

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33446
Docket No. MW-34471
99-3-98-3-109**

The Third Division consisted of the regular members and in addition Referee John M. Livingood when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Burlington Northern Santa Fe Railway (former Burlington
(Northern Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Water Service Foreman D. C. Sorenson for alleged violation of Rules 1.2.7, 1.6, 1.19, and 1.25 of the Burlington Northern Santa Fe Maintenance of Way Operating Rules, in connection with the hearing held on December 10, 1996, “ . . . for the purpose of ascertaining the facts and determining your responsibility in connection with your alleged misuse of Burlington Northern Santa Fe material, manpower and equipment for your personal use from August 1996 to November 8, 1996.”, was arbitrary, capricious, without just and sufficient cause, excessive and in violation of the Agreement (System File T-D-1286-B/MWB970513AA BNR).

(2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with seniority and all other rights unimpaired and he shall be compensated for all wage loss.”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant, an employee of the Carrier for approximately 22 years, was dismissed from service following an Investigation concerning misuse of Carrier material, manpower, and equipment, violating Rules 1.2.7, 1.6, 1.19, and 1.25 of the Carrier's Maintenance of Way Operating Rules. The Rules at issue are:

"Rule 1.19 Care of Property

Employees are responsible for properly using and caring for railroad property. Employees must return the property when the proper authority requests them to do so.

Employees must not use railroad property for their personal use.

Rule 1.25 Credit or Property

Unless specifically authorized, employees must not use the railroad's credit and must not receive or pay out money on the railroad account. Employees must not sell or in any way get rid of railroad property without proper authority. Employees must care for all articles of value found on railroad property and promptly report the article to the proper authority.

Rule 1.6 Conduct

Employees must not be:

- 1. Careless of the safety of themselves or others**
- 2. Negligent**
- 3. Insubordinate**
- 4. Dishonest**
- 5. Immoral**

6. Quarrelsome
or
7. Discourteous”

Certain facts are not in dispute. Claimant Sorenson used Carrier equipment and manpower under pay with the Carrier to deliver three loads of stone/ballast to his home and the purchase was initially billed to the Carrier. Also the Claimant secured and used a Carrier owned backhoe for his personal use without permission, and he secured the use of a Carrier boom truck and operator under pay with the Carrier for personal use without permission from the Carrier. Additionally, the Claimant acquired plywood from the property of the Carrier without permission.

In addition to asserting that the Carrier failed to present sufficient probative evidence to support its decision to dismiss the Claimant, the Organization asserts that the Carrier failed to notify the Claimant of the precise nature of the charges leveled against the Claimant, that the Carrier’s designated Appeal’s Officer prejudged the Claimant, and that the Carrier failed to produce all witnesses with pertinent information which denied the Claimant’s right to a fair and impartial Investigation.

The Carrier counters the Organization’s attack on its notice of discipline stating that the notice provided the Claimant involved numerous Rule violations over a period of several months and, additionally, that “all the allegations were offered up to the Claimant during interviews with Asset Protection.”

In regard to the Organization’s assertion of prejudgement, the Carrier Official charged with prejudgement explained that his participation in the decision to hold an investigation was to “formally determine the facts,” and that the investigation is “to protect an employee against pre-judgement and assessment without the benefit of the truth and the facts,” and that he was complying “with the rules of the current agreement” and insuring that the Claimant’s “rights were protected.”

The Carrier counters the Organization’s assertion regarding not presenting “all witnesses with pertinent information” with the Claimant’s acknowledgment of the truth of the statement from one of the individuals in question, who was not an employee of the Carrier, and the Organization’s failure to take exception to any portion of the witness’ statement, stating that a postponement could have been requested for an attempt to secure the witness’ presence. Also, the Carrier cites awards in support of its position

that it is not prejudicial to admit into evidence statements from witnesses who do not testify at an Investigation and that the Carrier can not compel non-employees to testify: Public Law Board No. 3304, Award 3; Third Division Award 24273, and Public Law Board No. 4788, Award 1.

The statement in question was admitted into evidence, and only the use of the word "random" seems to be questioned. The statement in question contained the sentence, "He said just take 2 random 4" minus & 1 random grade 2 out of the invoice packs and bill them to him personally, to his . . . address." When questioned on this portion of the statement, the Claimant responded, "No, I don't believe so, I believe that I talked about the headings . . . she didn't understand . . ." This response is as close as the Claimant came to contradicting the content of the statement.

