

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31840
Docket No. MW-32161
96-3-94-3-587**

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Kansas City Southern Railway Company (former
(MidSouth Rail Corporation)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Messrs. H. Jones, J. McBride and N. Keeton for alleged violation of MidSouth Rail Corporation Rules H, L and GCR-3 was arbitrary, unwarranted and excessive.

(2) As a consequence of the violation referred to in Part (1) above, the Claimants' records shall be cleared of the charges leveled against them and they shall be reinstated to service with all back pay and all other rights and benefits restored."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

At the time of the incidents leading to their dismissal, Claimants were employed respectively as a Machine Operator, a Section Foreman, and a Track Supervisor working with the tie gang in the vicinity of DeRidder, Louisiana. By letter of October 15, 1993, Claimants were instructed to appear for an Investigation concerning their alleged unauthorized removal of Carrier material (used railroad ties) and their subsequent dishonesty and disloyalty in connection with the sale of that material. A Hearing was held on October 28, 1993. Following the Hearing all Claimants were dismissed from Carrier's service.

The Carrier maintains that each Claimant is culpable in this case. McBride told Jones to sell the ties. Jones complied, although he knew it was against Carrier's Rules, and cashed the checks he received from the private sale of company property. Keeton used Carrier's equipment to load the ties and received cash payments for his work from Jones. The Carrier points out that McBride acknowledged in his testimony at the investigatory Hearing that he did not have authority to sell the ties privately.

The Organization contends that there was an unwritten procedure for selling scrap ties. It also notes that the Claimants testified that they did not use the money for personal gain, but rather bought food and other items for the tie gang. Thus, the Organization maintains that Claimants had no intention of profiting personally from the sale of the ties.

There is no disagreement on the record that Claimants sold scrap ties to private individuals without authorization. Nor is there any doubt that all three individuals knew they were acting contrary to Carrier's reasonable rules and regulations. As this Board has held in numerous past Awards, theft is a serious breach of an employee's responsibility to his/her employer. (Third Division Award 29334). There is nothing on this record to suggest that the employees were unaware of the Rules prohibiting their behavior. Finally, Claimants' behavior may not be excused because they allegedly shared the fruits of their earnings with other Carrier employees. Unless they turned the moneys obtained over to Carrier, what they ultimately used the funds for is immaterial, and cannot constitute an acceptable defense.

AWARD

Claim denied.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 26th day of December 1996.