NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24666
THIRD DIVISION Docket Number MW-24854

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Railroad Company (former St. Louis-San Francisco Railway Company)

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

(1) The dismissal of Messrs. L. D. Williams, L. Phillips and P. Caldwell for alleged violation of the first paragraph of Rule 176 and Rule 181 of the Rules For the Maintenance of Way and Structures" was excessive and unwarranted (System File B-924/MWC 82-2-g).

(2) The claimants shall be resinstated with seniority and all other rights unimpaired and they shall be compensated for all wage loss suffered.

OPINION OF BOARD: The record shows that prior to dismissal, Claimants L. A. Phillips, with about fifteen (15) years of service, L. D. Williams, with eleven years, and P. Caldwell, with seven years, were employed by the Carrier as Track Foreman, Assistant Foreman, and Trackmen, respectively. They were assigned as such on Gang No. 613 at Lawton, Oklahoma, working under the supervision of Roadmaster W. Jones and Assistant Roadmaster C. 0. Thompson.

The Carrier contends that while employed on Gang No. 613 on June 11, 1981, the claimants removed 41 new railroad ties from M.P. G6633/28 and transported them to an A&A Food Store in Lawton, where the ties were sold by the claimants to the owner of the store for $4.50 each, which money was divided among the claimants, and at no time had the claimants received authority from a Carrier officer to sell the ties or to remove them from Carrier's property.

When Carrier learned of the sale, the Claimants were questioned by a Special Agent of the Carrier and Roadmaster Jones on June 18, 1981, at which time the claimants signed waivers and gave statements acknowledging that they had taken 41 ties to the A&A Food Store and sold them for $4.50 each. Claimants were also arrested by civil authorities and formally charged with embezzlement. The claimants were at that time removed from Carrier's service.

Following a request from the Organization representative, the claimants were cited to attend an investigation at 9:00 A.M., June 30, 1981:

> • . ..to develop the facts and determine your responsibility, if any, in your alleged unjust dismissal from service by Roadmaster Wilson Jones on June 18, 1981, for allegedly selling 40 new ties to a Mr. Jim Allquizer on June 11, 1981 at Lawton, Oklahoma without proper authority."

The investigation was postponed and conducted on July 17, 1981, following which claimants were notified on July 21, 1981, that they were permanently dismissed from Carrier's service. In the letter of dismissal the Carrier cited the first paragraph of Rule 176 and Rule 181 of the Rules for the Maintenance of Way and Structures. The rules cited read:

Rule 181:

'181. Employes are forbidden to make a charge or accept a gratuity or reward for services performed in line of duty, or to permit discrimination, and unless specially authorized, must not use the credit of the railway and must neither receive nor pay out money on the railway's account. Property of the railway must not be sold, loaned, borrowed, or in anyway disposed of without proper authority. All articles of value found on railway property must be cared for and promptly reported..

Rule 176:

'176. Employes who are negligent or indifferent to duty, insubordinate, dishonest, immoral, quarrelsome, insolent or otherwise vicious, or who conduct themselves and handle their personal obligations in such a way that the railway will be subject to criticism and loss of good will, will not be retained in the service."

In its submission to this Board, the Organization contends that claimants were not charged with violating Rules 176 and 181 and implies that claimants were "tried on one charge and dismissed on another." The Carrier points out that such argument or contention was not made in the on-property handling of the dispute and is barred from consideration by the Board. A review of the correspondence covering the on-property handling of the dispute bears out the contention of the Carrier in this respect. It is so well settled as to require no citation that issues or defenses not raised on the property may not be raised for the first time before the Board; therefore, the contention of the Orzanization in this respect must be rejected. If the issue were properly before the Board it would be denied as no rules of the Agreement have been cited requiring that the notice of investigation specify any particular rules allegedly violated. Sea Award No. 25 of Public Law Board No. 2206 and Award No. 15 of Public Law Board No. 2746, both involving these same parties as involved herein.

In the investigation conducted on July 17, 1981, the statements made by each of the claimants to Carrier's Special Agent and Roadmaster on June 18, 1981, wherein they admitted taking the ties without authority on June 11, 1981, and selling them to the A&A Food Store for $4.50 each, were introduced into the record of the investigation. There was also substantial evidence adduced that each of the statements was made by claimant of his own free will, and that the ties were sold without authority. Claimant Phillips, the foreman, stated that the ties were removed from Burlington Northern property and sold without authority. Claimant Caldwell also testified that the ties were sold without authority. Claimant Williams admitted that the statement previously entered into the record was his. The statement referred to read:

"I, L. D. Williams, P.Caldwell, L. Phillips, pick up ties at 633/29 took them to this store on 27th St. and frop (sic) them on the afternoon of June 11, 1981. I, L. D. Williams was with them when we carry one load of 26 or 28 ties, I didn't want to do that but, I was not in charge of the job so, I just went along with them."

In the investigation Williams stated that he received $40.00 from the sale of the ties. There were contentions in the investigation that claimants thought the ties involved were Rock Island ties and not Burlington Northern ties. However, Claimant Williams went on to testify:

"A. I was under impression they were Rock Island ties but either way that day I didn't want to do it. I went along with it. That is irrelevant now.

Q. Mr. Williams would you care to make a statement on your behalf at this time?

A. I feel like the type of person that I am and the life I live there should of been something I could of stopped this, but I didn't do it. I don't blame them. I blame myself that I allowed it to happen. We all hate to loose (sic) our jobs over an incident like this. Because, I feel that anybody is entitled to one mistake. We are all human. Thats all I have."

The contention was advanced in the investigation, in the on-property handling, and in the submission to this Board that the claimants thought the ties involved were Rock Island ties and not Burlington Northern ties. However, substantial evidence was given by Carrier's Assistant Roadmaster that the ties involved were Burlington Northern ties. However, the Board agrees with the Carrier that any possible distinction as to whether the ties involved were Burlington Northern ties or Rock Island ties is irrelevant. The fact remains that the ties were removed from the Carrier's property by claimants without authority, were sold by the claimants, and the claimsnts kept the money. The evidence in the case clearly shows that.the claimants were each guilty of acts of dishonesty. The Board has issued numerous awards upholding the dismissal of employes for dishonesty. As stated in our Award No. 22745:

'It is a generally accepted tenet in the railroad industry that dishonesty is a dismissal offense.'

Carrier's action in dismissing the claimants from the service was not arbitrary, capricious, or in bad faith.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 Agremeent was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illnois this 24th day of February, 1984