

CH
SAR
NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26152
Docket Number MW-26303

Edwin H. Benn, 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 Mr. W. F. Jones for alleged 'unauthorized sale and/or disposal of approximately 40 pieces of Burlington Northern scrap rail to a Mr. Harold Cronin, on or about August 6, 1983' was without just and sufficient cause and on the basis of unproven charges (System File B-2193/MWC 84-2-15C).

2. Mr. W. F. Jones shall now be allowed the benefits prescribed in Article II, Rule 91 (b) (6)."

OPINION OF BOARD: Claimant worked for the Carrier commencing December 8, 1969, and established seniority in the Track Department. Claimant was later promoted to Track Foreman with established seniority of August, 1974. Thereafter, while retaining his seniority as Trackman and Track Foreman, Claimant was promoted to Roadmaster. At the time of the incidents discussed below, Claimant was Roadmaster in charge of construction and maintenance on the Carrier's Fifth Subdivision which extended from Mile Post 558 to the yard limits at Quanah, Texas.

Claimant was dismissed from service effective August 29, 1983. The Investigation Transcript (which Investigation the Carrier contended was not contractually required because of Claimant's position, but which the Carrier nevertheless, without prejudice, agreed to participate in) resulting from the dismissal showed the following evidence was presented:

On August 4, 1983, Assistant Superintendent of Roadway Maintenance, W. F. Switzer and B & B Supervisor, H. R. Bowman took a Hi-Rail inspection trip between Lawton, Oklahoma and Quanah, Texas. This trip took Switzer and Bowman past a previous derailment site in the vicinity of Mile Post 673 near Headrick, Oklahoma. At the time of the derailment, Claimant was Roadmaster in charge of that territory. At the time Switzer and Bowman passed the derailment site, both Switzer and Bowman noticed that there was scrap rail adjacent to the south side of the track.

On August 11, 1983, Switzer, Bowman, Tulsa Division Superintendent, J. K. Vaden, and Claimant took another Hi-Rail trip through the same area. When the group passed the derailment site, Switzer noticed that the scrap rail that had previously been adjacent to the south side of the main track was missing. Switzer asked Claimant what happened to the scrap rail. Claimant

replied that there was no scrap rail there and there had not been scrap rail there for a long time. Switzer noticed that a bulldozer had been working in the area. Switzer asked Claimant who had been there with a bulldozer. Claimant stated that there was a Contractor working there who bought the damaged cars from the derailment. Switzer inquired about the Contractor's identity. Claimant stated that he did not know who the Contractor was.

On August 14, 1983, Switzer again spoke to Claimant about the missing scrap rail. Claimant told Switzer that there might have been a few pieces of bent scrap rail that could not be loaded because of its condition, but Claimant stated to Switzer that he did not know what happened to those pieces. Switzer then called Superintendent Vaden and informed Vaden of the circumstances. Vaden decided to bring in the Special Officers to investigate the disappearance of the scrap rail.

Division Special Agent, W. W. Perkins received the inquiry request from Vaden. On August 7, 1983, Perkins assigned Special Agent R. Wright to conduct that investigation.

On August 18, 1983, Wright met with Claimant. Wright asked Claimant about the missing rails. Claimant told Wright that some of the rail had been taken to Headrick and some was at the depot at Snyder, Oklahoma. Wright then inspected the rail at Snyder and expecting to find twisted rail from a derailment, nevertheless found rail in a condition that did not appear to result from a derailment. Wright inquired of the Agent, J. C. Garner, where the rail came from. Garner advised Wright that the rail at Snyder was removed from a Sperry Car over track testing. Wright concluded that the rail was not from a derailment. Wright investigated further.

During Wright's inquiry, Wright contacted Harold Cronin, a private Contractor who performed work for the Carrier. Wright asked Cronin if he was aware of any scrap rail that came from the Headrick area. Cronin replied that he had some rail from Headrick on a trailer at his home. Cronin asked Wright if he would like to see the rail. Wright responded affirmatively and thereafter inspected the rail. Cronin advised Wright that he purchased the rail from Headrick from Claimant for \$400.00 in cash. Cronin supplied a written statement that he made the purchase from Claimant.

On August 19, 1983, during a meeting between Claimant, Perkins, Vaden, Wright and Switzer, Claimant was confronted with the substance of Cronin's statement and the fact that the rail had been found in the Snyder area. Claimant denied selling the rail to Cronin. Claimant also gave a written statement to that effect.

On August 20, 1983, Wright reinterviewed Cronin. Wright advised Cronin that Claimant denied selling the rails to Cronin. Cronin told Wright that was untrue and again stated that he purchased the scrap rail from Claimant for \$400.00 cash. Cronin gave a second written statement to that effect.

On August 23, 1983, Perkins met with Claimant and reviewed the developments of the Investigation, particularly the discrepancies between Claimant's and Switzer's versions concerning how long the rails had been missing, Claimant's subsequent changing of his story concerning his contention that there were in fact pieces of twisted rail, and the contents of Cronin's signed statement that attributed the sale of the scrap rail to Claimant.

On August 29, 1983, Claimant met with Vaden and the entire matter was reviewed again. At that time, Vaden relieved Claimant from his duties as Roadmaster and Trackman for the unauthorized sale of scrap rail.

Cronin attended the Discharge Investigation. Cronin testified that he approached Claimant and asked him if the rail at Headrick was for sale. According to Cronin, Claimant stated that it was. Cronin testified that Claimant requested cash, and after some bargaining over the amount, Cronin paid Claimant \$400.00.

During the Investigation, Claimant testified and denied that he was approached by Cronin concerning the scrap rail and further denied that he similarly approached Cronin. Claimant further denied that Cronin paid him \$400.00 for the rail or that he received any cash from Cronin for the rail.

Rule 506 of the Rules of the Maintenance of Way Department states:

"Unless specifically authorized, employes must not use the railroad's credit and must neither receive nor pay out money on the railroad account. Property of the railroad must not be sold nor in any way disposed of without proper authority. All articles of value found on railroad property must be cared for and promptly reported."

Irrespective of the issue concerning whether an Investigation was contractually required due to Claimant's position, our close examination of the record, in particular the Investigation Transcript, satisfies us that there was "substantial evidence of probative value in support of the decision" to terminate Claimant on the basis of a Rule 506 violation. First Division Award No. 16411. Clear evidence was presented that Claimant, notwithstanding his denial, sold the scrap rail to Cronin for \$400.00 and it was that evidence upon which the Carrier based its decision to terminate. Cronin gave two written statements to that effect and further so testified during the Investigation as reflected in the Transcript. Further, there are serious inconsistencies in Claimant's version concerning whether there was scrap rail at the derailment site and when it was removed. We therefore cannot say that the decision to terminate Claimant was "unjust, discriminatory, arbitrary or capricious." Fourth Division Award No. 2445. Our function is "to look at the record and decide if the evidence is sufficient, even if disputed, to warrant the decision made by the Carrier." Third Division Award No. 13117. We find the evidence adduced in this case was sufficient.

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

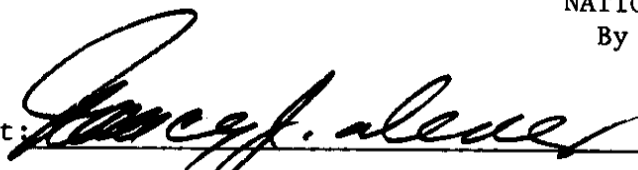
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of September 1986.

