

Joseph Lazar, Referee

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
TO) " " " " and
DISPUTE) BURLINGTON NORTHERN RAILROAD COMPANY

Request that Otis Grant, Gang 113, Lenexa, Kansas, be returned to service immediately with payment for all time lost, with all rights intact, and the charge 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.

On July 2, 1986, investigation was held for the purpose of ascertaining the facts and determining the responsibility, if any, in connection with the alleged unauthorized sale of company material by Claimant on or about May 2, 1986, near Kansas City, Missouri. By letter dated July 10, 1986, the Carrier informed Claimant that "The decision hereby rendered as a result of this investigation is that your dismissal is sustained." Claimant allegedly violated General Rules A, B, D and L and Rules 530, 530A, 530B, and 535 of the Rules of Maintenance of Way effective April 27, 1986. These rules read:

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 their 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, "Relieved from Service":

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 such a manner that the Railroad will not be subjected to criticism and loss of goodwill.

General Rule 530A, "Factual Report of Information":

Employees who withhold information or fail to give factual report of any irregularity, accident, or violation of rules will not be retained in service.

General Rule 530B, "Theft or Pilferage":

Theft or pilferage shall be considered sufficient cause for dismissal from Railroad service.

General Rule 535, "Railroad Credit Accounts and Property":

Unless specifically authorized, employees must not use the Railroad's credit and must neither receive nor pay out 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 statement made part of the record by the Assistant Special Agent in Charge at Kansas City, Missouri:

"In reference to the tie purchase I made from Otis Grant and the Burlington Northern Railroad. About the first of May, Otis Grant called me and asked if I wanted to buy some ties. I met him at the BN tracks behind the K.C. Terminal yards. We agreed on the purchase of 300 railroad ties at \$1.00 each. Otis Grant came to my house and I gave him a check of \$150.00, for ½ of the ties. I was to pay him the other \$150.00 when I got the ties. When he came to the house, my wife ** issued check #4151, dated May 3, 1986, on ** Inc., to Otis Grant in amount of \$150.00. When I sent my men to pick up the ties, they call back and advised they could not get the ties. I went to this location, and then met with Roadmaster Mike Newman. He told me Otis could not sell the ties, and if he wanted them, he would have to get a contract with the B.N. My wife stopped payment on the check with the bank. I obtained a contract with the BN for 488 ties at \$1.00 each. This contract was made on May 5, 1986. I later talked with Mike Newman and he told me to go ahead and release the check to Otis Grant, but not to pay him the additional \$150.00. He stated that due to all the trouble on this deal, to go ahead and get the 300 ties Otis had made the deal on. This would make a total of 788 ties. I did get all of the 300 ties on the deal with Otis and most of the 488 ties on the BN contract. The rest of the ties are there, but I have not picked them up yet." (Tr., pp. 7-8).

The transcript of investigation shows the following testimony of Mr. John M. Newman, Roadmaster, Murray Yard, North Kansas City, Missouri:

"Q. On or about the first of May, did Otis Grant have occasion to work on your territory?

A. Yes.

Q. Where did he work?

A. In Tower 4 area. We had a UP coal train derail.

Q. Were there ties generated from that derailment?

A. Yes.

Q. Did Mr. Grant ask to purchase some of those ties?

A. Yes.

Q. Did you give him a permit on the authorized form?

A. Yes. I gave him a contract.

Q. How many ties did you authorize him to take?

A. Fifty.

Q. At what cost?

A. Fifty cents apiece.

Q. Where were they to come from?

A. Come from where the derailment was at, and we had the track there--since we had the derailment, we've had a track we were going to abandon anyway and it was going to be part of that, too.

Q. Did you ever receive payment from Mr. Grant for those 50 ties?

A. No. I cancelled the contract.

Q. Why did you cancel the contract?

A. Because Otis had authorized somebody else to pick the ties up.

Q. Were you aware--did you give Otis Grant authority to sell those ties?

A. No.

Q. Did you ever give Otis Grant authority to sell more than the 50 ties he had purchased?

A. I didn't give him authority to sell any ties.

Q. Did the Burlington Northern Railroad receive a check for the removal of all these ties?

A. Yes.

Q. Do you recall the amount of money that they received?

A. Four Hundred and Eighty-Eight Dollars.

Q. And this was to cover the 788 ties that was in there?

A. Yes." (Tr., pp. 11-13).

The transcript of investigation shows the following testimony by Claimant, Otis Grant:

"Q. If you were only authorized to take 50 ties, why did you offer to sell ** 300 ties?

A. I was told if I'd clean out the derailment I would have all the ties come out of the derailment.

- Q. Did you receive any written permission to remove more than 50 ties from the property?
- A. No, I didn't.
- Q. Did Mr. Newman specifically authorize you to remove more than 50 ties from the property?
- A. He told me if I'd clean out the derailment I could have all them scrap ties.
- Q. The difference between what you were authorized to remove and what you actually gave ** is 250 ties. Were those all scrap ties from the derailment?
- A. Repeat that sentence.
- Q. Were those all--the 250 ties over and above what you were authorized, were they scrap ties from the derailment?
- A. Yes.
- Q. Did Mr. Newman authorize you to sell those ties to **?
- A. The 300 that I sold for--yeah--well--I'm mixed up. Repeat that.
- Q. Did Mr. Newman specifically authorize you to sell ** 300 ties?
- A. No, he didn't authorize me to do it." (Tr., p. 17).

"Mr. Spears: Mr. Grant, the contract called for 50 ties. Was it my understanding during the investigation that you also thought that you could dispose of the rest of these ties, as Mr. Newman told you you could have 'em?

Mr. Grant: Mr. Newman told me I could have all the ties that was in the derailment if I'd clean 'em up, but as I was going through 'em the ties began to better, so I did not get anymore than that because as a foreman I don 't believe in getting rid of material and stuff that I have to work with to keep me working, so when the ties starting getting good--better--that I thought was in good enough shape that we could reuse 'em, I left 'em alone." (Tr., p. 21).

The evidence of record is clear that Claimant purchased 50 ties by formal contract with the Carrier. It also is clear that Claimant contracted to sell 300 ties to a third party. Claimant admits that he was not authorized to sell the 250 ties he had not purchased. There is, accordingly, substantial probative evidence of record to support the Carrier's determination that Claimant was in violation of the rules quoted.

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Dismissal from the service of the railroad is not excessive discipline for violation of the cited rules. Nevertheless, mitigating factors are present in the circumstances of the instant case. There is no denial in the record to contradict Claimant's statement that he was led by the Roadmaster to believe "I could have all the ties that was in the derailment if I'd clean 'em up". Claimant's belief and actions were in good faith: "... so I did not get anymore than that because as a foreman I don't believe in getting rid of material and stuff that I have to work with to keep me working, so when the ties starting getting good-- better--that I thought was in good enough shape that we could reuse 'em, I left 'em alone." In the special circumstances of the present case, Claimant should be reinstated to service, but without pay for time lost.

A W A R D

1. The Carrier is not in violation of the Agreement.
2. Claimant shall be reinstated, but without pay for time lost.

Order: The Carrier shall implement this Award within thirty days of date of Award.



JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER

Dated: September 13, 1987