

Joseph Lazar, Referee

CASE NO. 2

STATEMENT
OF CLAIM:

FINDINGS: The Board, on consideration of the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated April 10, 1987, that it has jurisdiction of the parties and the subject matter, and that, pursuant to the Agreement dated April 10, 1987, oral hearing by the parties, including Claimant, has been duly waived.

Claimant Donald R. Patton, Special Equipment Operator, was dismissed on July 17, 1986 "for alleged improper and unauthorized sale of company material and use of company equipment in connection with used ties and miscellaneous structures, including violation of General Rules A, B, D and L plus additional General Rules 530, 530A, 530B, 532(C) and 535 of the Rules of the Maintenance of Way, effective April 27, 1986." These rules read as follows:

General Rule A: "Obedience to the rules is essential to safety and to remaining in service. The service demands the faithful, intelligent, and courteous discharge of duty."

General Rule B: "Employees must be familiar with and obey all rules and instructions and must attend the required classes. If in doubt as to the meaning of any rule or instruction, employees must apply to the supervisor for an explanation."

General Rule D: "Employees must cooperate and assist in carrying out the rules and instructions and must promptly report to the proper officer any violation of the rules or instructions, any condition or practice which may imperil the safety of trains, passengers, or employees, and any misconduct or negligence affecting the interest of the company."

General Rule L: "Employees must conduct themselves in such a manner that their company will not be subject to criticism or loss of goodwill."

General Rule 530: "Employees will not be retained in the service who are careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, quarrelsome, or otherwise vicious, or who do not conduct themselves in a manner that the railroad will not be subjected to criticism and loss of goodwill."

Rule 530A: Factual Report of Information. Employees who withhold information or fail to give factual report of any irregularity, accident or violation of the rules will not be retained in the service."

Rule 530B: "Theft or pilferage shall be considered sufficient cause for dismissal from railroad service."

Rule 532(C): "Other Business or Occupation. Employees must not engage in other business or occupation unless they have applied for and received written permission from the proper authority."

Rule 535: "Unless specifically authorized, employees 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."

The transcript of investigation shows the following testimony by Mr. R. C. Wagoner, General Roadmaster, Springfield, Missouri:

"Q. Why did you remove Mr. Patton from service?

A. For his alleged misuse of company machines off of company property and on company property, and his receipt of money for company material.

- Q. Why did you not have Mr. L. O. Ghramm (Roadmaster who supervised Claimant) remove Mr. Patton from service?
- A. Division Superintendent W. D. Macormic had removed Mr. Gramm from service prior to 9:25 p.m.
- Q. Do you know why Mr. Macormic removed Mr. L. O. Ghramm from service?
- A. For the sale of company material.
- Q. Mr. Wagoner, when used ties are available, what has been the usual practice of disposal of those ties in the past?
- A. Depending on the area, some places we give them to adjoining land-owners; some places we fill out a form that releases us from liability, charge so much per tie, depending on how good the tie is. That's just--any individual can receive a form; then on a big tie program we get a contractor who comes in and takes all the ties at a set amount.
- Q. Is it permissible for an employee to take a used or scrap tie?
- A. If he has a permit, for his use only, not for resale.
- Q. Is it permissible, then, for an employee to sell used or scrap ties for personal gain?
- A. No, sir.
- Q. May employees charge money for loading or hauling used ties with company equipment?
- A. No, sir.
- Q. Has it been company policy to allow employees to engage in other occupations outside of railroad employment without permission or authority?
- A. No, sir.
- Q. What is the standard procedure for an employee desiring to enter into business outside of the railroad?
- A. To get permission from the proper officer.
- Q. Does that permission have to be in writing?
- A. Yes, sir." (Tr., pp. 6-7).

The transcript of investigation shows the following testimony by Mr. D. J. Grisham, Special Agent, Joplin, Missouri:

- "Q. Is it your duty to investigate misappropriation of company equipment and material?
- A. Uh, yes, sir.

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Q. Did you recently become aware of possible misappropriation of material and equipment in the Joplin area?

