Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41486
Docket No. MW-41410
12-3-NRAB-00003-100306

The Third Division consisted of the regular members and in addition Referee Richard Mittenthal when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
(
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline [Level S thirty (30) day record suspension with three (3) year probationary period] imposed upon Mr. G. Jordan by letter dated September 18, 2009 for alleged violation of M of W Operating Rule 1.25 Credit of Property, Rule 1.3.1 Rules, Regulations and Instructions, Rule 1.6 Conduct, item 2 Negligent and Engineering Instructions G.5.3 Releasing Scrap OTM Steel in connection with charges of allowing an individual without a contract with BNSF to remove scrap material from the right of way while he was assigned as an exempt officer sometime prior to July 17, 2009, was arbitrary, capricious, unwarranted and in violation of the Agreement (System File C-09-D040-9/10-10-0003 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant G. Jordan shall now receive the remedy prescribed by the parties in Rule 40(G)."

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.

This case has a somewhat complicated background. Claimant G. Jordan was initially hired as a Trackman in the Maintenance of Way & Structures Department in April 2005. He was promoted to the excluded supervisory position of Roadmaster in the spring of 2008. His duties included supervision of employees, contractors, and work equipment, maintenance of capital and operating budget and general maintenance of the railroad covered within his territorial limits. He remained in that position until July 17, 2009, when he was placed on administrative leave for "inappropriate behavior" while a preliminary investigation was made by the Carrier. The leave notice sent to Jordan did not specify the nature of such "inappropriate behavior."

The Carrier's investigation was prompted by an anonymous phone call from an employee to G. Hill, Manager of Human Resources, on May 19, 2009. The caller stated that Jordan had been engaged in conduct contrary to Carrier Rules and Policies. Hill notified J. Dale, a Special Agent in the Carrier's Police Department, who then began an investigation. The allegations were that: (1) Jordan had used a contractor and Carrier equipment to excavate the footing in the basement of his home (2) Jordan had been drinking excessively on and off duty while driving a Carrier vehicle and (3) Jordan had taken employees on a motorcycle ride during working hours. Soon after Special Agent Dale looked into these matters, he cleared Jordan of the "drinking" and "motorcycle" allegations.

However, Special Agent Dale discovered other information that plainly suggested "inappropriate behavior." He learned that: (1) the contractor who did the footing work in Jordan's basement was someone named S. Atwell (2) Jordan had arranged for Atwell to pick up scrap ties and metal off of the Carrier's tracks and out of the Carrier's yards (3) Atwell had taken such materials from the Carrier's premises and sold them to a scrap dealer for $149,646.00, and (4) Atwell had no contractual relationship with the Carrier to remove materials from the Carrier's premises; indeed, he never had any such relationship.

Furthermore, at some point in the investigation, Dale and Hill were told by Track Inspector T. Anderson that Jordan may have used a Carrier back-hoe to perform work on the foundation of his home. And, according to Anderson, Jordan later approached him and made several statements that Anderson believed were threatening and retaliatory in nature. Anderson was so concerned about Jordan's words that he used his I-phone to tape his conversation with Jordan.

Given all of these circumstances, the Carrier decided on August 3, 2009, to "terminate" Jordan's "exempt employment relationship. . ." primarily because "your recent behavior is not in line with our leadership model." It went on to advise him:

> "You may choose to exercise your seniority as provided by the terms of the collective bargaining agreement by which you may be covered. If you elect to exercise your seniority, a formal investigation will be scheduled to determine your responsibility if any regarding improper dissemination of company materials. Under these conditions we would be willing to accept a resignation from the BNSF." (Emphasis added).

Jordan believed he was innocent of any wrongdoing and exercised his seniority, seeking to return to a bargaining unit job. The Carrier, consistent with its statement above, believed discipline was appropriate and a formal Investigation was held on August 27, 2009. The Conducting Officer, D. Mead, issued the Carrier's ruling on September 18, 2009. It read in part:

". . . you are hereby assessed a Level S 30-day record suspension with a 3-year probationary period . . . this investigation confirms that you allowed an individual [Atwell] without a contract with BNSF to remove scrap material from the right of way resulting in loss of revenue to BNSF violating Operating Rule 1.25 . . . 1.31 . . . 1.6, item 2 . . . [and] Instructions G.5.3 . . . ." (Emphasis added)

The Organization protested the discipline on several grounds. When the parties were unable to resolve their differences, the dispute was appealed to the Board.

To begin with, it should be emphasized that the Carrier took two separate and distinct actions against Jordan. The first on August 3, 2009, was its decision to remove him from his "exempt employment relationship . . ." as a Roadmaster. That action was not subject to challenge under the parties' Agreement because a Roadmaster is not a bargaining unit position. Second, on September 18, 2009, after Jordan's return to the bargaining unit and after a formal Investigation into his alleged misconduct, was the Carrier's decision to discipline him for "allow[ing] an individual [Atwell] without a contract with BNSF to remove scrap material from the right of way resulting in a loss of revenue to BNSF [thereby] violating . . ." several Carrier Rules and Policies. This is the only charge properly before the Board. The Organization insists that the Carrier has not met its burden of proof - that Jordan should hence be found not guilty of the charge against him.

There is "substantial evidence" to support the Carrier's action. Jordan employed Atwell to perform some footing work in his basement. That work was done, apparently through the use of Carrier equipment, although there is very little information in the record as to the terms of their relationship. It seems that Jordan believed Atwell was a Carrier contractor. That belief was mistaken. Nevertheless, Jordan allowed Atwell to take a large amount of Carrier scrap material off of the Carrier's property without securing prior approval from any higher Carrier official, without following applicable Carrier Rules or Policies, and without obtaining any kind of written agreement with Atwell. It is difficult to understand such behavior, particularly when one considers the amount of scrap material involved and the estimated money value of what Jordan was giving away. The Carrier's reaction was that Jordan's behavior was, at the very least, improper.

