissal from service.

The Organization contends the **claimant** built the bridge with railroad ties purchased **from** a Mr. Tim Arthur and produced a receipt dated August 17, 1978 covering the purchase of 44 railroad ties at \$11.00 each for a **total of** \$484.00. It was noted to be a **cash transaction**. The **Organization** further contends the ties purchased from **Mr. Arthur** were installed by the claimant but were subsequently replaced with new Conrail **ties by a third party**. The **claimant** testified the third party was Contractor Whan whose truck he hit in July, 1978 **and** who substituted the **new** Conrail ties in the bridge and called **Houser** to get revenge for the damage done to his truck.

On careful review of the record before the **Board**, including the transcript of the trial, we find that none of claimant's substantive procedural rights was violated and he was given **every opportunity** to examine and cross **examine** all witnesses, which he did extensively. Se was **properly notified** of the trial under the rules of the Agreement and specifically notified of his rights to produce witnesses in his own behalf.

Mr. Philip P. Whan, Sub-Contractor for A&O Sewer Service, a Conrail contractor, testified that he saw claimant in his pick-up truck with 7 or 8 new ties **on** September 7, 1978 and on the following morning upon checking at the derailment site **found** 8 ties to be missing. **Mr. Tim Arthur** in a statement dated November 7, 1978 repudiated the contention of the **claimant by** stating the receipt showing the purchase of 44 ties by the claimant was "a wade up fake receipt." Mr. Michael L. Stratton, an **employee of Heuer** Industrials, a Conrail contractor, testified that he assisted claimant **in** loading the 20 foot culvert bearing **the** same identifying markings as the subject missing pipe. **He** also assisted in recovering the pipe from the bridge site.

Claimant was represented by a duly accredited representative of his **Organization** and also had present at the trial his **lawyer, who was** not permitted to participate, which was proper **under** the rules of the agreement **under** which the trial was conducted and which practice is universal **in** the industry. The presence of legal counsel **indicates** to the Board that claimant was aware of the importance of producing witnesses to support his contentions. **Inasmuch** as claimant chose not to produce witnesses, the Board must rely on the Carrier's impressions of the credibility of the **claimant's** testimony.

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On October **14**, 1980 a hearing was held by the Board **before** this Referee and the claimant was given full opportunity **to present** his case.

The evidence produced in the trial **overwhelmingly** supports the charges of **the Carrier**. The Carrier's action in imposing the discipline was justified and with sufficient cause. The action was not arbitrary, capricious **or in** bad faith. There is no proper basis **for** the Board to interfere with **the** discipline imposed.

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 Employee involved in this **dispute** are respectively Carrier and Employee 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 not violated.

A W A R D

Claim denied.

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

ATTEST: _____

A.W. Pauls
Executive Secretary

Dated at Chicago; Illinois, this **15th** day of December **1980**.