A. Uh, yes, sir.

Q. Did this misappropriation appear to involve company employees?

A. Yes, it did.

Q. Which employees did it appear to involve?

A. Uh, three at the time had been Rick Patton, Lester Ghramm, L. O. Ghramm, Roadmaster.

Q. Rick Patton? Is he the D. R. Patton who's the principal of this investigation?

A. Yes, sir.

Q. How did you become aware of this misappropriation?

A. Uh, originally, uh, by rumors just floating around Joplin area that ties were being sold by company employees, and then by, uh, again, by word of--uh ties that were sold and that employees were pocketing the proceeds from them, and we just started an investigation.

Q. Did you take any statements of any witnesses that may have--?

A. Yes, sir. I had, uh, during the past few months I had made notations of names of people who I knew were getting ties, and I had a few tie contracts in my possession. Then I contacted these people and obtained the statements from them of how they purchased the ties and how the payment was made and who the payment was made to.

Mr. Spears: Mr. Hiett, do you intend to have these, uh, people here that signed these statements at the investigation?

Mr. Hiett: Mr. Spears, that information--some information regarding presence of witnesses may be brought out during the investigation.

Mr. Spears: Besides, I'd like to go on record to object to any statements that's being--that's entered into the investigation that there's no--if the people are not here that signed the statements where I can cross examine, I'd like to object to the entering of statement.

Mr. Hiett: Your objection is duly noted and will be made a part of the record of this proceeding.

Q. Is it ready?

A. Just a second. I'm trying to separate out the two here. Okay I have a statement here from, uh, Gary D. Yoder, Y-o-d-e-r, and he

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lives at 637 N. Shefferdecker, Joplin. He stated that he has been picking up pies from the railroad and that he states in his statement he saw after working hours, uh, Rick Patton was loading ties into, uh, a vehicle using a company speed swing to do so, that that was at Carl Junction; and then he also stated that at the old Sixth Street yard after working hours he also again saw, uh, Rick Patton loading ties. Uh, and this was also after working hours. It was, Rick Patton and two other gentlemen bading into a black Chevy--black pickup at that time.

Q. Would you like to enter that statement as an exhibit?

A. Yes, sir.

Mr. Hiett: We'll mark this statement as Exhibit A of the Carrier.

Mr. Spears: I'd like to examine the statement, Mr. Hiett.

Mr. Hiett: Exhibit A, statement from Mr. Gary D. Yoder. Mr. Spears may examine the statement.

Q. Mr. Grisham, do you have any other statements to introduce?

A. Yes, sir. I have a statement from, uh, Tony Mack Williams, taken from him in Joplin, Missouri. In this statement he states that he was approached by Rick Patton, or D. R. Patton, about picking up ties at Carl Junction yards.

Mr. Hiett: We'll mark that Exhibit B. This statement taken from Tony Mack Williams. Mark it Exhibit B.

Q. Mr. Grisham, would you read this statement, Exhibit B, into the record.

A. You want me to read the complete statement?

Q. Yes.

A. This statement is given in reference to used railroad ties that I purchased from the Burlington Northern Railroad reference to a tie contract dated January 4, 1985, for used ties out of Carl Junction, Mo., Yards. I was approached by Rick Patton about picking up a lot of ties at the Carl Junctions Yards. Rick told me that I would sell the ties, have the check put in my name, and then split three ways with him and Lester Ghramm. Rick said that we would pay Tuffy Ghramm for one load and then not pay him for another load. I got approximately 4,000-5,000 ties (used switch and 8' ties) out of the yards. The ties were loaded on my trucks and trailers by Rick Patton using the Burlington Northern speed swing. I sold the ties to Payless in Joplin (approx. 1500 - 8' ties),

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Southerland Lbr. in Pittsburg, Kansas (approx 100-8' ties), 100 ties to Snyder Bridge and the remaining ties to different individuals out of my yards through ads in the paper. I sold the ties at approx. \$4.00 each. When I would get paid for the ties I would cash the checks and per agreement pay Rick Patton and Lester Ghramm a third each. During this time Tuffy was given approx. \$900.00 in cash as he refused a check. A couple of times I gave Tuffy cash at the railroad depot on W. 20th or to give the money to Rick and Lester and they were supposed to give the money to Tuffy. Sometimes Tuffy would say--just give the money to Rick or Lester. I hired Kenny Townsend from Joplin to haul the ties out of Carl Jct. Yard. I believe he hauled at least 200 ties to Suthwerland Lbr. in Pittsburg, Kansas, for which I paid him approximately \$200.00. I paid Rick Patton and Lester Ghramm approximately \$5,000 for their share of the ties from Carl Jct.

