

PUBLIC LAW BOARD NUMBER 3566

Award Number: 2

Case Number: 2

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

BURLINGTON NORTHERN RAILROAD COMPANY

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Foreman C. Rhodes and Trackman G.D. Greenwood for alleged "violation of Rules 700 and 700-B" was without just and reasonable cause.
- (2) The Claimants shall be reinstated with seniority and all other rights unimpaired, their respective records shall be cleared of the charges leveled against them and they shall be compensated for all wage lost suffered.

FINDINGS:

On the evening of September 18, 1982, Roadmaster Lawrence E. Miller was informed by the Chief Dispatcher that unidentified persons were picking up ties at Bridge 375.9 between Catale and Chelsea. Upon further investigation, Miller discovered that the ties had been taken by Claimants, and he removed them from service.

A hearing was held in order to investigate the charges against Claimants, and on the basis of the evidence adduced during the investigation Carrier

determined that Claimants had attempted to steal the ties and that they should be dismissed.

The Organization filed a claim protesting Carrier's actions and requesting that Claimants be returned to service with pay for time lost and with all rights unimpaired. The Claim was denied at all levels of appeal on the property, and the Organization then submitted the matter to this Board for resolution.

The issue to be decided in this dispute is whether Claimants were dismissed for just and reasonable cause; and if not, what should the remedy be.

At the hearing, Miller testified that he had given old ties to Claimants in the past. He testified further that he had told Claimants that if they had asked for them, he (Miller) would have given Claimants the ties. In response to a question by the conducting officer, Miller stated that some old ties are reused and some discarded, and that "normally we pick up the ones we want to keep first."

In a dismissal case for theft, Carrier must show, by clear and convincing evidence, that the accused employee or employees had the requisite intent to commit theft. Carrier has failed to make such a showing in the instant case. Although Claimants took the ties without asking permission, all of the evidence shows that Claimants thought it was permissible for them to take the ties. Miller had given Claimants used ties in the past, and told them he would have given the ties to Claimants if they had asked. Claimants testified that they did

not believe that what they had done constituted stealing, and their testimony is credible since there is ample evidence to show that Claimants had good reason to believe that the ties would not be reused by Carrier. In addition, Claimants made no effort to conceal their activities, they cooperated fully with the investigation, and they made restitution without protest when requested to do so. Claimants' behavior simply does not resemble that of persons engaging in theft.

For the reasons stated above, it is the opinion of this Board that Carrier has failed to show, by clear and convincing evidence, that Claimants were dishonest or that they committed theft or pilferage. Accordingly, the claim must be sustained.

**AWARD:**

Claim sustained. Carrier shall return Claimants to service in their former positions immediately with full seniority, and shall expunge all evidence of this discipline from their service records. Carrier shall also compensate Claimants for all pay lost as a result of the dismissal, minus any outside income Claimants may have earned during the dismissal period.

*Nicholas Hyman*  
Neutral Member

W. H. Dickson DISSIDENT  
Carrier Member

Ma. Christie  
Organization Member

Date: February 1, 1955