This Board finds that the procedural arguments made by the Organization are without merit based on the facts in this case.

The Organization has asserted the "unrefuted fact that it was a common practice and accepted policy for employees . . . to borrow Company tools and equipment for personal use, so long as the borrowed items were returned," and that the Carrier has presented no evidence that the Claimant misused any Company material. Also, the Organization asserts, in that the Carrier dismissed the Claimant for violating all four Carrier rules, the Carrier must prove all rules were violated and that the Claimant intentionally misused material, manpower and equipment, citing First Division Award 8259, Second Division Award 11971 and Third Division Awards 2298, 16032, 28577, and 28672.

In regard to Rule 1.19 - Care of Property, the Carrier points to testimony that a Carrier truck driver, during his working hours, was instructed by the Claimant to pick up several loads of ballast from a vendor, using Carrier credit, and to deliver that ballast to the Claimant's home, as well as to the Claimant's acknowledgment as to these facts and his admitted "indiscretion," that he had not complied with Rule 1.19.

Additionally, testimony was produced that the Claimant drove a Carrier backhoe from its B&B shop to the Claimant's property to level the ballast that had been delivered and did so without permission, that the Claimant directed a Water Service Mechanic to use a Carrier boom truck to take plywood from the Carrier property to the Claimant's house, and that the Claimant instructed a subordinate employee to remove

a fuel tank from the Claimant's property with a Carrier boom truck while the employee was "on the clock."

The Organization's asserted "unrebutted common practice and accepted policy" was refuted on the property as being without merit, contrary to Carrier's Rules expressly prohibiting the use of railroad property for personal use, and self-serving with no evidentiary support.

There is no evidence to support the alleged "common practice," other than the Claimant's statement. The Claimant's acknowledgment of his "indiscretion" and violation of Rule 1.19 seems to contradict the claimed "common practice." Additionally, the Carrier introduced evidence in the form of Carrier Rules that specifically prohibited the personal use claimed to be a "common practice."

In regard to Rules 1.25 and 1.6, the Carrier points to testimony that a search of the Claimant's home found numerous tie plates that the Claimant admittedly did not have authority to possess, and that the Claimant improperly obtained ballast using the Carrier's credit and purchasing process: he ordered an employee to purchase the ballast using the Carrier's usual purchasing process, which would have effectively resulted in the Carrier being billed for the purchase, and he tried to alter the bills just prior to a meeting with Carrier's Special Agents, regarding his unauthorized purchase of the ballast.

There is inconsistency between the testimony and statements of the truck driver that delivered the stone/ballast and the Claimant regarding the billing issue. The truck driver states he did not know how the bill was being paid; the bills were left blank but otherwise he handled them like other Carrier bills. The Claimant testified that he told the truck driver that he would have the billing sent to him, the Claimant. In fact, the Claimant shortly before his meeting with investigators concerning the stone/ballast went to the vendor and had three bills redirected from being billed to the Carrier to be billed to him. These three bills which were paid by the Claimant were not for the days the stone/ballast was purchased and delivered to his home.

The Organization states there is no evidence that the Carrier paid for the stone, and that the Claimant did make arrangements that the billing for three loads of stone/ballast be made directly to him. The Carrier counters that the Claimant, at that time, knew he had been "caught dishonestly trying to bill the Carrier for ballast

delivered to his house,” and that the Claimant’s attempt to “pay for goods already stolen does not change that.”

The Carrier has submitted convincing evidence, including Claimant’s admissions, that the Claimant clearly violated Rules 1.19, 1.25, and 1.6. The Carrier has failed to prove a violation of Rule 1.2.7.

The Organization has argued that, if the Carrier fails to prove one of the rule violations with which the Claimant was found guilty, the discipline must be overturned, citing First, Second and Third Division Awards to support its argument and quoting Third Division Award 3398. However, in this particular case, the Claimant’s actions were so egregious that he could be dismissed for each rule that has been proven, and the failure to prove one charge presents no dilemma for this Board.

Based on our review of the entire record, this Board finds that the Claimant committed serious Rule violations and that the discipline assessed was within management’s discretion.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of August 1999.