In reference to the piggyback ramp I removed, for the Burlington Northern Railroad at 2101 W. 20th St., Joplin, Mo., I was told by Rick Patton and Lester Ghramm, while at my house, what to bid on the ramp removal. I went to Tuffy's office at the old BN Depot at 10th & Main in Joplin and told Tuffy that I bid \$8,300.00 to remove the dock. Tuffy said, let's make it \$9,300.00. Rick and Lester had told me that Ames Excavating had low bid of \$12,000.00. The same day I made the bid Tuffy told me I had the bid and to get it started. We used Burlington Northern Railroad speed swing, air compressor and jack hammer to do the work with. Rick Patton worked with me every day until it was done. Lester would be there from time to time running the jack hammer or speed swing. Don Benefield was there with the welder cutting the rebar when needed. The contract was made by Tuffy--was not made by Tuffy until the job was about completed and then he back dated it two days. The Burlington Northern paid me \$9,300.00 by check. I cashed the check and paid Rick Patton \$4,000.00 in cash with the understanding that he split it with Lester Ghramm and Tony Patton. I want to say that we actually started working on the dock removal four days before the contract was released and then it was back dated two of those four days.

In reference to used tie contract, dated May 7, 1985, for the removal of ties from 6th Street Yard in Joplin. I had an agreement with Rick Patton and Lester Ghramm to move ties from 6th Street. Rick Patton loaded approx. 400 switch ties and 8' ties onto my vehicles with the Burlington Northern speed swing. The ties were sold to Payless Cashways of Joplin for \$1200.00. My agreement with Rick and Lester was a three-way split. In this case I didn't give them their money as I had been withstanding

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all expenses and Rick and Lester got the clear profit. Charles Syketa and I removed 100 ties from 6th Street and sold to Payless for \$4.00 each as I had done in the past. Approximately two years ago I got approx. 200 8' ties from Tuffy Ghramm, but I did not pay any money to him. The ties came from Townes Yard. When I sold the ties I paid Rick and Lester, a third each, as agreed in all other cases. In the last three or four years I had gotten 7,500 - 10,000 used ties from the Burlington Northern Railroad. All of the ties were gotten through Rick Patton and Lester Ghramm. In all cases except for the one time I didn't split on the load of 400 ties from the 6th Street Yard, I have split all profits three ways between myself, Rick Patton and Lester Ghramm.

Q. Mr. Grisham, did Mr. Williams offer to come to this investigation to personally testify about the facts?

A. Yes, sir, he did.

Q. Is there a reason why he is not here today?

A. Uh, yes, sir.

Q. What is that reason?

A. Okay, he stated to me that since he gave the statement and apparently people became aware of it he's received several phone calls in what he considered to be a threatening manner. Uh, someone, parties unknown, cut the liner on a swimming pool they'd just recently installed; and also last week end, this past week end, Saturday, uh, in Joplin on Main Street he met Lester Patton and, uh, Lester, of course, was, he said, flipped him the finger, but also aimed his vehicle at Tony Williams' vehicle as though he was going to hit him and at the last minute he did not; and through these incidents, his wife has felt that she did not want him to appear here today.

Mr. Spears: Mr., uh, all right, this is hearsay. Uh, I'd like to object to this statement that Mr. Grisham has entered here. Uh, Mr. Williams could have been here if he'd so desired, and I'd like to object to Mr. Grisham's statements in regards to why he's not here. It's all hearsay.

