

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24566
Docket Number MW-24737

Tedford E. Schoonover, Referee

PARTIES TO DISPUTE: (**Brotherhood of Maintenance of Way Employees**
(**Union Pacific Railroad Company**

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

(1) The dismissal of **Extra** Gang Foreman J. W. Kelly for alleged violation of 'General Rule B and General **Regulations** 700, 702(B), 704, 708, 709' was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File 5-19-11-14-55/013-210-K/.

(2) The claim as presented by Assistant General Chairman J. V. Larson on March 5, 1981 to Division **Engineer** F. D. Wengert shall be allowed as presented because said claim was not disallowed by Division Engineer F. D. Wengert in accordance with Rule **49(a)** 1.

(3) As a consequence of either or both (1) and/or (2) above, the claimant shall be

'reinstated and paid for all time lost'."

OPINION OF BOARD: Claimant was first employed by Carrier as an extra gang laborer on June 2, 1978. He was later **promoted** to the position of extra gang foreman. On March 3, 1981, the date of the incident which resulted in his dismissal, he was assigned to replace defective cross ties at **Calamada** Street, Whittier, California.

At about **12:45** PM, T. R. Cromwell, Special Agent observed a green Chevrolet Blazer with a small trailer at the site and two men, John Jeffreys and his brother, load five railroad ties into the trailer. After loading the ties, Mr. Jeffreys crossed the street, walked up to Foreman Kelly and handed him something, later identified as \$25.00. At a location some two blocks away from the site where this occurred, Mr. Jeffreys was stopped by the Special Agent and asked whether he had bought the ties from Mr. Kelly. **He** replied affirmatively and added he paid \$5.00 each for the ties. Mr. Jeffreys supplied the Carrier with a signed statement confirming the transaction but said he did not wish to be involved in any investigation of the matter. A picture of **the** ties loaded in the trailer was made a part of the evidence.

The incident was called to the attention of R. R. Brown, Roadmaster who listened to Mr. Jeffreys' statement as to what had transpired. On learning the circumstances, Mr. Brown advised Mr. Kelly he was removed from service. On March 6, 1981, Mr. Brown addressed a letter to Mr. Kelly confirming his removal from **service** account sale of the ties in violation of General Rule B and General Regulations 700, **702(B)**, 704, 708 and 709, quoted as follows:

"GENERAL RULE B: **Employees** must be conversant with and obey the rules and special **instructions**. If in doubt as to their meaning, they must apply to proper authority of the railroad for an explanation.

RULE 700: Employees will not be retained in service who are careless of the safety of themselves or others, insubordinate, dishonest, **immoral, quarrelsome** or otherwise vicious, **or** who do not conduct themselves in such a manner that the railroad will not be subjected to criticism and loss of good will, or who do not meet their personal obligations.

RULE 702-B: **Employees** must comply with instructions from proper authority.

RULE 704: Employees are required to report any misconduct or negligence affecting the interest of the railroad.

RULE 708: Unless specifically authorized, **employees** must not use the railroad's credit and must neither receive or pay out money on the railroad account. Property of the railroad must not be sold or in any way disposed of without proper authority. All articles of value found on railroad property must be cared for and promptly reported to proper authority.

RULE 709: Employees must not discriminate between patrons of the railroad. The acceptance of gratuities or rewards from patrons of the railroad is prohibited."

Mr. Brown's letter also notified Mr. Kelly to attend a formal investigation of the matter. A hearing was held on March 13, 1981 at which claimant was represented by officers of the Union who participated in the questioning of witnesses. On the basis of the facts and **circumstances** developed during the investigation and hearing, the claimant was advised by Carrier letter of March 30, 1981 of his dismissal for violation of the rules set forth above.

Statements pertaining to the alleged violation of the time limit rule as a basis for allowing the claim have been examined and are found to be without merit. Claimant was suspended from service in accordance with Rule **48(o)** of the Labor Agreement. Such action is permitted in serious cases such as this. The rule provides as follows:

"(o) It is understood that nothing contained in this rule will prevent the supervisory officer from suspending an employee from service pending hearing where serious and/or flagrant violations of Company rules or instructions are apparent, provided, however, that such hearing shall be conducted within thirty (30) calendar days from the date the **employee** is suspended and a decision rendered within twenty (20) calendar days following the date the investigation is concluded."

Following suspension claimant was accorded a hearing as required by the rule. Evidence, does not support the charge that the hearing was not conducted in a fair and impartial manner. Moreover, both the hearing and decision were well within the time limits specified in the rule. In cases of suspension and dismissal the burden of proof is clearly on the Carrier. Review of the evidence shows this requirement was fully met. The evidence establishes conclusively claimant's guilt in violation of Carrier rules cited in the allegation.

This is a case of misappropriation of company material to claimant's own financial benefit in clear violation of well established rules. Taking money for Company ties was clearly a dishonest act for which the Carrier took appropriate disciplinary action. As stated in Second Division Award No. 7831, Referee Van Wart held in part:

"By whatever name such act may be labeled, it remains a dishonest act. Carrier, particularly as a common Carrier, should not employ, keep, or be required to keep, in its employe (sic) a dishonest employee. There is no cause in the record to conclude that Carrier had acted arbitrarily or capriciously in discharging Claimant."

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 Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:



Nancy J. Devet - Executive Secretary

Dated at Chicago, Illinois, this 17th day of November, 1983.