

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24307
Docket Number MW-23826

Josef P. Sirefman, Referee

PARTIES TO DISPUTE: { (Brotherhood of Maintenance of Way Employees
(McCloud River Railroad Company

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

(1) The dismissal of Foreman J. M. Mitchell was without just and sufficient cause, wholly disproportionate to the offenses with which charged and in violation of the Agreement.

(2) Foreman J. M. Mitchell shall now be allowed the benefits prescribed in Agreement Rule 21(E)."

OPINION OF BOARD: Claimant John Mitchell, a Foreman, was removed from service on June 26, 1979, for violation of a number of Rules. An investigation was held on July 11, 1979 and Claimant was dismissed on August 17, 1979.

A review of the entire record before this Board establishes that Claimant had sufficient notice of the Rules infractions alleged by the Carrier to permit him to prepare a defense, and it further establishes that there was substantial evidence to sustain Carrier's decision to discipline Claimant for several serious violations.

However, the penalty of termination is too severe. In essence the record reveals that Claimant often treated Carrier's property as his own, and directed Carrier's personnel whom he was super-riding to perform for his personal benefit. What gives pause in sustaining termination is that the record also reveals that Claimant's pattern of conduct had been occurring over a substantial period of time. Given the relatively small area covered by the Carrier and the frequency of Claimant's misconduct it is reasonable to conclude that Carrier had knowledge of Claimant's activities and condoned them to a significant extent. Indeed, there were occasions when Claimant was explicitly permitted by his supervisor to sell second hand ties and share the proceeds with the Carrier (testimony of Chief Engineer J. Dixon). Such intermittent arrangements together with inaction by the Carrier over a number of years could well have conveyed to Claimant the impression that his misconduct was indeed proper.

Accordingly Claimant is to be returned to service hut without any back pay and should now be fully aware that he has no right to treat company property as his own, and that the personnel Claimant works with are to be given full and complete respect.

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 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 Discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of April 1983.