Mr. Hiett: Your objections are duly noted and made a part of the record of this proceeding.

Q. Mr. Grisham, uh, Mr. Grisham, in your comments about why Mr., uh, Mack could not appear here, you mentioned that Lester Patton had, uh, made a obscene gesture towards him, uh, could you clarify that?

A. Yes, sir, if I did say that. Uh, Mr. Williams advised me it was Lester Ghramm.

Q. Do you have a copy of the contract for the TOFC Ramp removal that Mr. Williams referred to?

A. Yes, sir, I do.

Q. Mr. Grisham, referring to this contract, does this contract anywhere allow for Burlington Northern employees to assist Tony Williams Construction Company?

A. No, sir, it does not.

Q. Does it allow for use of Burlington Northern equipment?

A. No, sir, it does not.

Q. Do you have any evidence that Mr. Patton received money for work piggyback ramp removal from Mr. Williams?

A. Uh, yes, sir, I do. I have a form 1099, it's a miscellaneous income form of the Internal Revenue Service, and it shows to Donald R. Patton from Tony Williams shows \$1,700, uh, which Mr. Williams states that was for his share on the dock so he could turn it in to his income tax.

Q. We'll enter this as, uh, Exhibit D. This will be marked later, as it appears to be an original. Does Mr. Williams want this copy back?

A. Yes, sir, he does.

Mr. Hiett: We'll mark it as Exhibit D after the proceeding is over.

Q. Do you have any other evidence that Mr. Patton may have received money for work on the piggyback ramp?

A. Yes, sir, I have a handwritten receipt signed by Mr. Rick Patton received \$1,700 for work on--labor on Burlington Northern Railroad located at Ruth Yards, 20th & Roosevelt in Joplin.

Q. ... receipt for--?

A. Receipt. It's a handwritten receipt, uh, signed by Rick Patton receipt of \$1,700.

Mr. Hiett: Mr. Spears and Mr. Patton, would you like to review Exhibit E?

(Pause for document review by Messrs. Spears and Patton)

Q. ...Mr. Grisham, in your investigation, did you find any information that indicated Mr. Patton had written authority to engage in this business with Mr. Williams?

A. No, sir.

Q. ...to assist removal of the ramp?

A. No, I did not.

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- Q. With regard to the statement by Mr. Williams that he received between 4,000 and 5,000 ties through Rick Patton and Lester Ghramm at Carl Jct. Yards, did you find any kind of written authority to Mr. Patton to do this?
- A. No, sir.
- Q. Did you have any--did you discover any written authority to Mr. Patton to operate the Burlington Northern speed swing to engage in this activity?
- A. No, sir.

- Q. Did you discover anything in your research that indicated that Mr. Patton had permission to accept money for delivering railroad ties?
- A. No, sir.
- Q. Did you discover any other possible misappropriations?
- A. Uh, yes, sir, reference to use of company equipment.
- Q. And to perform what kind of work?
- A. Uh, to build a retaining wall out of railroad ties.
- Q. Do you have any evidence to substantiate that statement?
- A. Yes, sir, I have two things. First, I have the photographs of the retaining wall. It's taken 44th and Indiana Street in Joplin, Missouri. It's for a Bob Himer. This wall was built, uh, according to (pause to search through file)--on July 17th, Lester Ghramm, he advised me that he and Rick Patton and another said name of Gary Wyatt built this retaining wall at 44th and Indiana, and that they did use the company backhoe to do it with. Matter of fact, he said they used the backhoe two different times down there. Also, an interview with a Gary Wyatt, the other party involved. He also admitted that, uh, he and Lester Ghramm and Rick Patton built the wall and used the company backhoe to do it with.
- Q. One of the pictures you've just shown me is a part of, uh, what we will call Exhibit H, shows some steps with some writing on the steps. Would you read that writing.
- A. Yes, sir, this is in the center of the wall in front of the house. It's a step and in concrete it has the name "Les," "Rick," and "Dave."
- Q. Did you receive any other information regarding possible misuse of company equipment?
- A. Uh, yes, sir, I did. Uh, same day on July 17th, Lester Ghramm advised me that they had used a speed swing to build a racetrack in the chatt piles out of Joplin for a man named Tullis. He said they used a speed swing to bulldoze.

