

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23098
Docket Number MW-23168

A. Robert Lowry, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Consolidated Rail Corporation

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

(1) The dismissal of Work Equipment Operator G. G. Morin was without just and sufficient cause and on the basis of unproven charges (System Docket 474).

(2) G. G. Morin shall be reinstated with seniority, vacation and all other rights unimpaired and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: On September 11, 1978 Mr. L. E. Houser, Assistant Track Supervisor, received an anonymous telephone call stating that the caller had seen claimant Morin with ties in the back of a pick-up truck and that he was using the ties to build a bridge at Schwartz Road to get to his property. The following day D. A. Fletcher, Supervisor of Track and Houser made an investigation and discovered 56 ties to be missing from the derailment site at Avilla, Indiana. After repeated efforts Sgt. J. Swygart of the Carrier's Police Department was notified on September 28, 1978 of the missing ties and was requested to investigate. On October 4, 1978, Fletcher and Houser accompanied Sgt. Swygart and Sgt. Boomershiner of the State Police Department to Schwartz Road and inspected the bridge that was built over a drainage ditch leading to claimant Morin's property. The result of this investigation revealed the bridge to have been constructed with 44 new ties, 80 to 90% clearly bearing the Conrail markings which normally appear on its ties. They also found a 20 foot length of 24" culvert drain pipe bearing the same identifying markings and size of Conrail pipe missing from the Carrier's M.W. Yard at Fort Wayne, Indiana.

Claimant was held out of service commencing October 6, 1978 and a trial (formal investigation) was held in accordance with the Rules Agreement on December 4, 1978 after a delay requested by the Organization. A copy of the transcript of the trial has been made a part of the record. Following the trial the claimant was notified of his dismissal from service.

The Organization contends the claimant built the bridge with railroad ties purchased from a Mr. Tim Arthur and produced a receipt dated August 17, 1978 covering the purchase of 44 railroad ties at \$11.00 each for a total of \$484.00. It was noted to be a cash transaction. The Organization further contends the ties purchased from Mr. Arthur were installed by the claimant but were subsequently replaced with new Conrail ties by a third party. The claimant testified the third party was Contractor Whan whose truck he hit in July, 1978 and who substituted the new Conrail ties in the bridge and called Houser to get revenge for the damage done to his truck.

On careful review of the record before the Board, including the transcript of the trial, we find that none of claimant's substantive procedural rights was violated and he was given every opportunity to examine and cross examine all witnesses, which he did extensively. He was properly notified of the trial under the rules of the Agreement and specifically notified of his rights to produce witnesses in his own behalf.

Mr. Philip P. Whan, Sub-Contractor for A&O Sewer Service, a Conrail contractor, testified that he saw claimant in his pick-up truck with 7 or 8 new ties on September 7, 1978 and on the following morning upon checking at the derailment site found 8 ties to be missing. Mr. Tim Arthur in a statement dated November 7, 1978 repudiated the contention of the claimant by stating the receipt showing the purchase of 44 ties by the claimant was "a made up fake receipt." Mr. Michael L. Stratton, an employee of Heuer Industrials, a Conrail contractor, testified that he assisted claimant in loading the 20 foot culvert bearing the same identifying markings as the subject missing pipe. He also assisted in recovering the pipe from the bridge site.

Claimant was represented by a duly accredited representative of his Organization and also had present at the trial his lawyer, who was not permitted to participate, which was proper under the rules of the agreement under which the trial was conducted and which practice is universal in the industry. The presence of legal counsel indicates to the Board that claimant was aware of the importance of producing witnesses to support his contentions. Inasmuch as claimant chose not to produce witnesses, the Board must rely on the Carrier's impressions of the credibility of the claimant's testimony.

On October 14, 1980 a hearing was held by the Board before this Referee and the claimant was given full opportunity to present his case.

The evidence produced in the trial overwhelmingly supports the charges of the Carrier. The Carrier's action in imposing the discipline was justified and with sufficient cause. The action was not arbitrary, capricious or in bad faith. There is no proper basis for the Board to interfere with the discipline imposed.

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:


Executive Secretary

Dated at Chicago, Illinois, this 15th day of December 1980.