

Joseph Lazar, Referee

PARTIES)
TO)
DISPUTE)

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
BURLINGTON NORTHERN RAILROAD COMPANY

Claim of ^LP. P. Ghramm for reinstatement to service with payment for all time lost beginning July 17, 1986, until reinstated to the service of the Carrier, with all rights intact and that the charges be removed from his service record.

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 L. P. Ghrumm, 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. D. J. Grisham, Special Agent, Joplin, Missouri:

"Q. Did you receive information about recent disappearances of company material in the Joplin area?

A. Yes, sir.

- Q. From what sources did you receive this information?
- A. From, uh, voluntary statements given by different, uh, people contacted in the Joplin area.
- Q. Did you receive signed statements from any of these people?
- A. Yes, sir, I did.
- Q. Do you have any of those signed statements with you?
- A. Yes, sir, I do. Uh, first I have one here from-uh Tony Mack Williams of Joplin, Missouri, Signed statement.
- Q. We'll introduce this as Exhibit "A".
- Q. Uh, would you please uh, read this statement into the record?
- A. Yes, sir. This statement is given in reference to used railroad ties that I purchased from the Burlington Northern Railroad. Reference to tie contract, dated January 4, 1985, for used ties out of the Carl Junction, Missouri, Yards. I was approached by Rick Patton about picking up a lot of ties at the Carl Junction, 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 Ghrumm. Rick said that we would pay Tuffy Ghrumm for one load and then not pay him for another load. I got approximately 4,000 to 5,000 ties (used switch and 8 foot 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 (approximately 1,500-8 foot ties), Sutherland Lumber in Pittsburg, Kansas (approximately 1,000-8 foot 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 approximately \$4.00 each. When I would get paid for the ties, I would cash the checks and per agreement pay Rick Patton and Lester Ghrumm a third each. During this time Tuffy was given approximately \$900 in cash as he refused a check. A couple of times I gave Tuffy cash at the railroad depot on West 20th Street or I would give the money to Rick and Lester and they were suppose 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 have the ties--to haul the ties out of Carl Junction Yard. I believe he hauled at least 200 ties to Sutherland Lumber in Pittsburg, Kansas, for which I paid him approximately \$200. I paid Rick Patton and Lester Ghrumm approximately \$5,000 each for their share of the ties from Carl Junction.

In reference to the piggyback ramp I removed for the Burlington Northern Railroad at 2101 West 20th Street, Joplin, Missouri. I was told by Rick Patton and Lester Ghrumm, while at my house, what to bid on the ramp removal. I went to Tuffy's office at the old BN Depot at 10th and Main Street, in Joplin and told Tuffy that I bid \$8,300 to remove the dock. Tuffy said, "Lets make it \$9,300."

Rick and Lester had told me that Ames Excavating had a low bid of 12,000. 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 everyday until it was done. Lester would be there from time to time running the jack hammer or speed swing. Don Benefill was there with the welder, cutting the rebar when needed. Contract was made by Tuffy--contract was not made by Tuffy until the job was completed--about completed and then, he back dated it two days. The Burlington Northern paid me \$9,300 by check. I cashed the check and paid Rick Patton \$4,000 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 days of those four days.

In reference to the Used Tie Contract dated May 7, 1985, for 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 approximately 400 switch and 8 foot ties onto my vehicles with the Burlington Northern speed swing. The ties were sold to Payless Cashways of Joplin for \$1,200. 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 all expense and Rick and Lester got a 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 approximately 200-8 foot 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 have gotten 7,500 to 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 onetime I didn't split on the load of 400 ties from 6th Street Yard, I have split all profits three ways between myself, Rick Patton, and Lester Ghramm." (Tr., pp. 7-9).

- "Q. Did you find any evidence that Mr. Ghramm had been paid by Mr. Williams to assist on this ramp?
- A. Yes, sir. Uh, one the things I have here is, uh, 1099 Miscellaneous--its a form from the Internal Revenue Service for tax reporting purposes. Shows here from Tony Williams to Lester Ghramm, receiving \$700 for sub-contract labor on a Burlington Northern Railroad job located Ruth Yards, 20th and Roosevelt, in Joplin.
- Q. We'll mark this Exhibit "D".

Mr. Spears: Mr. Hiett, I'm going to have to object to the enter of these statements from, uh, these people, uh, it's my understanding their not here, to be present, during the investigation for me to cross-examine them, so therefore, I am going to object to entering any statements from these people. Also, I would like to bring to your attention, this thing is dated 1984 it look like it just been recently prepared, uh, there's not even any carbon papers in here, its just an original page of the Form 1099. Therefore, I must object to this being entered also.