- Q. Was that done with, uh, permission from the Company that you're (10) aware?
- A. No, sir. And, uh, he advised that time that the track was built by himself and Rick Patton. I contacted--it was found out to be for a Frederick Ward Tullis, Jr. It was a--in the chatt piles north out at North Main and Joplin Street. I contacted Mr. Tullis, and he advised that he had paid \$300 to Lester Ghramm and Rick Patton to use the speed swing to construct a racetrack in the chatt piles. It was a, uh, what is that called a circular track? It had a lot of curves in it but it didn't come back around to the starting location. And he stated the speed swing was used. He issued a check to Lester for \$149.99, and he had a partner named Jim Martin who paid \$150 in cash.

Q. Were you able to find a copy of that check?

A. Uh, I don't have a copy of it at this time. We did check their records and found where it was written, and I do have a copy still coming on it though.

Q. Did you ever find any evidence that Mr. Patton had turned any money into the Burlington Northern for any of the activities that he's alleged to have participated in?

A. No, sir.

Q. Mr. Grisham, when did you inform Mr. Wagner of the statements that you presented here?

A. That'd been on the 17th of July this year.

Q. What action did Mr. Wagner take?

A. At that time, uh, he pulled Mr. Patton out of service.

Q. Were you present as a witness?

A. Yes, sir.

Q. Did you question Mr. Patton about the use of company equipment at that time?

A. I, uh, tried to talk to him at the time and he just said he would not comment on the use of the backhoe or speed swing for personal use. Uh, he advised he had not received any money from any sales of ties, and he admitted working on the TOFC or the old piggyback ramp, he said for a short time. Uh, the only thing he did say about selling railroad ties that he had sold railroad ties to Jim Burt Landscaping, uh, prior to the Frisco-Burlington Northern merger.

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Q. Did you, uh, question him about sale of ties at Carl Junction?
A. Yes, sir, I did, and he just said he didn't receive any money from the sale of the ties.

Q. Did you question him about if he'd received money for working on the TOFC ramp?
A. Uh, yes, sir, and he said he did not receive any money for his work on the ramp.

Q. Did you talk to Burt Landscaping?
A. Yes, sir, I did, and he advised approximately three to four years ago that he did buy his used railroad ties from Rick Patton, and he still had his phone number and name on his books, but he said it had not bought any recently from him." (Tr., pp. 9-18).

The transcript of investigation shows the following testimony by Mr. Donal Dean Benefiel, Rail Complex, Springfield, Missouri:

"Q. Did you have occasion to work on removing a TOFC ramp in Joplin?
A. Yes, I did. I cut some rebar out of it.

Q. Who asked you to do this work?
A. I was told to by my boss, Roadmaster Ghramm, Lawrence Ghramm.

Q. Do you know a Mr. Tony Williams?
A. Yes, sir, I do.

Q. Was he present at the time you were working on that ramp?
A. Just sometime. I don 't know what position or anything. I just cut the rebar and that was my job. That was what I was told to do.

Q. Did Mr. Williams pay you for working on that ramp?
A. No, sir.

Q. Did you observe any other people working on that ramp removal?
A. Yes, sir.

Q. Were any of them Burlington Northern employees?
A. Yes, it was.

Q. Was Mr. D. R. Patton one of those employees?
A. Yes, sir.

Q. Have you ever been to Carl Junction?
A. Yes, sir.

Q. While you were there--were you there in the Spring of 1985?
A. Yes, sir.

- Q. While you were there, did you observe any employees loading ties?
- A. Yes, sir, and I helped. I was told to by my boss, Roadmaster Ghramm.
- Q. What equipment was being used?
- A. We was told to use the speed swing and whatever else we could use, by hand or whatever it took. We was dismantling the yards.
- Q. Was Mr. Patton one of the employees that was working there--
- A. That's true.
- Q. Was he operating the company equipment that was involved in loading the ties?
- A. Yes, sir." (Tr., pp. 23-24).