Consider some of the relevant Rules and Policies. One states that "a Service Contract must be in writing and, when practicable, must be executed by both parties prior to the contractor starting any work under the Service Contract." Of course, as indicated earlier, there was no such Service Contract in this case. And if Jordan's action is simply regarded as a "giveaway" of Carrier scrap, then Engineering Instruction G.5.4 suggests that some kind of approval by a higher authority was necessary here. Or if the scrap was considered a kind of payment for the work done by Atwell in Jordan's basement, that surely would have called for some other manager's approval. Any doubts should surely be resolved by Operating Rule 1.25, "Unless specifically authorized . . . employees must not sell or get rid of railroad property without proper authority." Nothing in the record shows that Jordan had "proper authority to allow Atwell to take such a substantial amount of scrap from Carrier property.

Jordan seeks to defend his action (or inaction) on different grounds. First, he contends that he did not know the Rules or Policies regarding this matter. But even if that were so, he would have been "negligent" in failing to check to see whether he had any special responsibility in giving away Carrier scrap. As Operating Rule 1.6 states, "Indifference to duty, or to the performance of duty, will not be tolerated." The fact is that Jordan had received training and testing regarding the Carrier's Rules each year from 2005 through 2009 and had received special training for Engineering Department instruction each year from 2006 through 2009. And, according to Rule 1.3.1, "Employees governed by these rules must have a current copy they can refer to while on duty." Jordan does not contend that he made any attempt to find and read the applicable Rules. An alleged lack of knowledge is not a sound defense in these circumstances.

Jordan also contended that he had been misled by others, directly or indirectly, and hence should not be held responsible for certain failings on his part. He asserts that because he "didn't know what the actual procedure was," he "turned it over to . . . D. Newbauer [Assistant Roadmaster] who . . . handle[d] this type of stuff for me. . . ." He asked Newbauer to check on Atwell's insurance coverage before allowing him to come on the Carrier's property to remove scrap material. When Newbauer later "OK'd" Atwell's insurance coverage, Jordan asserts that he thought that meant everything had been taken care of and Atwell had received permission to enter the Carrier's premises to remove scrap. Jordan's

testimony on this point was extremely vague. And Newbauer was not called as a witness to corroborate Jordan's testimony. The fact is that Newbauer had "OK'd" Atwell's insurance coverage, nothing more.[1]

For all of these reasons, the Board finds that the Carrier met its "burden of proof" and that Jordan was guilty of the charges made against him.

That being said, the Organization argues that Jordan's discipline should be set aside for other reasons as well – some raising fundamental questions of fairness and others involving matters of procedure. Brief answers to each of these arguments are set forth below.

First, it contends that Jordan was the victim of "double jeopardy," that he was "disciplined" twice for the same offense. That argument, however, cannot withstand careful analysis. Initially, on August 3, 2009, Jordan was advised that he was being removed from his "exempt employment relationship . . . as Roadmaster . . ." primarily because his "recent behavior is not in line with our leadership model." Some of that "behavior" no doubt involved his alleged violation of various Carrier Rules mentioned earlier in this Award. But because a Roadmaster is not a bargaining unit position and hence is not entitled to the protection offered by the Collective Bargaining Agreement, Jordan had no right to protest his removal. Nor could he be considered to have been "disciplined" within the terms of the Collective Bargaining Agreement. That being so, it seems clear that when the Carrier later, on September 18, 2009, chose to give Jordan a 30-day record suspension and a three-year probationary period, he was being "disciplined" for his misconduct for the "first" time. For purposes of the Collective Bargaining Agreement, he had not been subjected to "double jeopardy."

Second, the Organization contends that Jordan's discipline should be set aside because the same Management person, D. Mead, served both as the Presiding Officer at the formal Investigation and later as the author of the written notice of discipline. This argument, absent a showing of actual prejudice, is not persuasive.

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[1] Jordan also suggested that it was Division Engineer R. Roskilly who allowed Atwell to come on the Carrier's premises and remove scrap material. However, Jordan's testimony on this point was far from convincing.

And the record in this case does not establish any such prejudice. Nor is there anything inherently wrong with a Management official performing both of these functions in the same case. This argument has been rejected numerous times in prior Board Awards.

Third, the Organization asserts that the discipline should be set aside because the formal Investigation did not occur within the relevant 15-day time limit. Rule 40A provides:

> "An employee in service sixty (60) days or more will not be disciplined . . . until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employees of the Security Department) . . . ." (Emphasis added).

Dale was a Special Agent in the Security Department. His investigation of Jordan involved "personal conduct." Hence, the 15-day time limit ran "from the date information is obtained by an officer of the Company (excluding employees of the Security Department). . . ." Because of a lengthy investigation, a final report from Dale did not reach the Human Resources Manager until August 10, 2009. And the Carrier promptly advised Jordan that a formal Investigation would be held on August 10, 2009. And the parties agreed the following day to postpone the Investigation until August 27, 2009. Given these circumstances, we find there was no violation of Rule 40A.

We do not believe the penalty assessed against Jordan was excessive or unreasonable.

Accordingly, we find that Jordan was guilty of misconduct and that the Carrier did not violate the Collective Bargaining Agreement. Accordingly, the claim must be denied.

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 13th day of December 2012.