

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21342
Docket Number MW-21445

William G. Caples, Referee

PARTIES TO DISPUTE:

{ Brotherhood of Maintenance of Way Employees
{
(Chicago and Eastern Illinois Railroad Company

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

(1) The dismissal of Track Foreman H. R. Kissack effective upon completion of his tour of duty July 24, 1974 was without just and sufficient cause and was based on unproven and disproven charges (System File M-670-214-43).

(2) The decision of Superintendent L. L. Carmichael dated August 8, 1974 was invalid because reason was not therein given for his denial.

(3) Because of (1) and/or (2) above

- a The entry of dismissal and the threat of another investigation on an unrelated matter be expunged from Mr. Kissack's record;
- b Mr. Kissack shall be restored and reinstated to his position of Track Foreman, with seniority, vacation and all other rights unimpaired;
- c Mr. Kissack shall be reimbursed for any loss of compensation incurred, including any loss suffered because of suspension of group insurance;
- d Interest at the rate of ten (10%) per annum be paid on the monetary allowance accruing from the initial claim date until paid.

OPINION OF BOARD: On May 24, 1974, Carrier charged Claimant in writing with:

"Unauthorized removal and sale of company material and failure to remit the proceeds of such sales to the C&EI Railroad during the period of December 10, 1973 to March 23, 1974."

and investigation was set for and conducted on June 17, 1974. On July 23, 1974, Mr. L. L. Carmichael by certified mail advised Claimant of the Carrier's decision as follows:

"You are hereby advised that your record has this date been assessed with DISMISSED, effective completion of your tour

"of duty July 24, 1974, for your failure to comply with Rules and Regulations for the Maintenance of Way and Structures General Rule H, General Rule C, Rule 295, Rule 299 and Rule 400, as developed in formal investigation conducted on June 17, 1974, June 26, 1974 and July 16, 1974. This will also advise you that were you not being dismissed from service for this cause, it would now be necessary to cite you for another investigation, based on information recently received on the charge of materially falsifying your application for employment with this company.

Your record now stands DISMISSED."

In discipline cases our function is to review the record in its entirety to determine whether (1) in the discipline proceedings the due process provisions of the Agreement were satisfied; (2) if found guilty in whole or in part, the finding is supported by substantial evidence; and (3) the discipline assessed was excessive for the offense. Award 20471 (Lazar).

The only procedural matter claimed is that a decision of the Superintendent in a letter dated August 8, 1974, not to restore and reinstate Claimant to his position as Track Foreman "was invalid because reason was not given for his denial." In denying this request, the Superintendent wrote:

"After carefully reviewing the transcript of this investigation and reading your appeal, I am not agreeable to reinstating Mr. Kissack to the service of the Chicago & Eastern Illinois Railroad as Track Foreman."

This Board has consistently ruled that no particular form or language is required to be used in denying a claim or giving the reasons for denial. Awards 10061 (Daly), 14761 (Ritter), 14846 (Dorsey), 14864 (Ives) and many others.

There is little controversy in the record that at one time some permission had been given Claimant, long before the time period which was the subject of the investigation, to remove scrap from the bins at Momence and Watseka. There was no written evidence of any permission and that alleged was not precise. Claimant, (Kissack), testified as follows at the investigation:

Q. Mr. Kissack, you have been present during all the testimony of this investigation, is that not correct?

A. Yes sir.

Q. You have heard considerable testimony concerning permission you claim you had to remove the material, is that correct?

A. Yes.

Q. As no one has substantiated your claim you had written permission to remove the scrap, how do you account for your making this statement?

A. 10, 11, 12 years ago I did have written permission, a letter from Mr. Tindale that he had given permission.

Q. The scale tickets that were presented earlier in the investigation that amount to 185,970 pounds and in the amount of \$5319.80. Did this scrap that you sold in this amount come out of the scrap bins at both Momence and Watseka?

A. Mostly Watseka.

Q. But all of it did come out of the scrap bins, is that correct?

A. Yes sir.

There is considerable weight given in Claimant's behalf that no witness was produced by the Carrier at the investigation who actually saw the material removed from Carrier's property, but the other evidence of removal and sale of material (scrap metal) in substantial weight, which the railroad identified as the source, is sufficient to sustain the Carrier's burden of proof. The evidence was not rebutted at the investigation on the property.

The decisions of this Board have consistently held that the scope of its review, both as to the question of guilt and the amount of discipline, will not be disturbed when the charge is supported by substantial evidence and the amount of discipline is not arbitrary or capricious.

The Board is of the opinion that the Carrier sustained its burden of proof of the charges brought by it and, thus, the Claim is denied.

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 Carrier did not violate the Agreement.

A W A R D

The Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1976.