The transcript of investigation shows testimony by Claimant Patton:

- "Q. He (Williams) states, "The ties were loaded on my truck and trailers by Rick Patton using the Burlington Northern speed swing." Is this true?
- A. I loaded a few ties on his truck.

- Q. Let's turn now to the TOFC ramp that Mr. Williams talks about. He states in his statement that you told Mr. Williams what to bid on the ramp removal. Was that true?
- A. No. Uh, there was some ties that Mr. Williams got out of Ruth Yards, and we was pulling 'em out of a track out there and they had just been in the road and he'd already got permit to get 'em, and they told me--Tuffy told me to set 'em right on his trailer so he could just haul 'em out of there and they didn't have to mess with 'em. He heard us talking about the ramp out there, and I did say that they was taking bids on it to him. He asked me what we was talking about, you know, and I told him they was going to tear out the loading ramp, but I didn't tell him no amount of money.
- Q. Did you work on that ramp with Mr. Williams?
- A. Yes, sir. He called me on a Sunday morning. He'd run a screw driver in his hand, working on an air compressor he had rented, and he was at the hospital and told me that his dad was out there working on this wall--or ramp by himself, and asked me if I'd get me and Lester to come out there and help him because his dad's not a very well man that ought to be--which he's really overweight, and asked me if I'd go out there and help on this ramp, and he'd pay us for coming over there to help on it. And then later on,

when he got there his hand was all bandaged up, and he couldn't do any work and I wound up taking a week's vacation and working on this ramp under his supervision.

Q. Did you receive money for working on this ramp?

A. Yes, sir.

Q. When Mr. Grisham questioned you when you were removed from service you told him you received no money from this ramp--

A. No.

Q. Why did you tell him that?

A. I didn't tell him that. You know, I mean he was asking a lot of different question, and on questions like that I told him I didn't want to answer it. That night he asked me them questions I'd been drinking. I'd already knew I was going to be fired, my wife and them and I'd stopped off and had two, three beers at a friend of mine's house, and, you know, I mean, I might've miss-- if he misunderstood me or I might've misunderstood him.

Q. Did you ever receive written authority from Mr. Ghramm to, uh, work with Mr. Williams on this ramp?

A. No, I didn't receive no written authority, verbal.

Q. Did you receive authority?

A. Well, I told him I was taking a week's vacation to work on that ramp. I had a week's vacation coming, which wasn't planning on taking until he'd hurt his hand and asked me to work on it. I didn't know I was even going to be working on the ramp until after he'd got hurt.

Q. At 6th Street, Mr. Williams stated, "I had an agreement with Rick Patton and Lester Ghramm to remove ties from 6th Street. Rick Patton loaded 400 switch and 8' ties onto my vehicles with the BN speed swing." Do you remember doing this?

A. ...And after I got off work I loaded 40 ties on his truck to help him finish his load up before I went home, which I did not receive any money for.

Q. I'd like to call your attention to Exhibit A, which is from Mr. Yoder. Mr. Yoder states, "After working hours I saw Lester Ghramm and Rick Patton loading these ties into a gold Jeep pickup and blue (I think) Chevy pickup with the speed swing. You recall loading ties in such fashion at Carthage Junction--Car Junction?

A. I loaded a--rex Hill had a blue Chevy pickup. I loaded ties in his truck, and then I hauled a few ties which Lester used around his driveway, in my gold truck.

Q. Did you have permission to load those ties?

A. Yes, sir.

Q. From Mr. Ghramm?

A. Yes, sir.

Q. Did Mr. Ghramm ever give you any written permission to remove ties?

A. Huh?

Q. Did Mr. Ghramm ever give you any written permission to remove ties?

A. No.....

Q. Exhibit H is--involves pictures of a retaining wall. Do you recall working on that retaining wall?

A. Yes, sir.

Q. Did you use company equipment to build that retaining wall?

A. Yes, there was a company machine used there.

Q. Did you operate it?

A. No, sir.

Q. Were you there helping on the construction of that wall?

A. That--yes. The machine was only used there to move back some dirt, I don't remember, one-two days; and then later on Mr. Wagner found out about it.

