

PUBLIC LAW BOARD NO. 1844

AWARD NO. 2

CASE NO. 13

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation
Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The dismissal of Track Supervisor Joseph Daniel Dean was without just and sufficient cause and wholly disproportionate to the alleged offense (System File D-11-1-321).
2. Track Supervisor Joseph Daniel Dean be restored to service with all rights unimpaired.

OPINION OF BOARD:

This is a dismissal case involving Track Supervisor Joseph Daniel Dean, an employee of Carrier since 1960. In November, 1975, Claimant was supervising a crew removing ties from abandoned track in the vicinity of Elmhurst, Illinois. On November 4, 1975, while supervising his crew Claimant was approached by an individual seeking to buy railroad ties. Claimant informed him he could have no new ties but that old ties were available for \$1.00 apiece. The individual, a gas station employee, thereupon removed some 15 ties from the work site for which he paid Claimant \$10.00. The incident was reported to Carrier officials by a member of Claimant's work crew and an investigation ensued. Thereafter by letter dated November 11, 1975, Claimant was advised to attend a formal hearing and investigation. That notice read in pertinent part as follows:

"Charge: Your responsibility in connection with the sale of company property, namely railroad ties, on or about Nov. 4, 1975 in the vicinity of the former CGW right-of-way, Elmhurst, Ill.

"You may be accompanied by one or more persons and/or representatives of your own choosing subject to the provisions of applicable scheduled rules and agreements and you may, if you so desire, produce witnesses in your own behalf without expense to the Transportation Company."

The hearing established essentially that Claimant had sold some ties to the gas station owner for \$10.00 and that some of the ties were scrap and the others were reuseable. Following the investigation, Claimant was dismissed from all services of the Carrier.

The Organization points out that Claimant admits a mistake in judgment and urges that he be given another opportunity in light of his long and unblemished service record. In support of this view the Organization turns our attention to Third Division Award No. 20636 involving a similar fact pattern. Carrier, on the other hand, insists that this is a case of proven dishonesty without mitigating circumstances and must be dealt with accordingly. Thus, Carrier maintains that the discipline of discharge from all service should not be disturbed by the Board.

We have analyzed carefully record evidence and the precedent awards. We are struck by the similarity between this case and the recent Third Division Award cited by the Organization, No. 20636. In that case, as herein, a matter of central importance is the condition of the ties involved in the transaction and Claimant's perception of that condition. This is not to say that employees may sell on their own account even abandoned property of the Carrier with impunity, but such questions do merit consideration with respect to the amount of discipline assessed for such activity. The uncontradicted record indicates that five of the ties in question were not salvageable and were beyond repair. A question remains as to the condition of the remaining ten ties sold by Claimant. The record indicates that the ties all

had been damaged in a derailment such that the ends had been broken off. Claimant testified that upon first viewing the ties he was convinced they were not salvageable but after the sale, when the purchaser was removing them, he saw that some were re-useable. The chief Carrier witness against Claimant was an 18-year old member of his work crew who had worked in railroad service seven days when he reported the sale to Carrier officials. Carrier's Roadmaster, upon investigating the ties at the gas station, found ten of them to be salvageable. But nowhere does the record clearly establish that Claimant knowingly and intentionally sold other than abandoned or non-usable ties. In these circumstances we find guidance from the previously cited Award No. 20636, to wit.:

"...It is apparent that the gravamen of this dispute is the question of where Claimant found the ties in question. If he took the ties from a pile of salvaged usable ties and sold them to the farmer, there is not much question as to the appropriateness of the discipline. If, however, the ties were taken from abandoned ties which were left to rot on the right of way, the issue is considerably different.

"A very similar situation involving the disposition of used ties was considered by Special Board of Adjustment No. 541 in its Award No. 54. We believe that the reasoning expressed in that Award is applicable herein:

'No justification is perceived for setting aside Carrier's decision that substantial discipline is warranted since employees must realize that they are not free to dispose of company property without permission. On the other hand, we are not persuaded that the record is sufficiently clear to provide a sound basis for dismissal of employees with long service or a finding that they are dishonest.'

We should not be understood, nor do we perceive the authority we cite, as condoning conversion and resale of company property, whatever its condition or status. Claimant is culpable of a serious dereliction of duty which will not go unpunished. But we are cognizant of the generally recognized labor relations principle, to which this Carrier adheres, that discipline should be remedial rather

than punitive and progressive rather than terminal if conditions and circumstances permit. In our considered judgment the penalty of outright dismissal is inappropriately severe given the nature and circumstances of the offense and Claimant's long-standing and apparently satisfactory work record. Accordingly, we hold that the discipline of dismissal should be reduced to a suspension without pay and that Claimant should be reinstated with seniority and other rights unimpaired but without compensation for that period of time that he has been outside Carrier's employment.

FINDINGS:


Public Law Board No. 1844, upon the whole record and all of the evidence, finds and holds as follows:

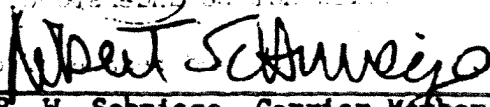
1. That the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;
 2. that the Board has jurisdiction over the dispute involved herein;
- and
3. That the penalty imposed was excessive.

AWARD

Claimant is to be reinstated with seniority rights unimpaired but without back pay. Carrier is directed to comply with this Award within 30 days of its issuance.


Dana E. Elschen, Chairman


O. M. Berge, Employee Member


R. W. Schmiege, Carrier Member

Dated: May 5, 1977

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