Q. Objection is noted. Make it a part of the record.

Along the lines of Mr. Spears question concerning Mr. Tonly Williams availability as a witness, did you ask Mr. Williams to come here today?

A. Yes, sir, I did.

Q. Did he come?

A. He was coming up until last night and he--he, uh, had his mind changed his mind.

Q. Why did he change his mind?

A. Well he stated that his wife had talked him out of it, due to since he gave the, uh, statement which you have there, someone person unknown had cut the liner on a swimming pool of his, he'd received several phone calls which he said they were threatening in nature, and also, last weekend, this past weekend, in Joplin on Main Street, he'd met Lester Ghramm, and he said Lester gave him the finger and then in dicated by moving his vehicle he was trying to hit him in the door, but he didn't, he took off and went on the other way then. And with all these things happening, his wife felt that he would not--had better not come." (Tr., p. 11).

Special Agent D. J. Grisham also testified concerning statements read into the record from a lady who made out a check to Claimant for \$54 (Exhibit E and Exhibit F); from a gentleman who made a statement concerning the purchase of ties from Claimant and made out, by his wife, a check to Claimant in the amount of \$832 (Exhibit G and Exhibit H); from another gentleman who gave Claimant a check for \$150 and saw Claimant receive \$150 in cash to bulldoze a circular track around chat piles using a speed swing (Exhibit I); from a gentleman for whom Claimant used a company backhoe to build a retainer wall (Exhibit J).

Mr. Donald Dean Benefiel, Rail Complex Springfield, Laborer, testified:

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"Q. Have you ever been to, uh, Carl Junction?

A. Yes, I have.

Q. Have you seen company employees loading ties there?

A. Yes, sir.

Q. Was Mr. Ghramm one of those employees?

A. Yes, sir.

Q. Was there company equipment being used at that time?

A. Yes, sir.

Q. Was this during normal working hours?

A. Yes, sir, "it was." (Tr., p. 19).

The transcript of investigation shows the following testimony by Claimant:

"Q. How much money did you received from Mr. Williams for working on the TOFC dock?

A. \$700." (Tr., p. 21).

Claimant denied that the Williams statement was true and correct; he testified that the \$54 check received from the lady was given back by him to the roadmaster and that he did not cash the check although he signed it; introduced a statement that the \$832 check for ties was made out to Claimant by mistake; testified:

"Q. Mr. Ghramm, did you participate in the construction of a retaining wall along 44th Street in Joplin?

A. Yes, sir, I did.

Q. Was company equipment used in the construction of that wall?

A. Yes, sir. We had permission from the roadmaster. That was the day that Mr. Grisham caught the machine out of the bull pen down here and the, Mr. Wagoner caught me in the bathroom here and told me not to be taking machine off of railroad property anymore, and they haven't been.

Q. Did you think that Mr. L. O. Ghramm, your supervisor had the authority to move that machine down to such a job?

A. Well, when I asked him, he said it was okay.

Q. Did you receive any money for working on that wall yourself?

A. Yes, sir, I did.

Q. How much money did you receive?

A. Uh, I don't remember. Four or five hundred dollars or so, I don't remember really. It wasn't for the ties, it was just for the landscape work.

Q. Did, uh, did you recall constructing a race track?

A. Yes, sir.

Q. Was company equipment used for construction of that race track?

A. Yes, sir, it was. We had permission from the roadmaster.

Q. Did you asked the roadmaster if it was acceptable to do this?

A. Yes. We asked him permission to use the machine, told him what we was going to do with it. He said it would be all right. Uh, I said that happened back before Mr. Wagoner told us not to be taking them off, so we haven't taking them off again." (Tr., p. 25).

The Organization made timely objection to the statement by Tony Mack Williams (Exhibit A) 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 of improper pressure brought upon Mr. Williams in regard to his making the statement. There is evidence of corroboration of Mr. Williams' statement. Mr. Benefiel's testimony concerning the work at Carl Junction performed by Claimant is an element of corroboration. Claimant's testimony about his working further corroborates this aspect of Mr. Williams' statement. Under the circumstances, despite the Claimant's denial of the accuracy of Mr. Williams' statement, it was not arbitrary or capricious for the Carrier to conclude that payment was made to Claimant as stated by Mr. Williams.

Claimant has admitted to the use of Company equipment on the retaining wall construction and on the race track construction. Although Claimant asserted that he had permission to do so, it is clear that he had no written permission to do so, and it was not arbitrary or capricious, under the circumstances, for the Carrier to conclude that he used the equipment without proper authorization.

With respect to Claimant's receipt of checks for payment of railroad ties, (\$54 and \$832), it was not arbitrary or capricious for the Carrier to conclude that making Claimant the payee of the checks, where railroad ties were actually transferred to the buyers, was not, in fact, a mistake.

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