Q. Is the picture showing the steps--

A. I wasn't finished.

Q. Oh, I'm sorry. Go ahead.

A. And, uh, Mr. Wagner got Lester--we was up here to Springfield when we was fired once before--and got Lester in to the bathrooms and told him he'd heard that we'd been using the machines off company property; and for him not to leave again; and they haven't been off railroad property since.

Q. Mr. Grisham made some comments when--about discussion with Mr. Lester Ghramm about a racetrack that you and he allegedly built. Do you recall building this racetrack?

A. Yes, sir.

Q. Was that with the company speed swing?

A. Yes, sir.

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- Q. Was that done with authority from Mr. Ghramm?
A. Yes, sir. I had permission from--I told--asked him about using the machine. I don't think he had it in that statement, but I could get him to come in as a witness." (Tr., pp. 30-37).

The Organization made timely objection to the Exhibit B statement by Tony Mack Williams on grounds of hearsay. Mr. Williams was not an employee of the Carrier, was not under the Carrier's supervision or control, and was not subject to subpoena power of the Carrier. Under the circumstances, it is well settled in the railroad industry that written statements may be admitted into investigations even though the persons making such statements are not available for cross-examination. It should be noted that the Claimant knew of the written statement, the identity of the person making the statement, the nature of the statement, and had opportunity to communicate with him and to make inquiry. The record indicates that Mr. Williams would have appeared at the investigation to testify had there not occurred acts construed as intimidation. Considering the nature of the transactions involving Mr. Williams as detailed in his statement, evidence of record pertaining to Mr. Williams' reputation allows doubt as to his credibility. Additionally, there is allegation by the Organization that Mr. Williams was subjected to improper pressure in obtaining the statement from him.

The Board has given serious consideration to the Organization's objections concerning Mr. Williams' statement. For chiefly this reason, the transcript of investigation has been quoted above at considerable length, and, even so, additional quotation might have been made. Close scrutiny of the record was made to determine the weight to be given to Mr. Williams' statement and to determine whether his statement is corroborated by other evidence of record.

The evidence of record fails to show probative evidence showing improper pressure brought upon Mr. Williams in regard to his making the statement. Further, the evidence of record shows corroboration of Mr. Williams' statement in significant respects. The testimony of Mr. Benefiel regarding the work at the TOFC ramp in Joplin and Claimant's participation in that work corroborates the events recited by Mr. Williams, and Mr. Benefiel's testimony concerning the work at Carl Junction performed by Claimant is further corroboration. Claimant's testimony in these respects is additional corroboration. Obviously, Mr. Williams' statement is not pure fabrication. It was not arbitrary or capricious for the Carrier to accept Mr. Williams' statement relating to the pricing (\$9,300) of the work at the ramp in view of Claimant's testimony of discussion on this. In the opinion of the Board, the Carrier reasonably could conclude that payment was made to Claimant as stated by Mr. Williams.

Claimant has admitted that he did not have permission from the Company to use Company equipment on the race track construction. Although Claimant states that he received verbal permission for the use of Company equipment regarding the retainer wall construction and other incidents, he admits that he received no written authorization to do so. In the circumstances, it was not arbitrary or capricious for the Carrier to conclude that admitted use by Claimant of Company equipment off the Carrier's property was an unauthorized violation of cited rules. It was not unreasonable for the Carrier to conclude that Claimant was paid for his work with Company equipment in violation of cited rules.

Viewing the record as a whole, there is substantial probative evidence in support of the Carrier's determination that Claimant violated General Rules A, B, D, and L and General Rules 530, 530A, 530B, 532(C) and 535 of the Rules of the Maintenance of Way. In the circumstances of this case, and in the light of Claimant's past service record, dismissal is not excessive discipline.

A W A R D

1. The Carrier is not in violation of the Agreement.
2. The claim is denied.

Joseph Lazar
JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER

DATED: September 28, 1987

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