

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24099
Docket Number MW-24122

Gilbert H. Vernon, Referee

PARTIES TO DISPUTE: { Brotherhood of Maintenance of Way Employees
{ Missouri Pacific Railroad Company
{ former Chicago & Eastern Illinois Railroad Company)

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

(1) The dismissal of Extra Gang Foreman R. W. Marlow for alleged unauthorized possession of Company property was improper, without just and sufficient cause and on the basis of unproven charges (Carrier's File S 214-112).

(2) Extra Gang Foreman R. W. Marlow shall now be allowed the benefits prescribed in Agreement Rule 34(d)."

OPINION OF BOARD: The record indicates that on September 25, 1979, the Carrier was alerted to the possibility of the Claimant having in his possession, at his home, railroad ties. In connection with this tip, Special Agent Latta drove to Claimant's home. There is no dispute over what he observed. He saw a red five-gallon gasoline safety can, two snow brooms, an Arctic water cooler, and a carton of Amoco grease cartridges. He also noticed several rolls of wooden storm fence, welding-equipment, several track shovels, and one orange colored 8-hp gasoline engine. Based on Special Agent's observation, the Claimant was notified to attend an investigation on the following charge:

"... to develop the facts and place responsibility, if any, in connection with your reported personal possession of Missouri Pacific Railroad Company shovels, cross ties, and other company material."

The Claimant do-as not deny that the items observed by Special Agent Latta were in his possession, but he claims that some of the items were not company property and other items had been discarded as junk, that the motor and ties were given to him by company supervisors, and that he possessed the shovels and broom in connection with his duties as a track foreman. The Claimant testified that the ties were given to him by Roadmaster Jeter and Roadmaster Pratt. In this connection the Organization directs attention to the testimony of Jeter and Pratt. Jeter testified as follows:

"Q. Have you ever given Mr. Marlow any company equipment to keep for his personal use?

A. I have given Mr. Marlow old ties, where we had taken them out of a road crossing on cleaning up the old ties. That is all."

Roadmaster Pratt testified to the following:

- 'Q. During this last **tour** of duty in which Mr. **Marlow** has worked for you did he ever ask your permission to take used cross ties for his personal use or did you ever **give** such **permission** to Mt. **Marlow**?
- A. During the **last tour** of duty **I don't believe** I did. But in the other tour of duty I have given **Marlow** cross ties."

Regarding the 8-hp engine, the Claimant contends that it was given to him by Mr. **Fawbush**, Equipment Mechanic. Regarding the shovels and **brooms**, the Claimant testified to the following effect:

"In connection with my possession of company shovels, as being foreman subject to call at any time, day or night I keep these shovels on hand so that when called out during the night, excessive **amount** of **time and** travel going to the headquarters to pick up tools, I **can** save by going directly to where the trouble is. Raving shovels **in my** personal possession with knowledge of supervisor **and was condoned.**"

Regarding the gas can, the **Amoco** grease cartridges, the organization established on **cross-examination** that these items are readily available for purchase **in** public places. The Claimant asserted that the snow fence was owned by his father and was not company property. It is noted that the Special Agent did not see any mark on the snow fence **that** would establish it **was** railroad property, **although** it was **similar** to that used by the Carrier. A similar defense was **proffered** regarding the welding equipment. Regarding the water cooler, the Claimant testified that it **was** discarded as **company** junk as it had a hole **in** it. He took it, patched it, and was using it to water calves.

The company **argues that** the function of the Board is limited to inquiring whether the Claimant received a fair and impartial investigation, whether substantial evidence supports the Carrier's findings, and whether the discipline assessed was reasonable. Particularly **in** respect to Carrier's determination that the Claimant had unauthorized **possession of company** property, they direct attention to the evidence as it relates to shovels, brooms, and the 8-hp engine.

After carefully considering the evidence, **it is** the Board's **conclusion** that the evidence regarding the gas can, grease cartridges, snow fence, welding equipment, the cooler, and ties is not particularly convincing. In respect to the ties, the **testimony** of the **Claimant** coupled with the testimony of **Jeter** and **Pratt** establishes a very strong **presumption** that the ties in the Claimant's possession were given to him by his supervisors. There is nothing **in** the record that **would** establish that the ties **found** in his yard were other than those given

to him by Jeter and Pratt. Regarding the gas can, grease cartridges, snow fence, and welding equipment, there is no evidence that would establish this material was company property. While the material was similar to material used on the Carrier's property, there is nothing unique about its nature, and moreover, the Carrier witnesses admitted that it could be purchased easily elsewhere.

In respect to the 8-hp engine and the shovels and brooms, however, it is the conclusion of the Board that there is more than substantial evidence to establish that the Claimant was not authorized to possess these items. Moreover, it is our conclusion that due to the serious nature of the offense, discharge is appropriate. The evidence in respect to the engine is very convincing. The Claimant testified that he was in possession of the engine because it was given to him by Mr. Fawbush. However, Mr. Fawbush testified in an unequivocal manner as follows:

'Q. Mr. Fawbush have you ever given Mr. Marlow an 8 horsepower orange Brfggs and Straton engine?

A. No sir.

Q. Have you ever placed such an engine in the back of Mr. Marlow's personal truck?

A. No sir.

Q. Have you ever given Mr. Marlow permission to remove such an engine from company property for any reason?

A. No sir."

Regarding the shovels and brooms, the Claimant testified that he kept them at home in the event that he was called out for emergencies. However, Mr. Jeter specifically testified that permission was not given to the Claimant to take these tools home. He testified that he had told "his people that all railroad equipment used on the railroad would stay on the property". In addition the Board notes the following rule in existence on the Carrier's property:

'Rule 295 - Tools and Material

Responsibility. For- and others specifically assigned are responsible and accountable for all tools, material, and supplies in their charge. Tools and material will not be loaned to or exchanged with anyone unless properly authorized. All tools and supplies when not in use must, if practicable, be kept locked in tool box, car, house, or where they can be protected."

Theft is a charge of utmost seriousness. Dismissal is most often held to be appropriate for an offense of this nature. In view of the nature of the evidence in the case, we cannot conclude that the penalty of discharge is either arbitrary, capricious, or excessive.

FINDINGS: The **Third** Division of the Adjustment **Board**, upon the **whole** record and **all** the evidence, finds endholds:

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 Agreement was not violated.

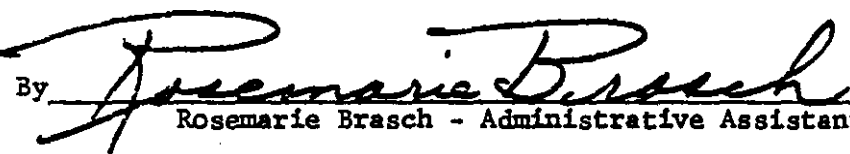
A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated 'et Chicago, Illinois, this 5th day of January 1983.

