

PUBLIC LAW BOARD NO. 2535

Joseph Lazar, Referee

AWARD NO. 20
CASE NO. 21

PARTIES)
 TO)
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
 AND
 BURLINGTON NORTHERN RAILROAD (Former Joint
 Texas Division)

STATEMENT
OF CLAIM:

1. That the Carrier's decision to dismiss B&B Foreman Mr. V. S. Baker without first according him the benefits of due process was in violation of the terms of the current Agreement, said action being capricious and unwarranted.
2. That Claimant Baker now be returned to his position with the Carrier with seniority and all other rights restored unimpaired and with compensation for all time lost.

FINDINGS: By reason of the Memorandum of Agreement signed November 16, 1979, and upon the whole record and all the evidence, the Board finds that the parties herein are employe and Carrier within the meaning of the Railway Labor Act, as amended, and that it has jurisdiction.

Claimant Vernon S. Baker entered the service of the Carrier on July 13, 1972, and he was regularly assigned as foreman of Carrier's B&B Gang No. 1, headquartered at Corsicana, Texas. On January 15, 1985, the Carrier advised Claimant that "Effective this date you are hereby dismissed from the service of the Burlington Northern Railroad for violation of Rules 580, 575, 564, 576, and 586 of the Burlington Northern Railroad Safety Rules and General Rules as disclosed in testimonies at investigation afforded you on January 3, 1985 at Teague, Texas."

The cited rules read:

"564. 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 conduct themselves in such a manner that the railroad will be subjected to criticism and loss of good will."

"575. Theft or vandalism shall be considered sufficient cause for dismissal from railroad service. All cases of robbery or attempted robbery, theft of property belonging to or in charge of the railroad, or other unusual occurrences at or in the vicinity of stations must be promptly reported. Unauthorized possession of railroad tools, equipment and materials including commodities in transit is prohibited."

"576. F-27 (Form 15016) wire report must be completed for:

- a. All EMPLOYEE CASUALTIES (injuries or job related illnesses).
- b. All injuries involving NON-EMPLOYEES (passengers, trespassers, non-trespassers, etc.) that DO NOT arise from an ON-TRACK RAIL EQUIPMENT ACCIDENT/INCIDENT.
- c. All other occurrences (theft, vandalism, company vehicle incidents, fires, unintentional release of hazardous material, etc.) involving damage to or loss of property NOT arising from an on-track rail equipment accident/incident."

The Transcript of Record shows testimony by Mr. M.A. Whisenant, a member of Claimant's gang, that Claimant "made use of company credit card to purchase gas for his personal vehicle" (Tr., p. 36). Also, that Claimant "stores lumber and plywood and cross ties at his own house"; makes "personal use of tools, which he purchases for the gang" and "uses them at his own residence" (Tr., p. 37).

The Transcript of Record shows testimony by Mr. H. A. Pair, a member of Claimant's gang, that: he observed Claimant "make use of that credit card to purchase fuel for his own vehicle";

that Claimant made purchases at a lumber company and he instructed the company people "to record these purchases as being other than the tools"; "that he made personal use of these tools that he purchased" "at his own residence"; that he was instructed by Claimant, and did, haul railroad ties for delivery to a private company; that a battery was stolen; that material sometimes disappeared when left on the truck. (Tr., pp. 46-49.

The Transcript of Record shows testimony by Mr. C. Crumpton, a member of Claimant's gang, that: Claimant "made purchases of tin at Donie, Texas and received also hammers and tools and had them charged as tin"; Claimant "required the gang to load material on trucks and take to his home"; that Claimant "made purchase of tools at the Carroll Lumber Company in Teague, Texas" and that the tools were not always provided to the gang; that following purchase of tools, the tools did disappear; that Claimant instructed the lumber company to label the tools as something else; that Claimant made purchases of fuel for his personal vehicle, using the Burlington Northern credit card; that a battery was stolen from the Company truck and that no report was made of this; that members of the gang were required to haul railroad ties to private businesses using the Company truck. (Tr., pp. 52-61).

The evidence of record unequivocally supports the Carrier's decision to discharge the Claimant, and additional evidence of record contained in the Transcript of Investigation need not be presented here. However, it is relevant to note that Claimant was asked whether he disagreed with the testimony of the witnesses, and he stated, as to each witness, that he did not disagree with the testimony. Also, when Claimant was asked whether he was in violation of each of the cited rules, quoted to him, admitted that he was in violation.

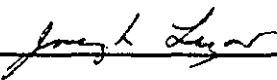
The Board has given considerable thought to the Organization's Position that there was error in the proceedings "when the same Carrier Officer functioned in every capacity conceivable in an investigative type proceeding with the exception that he did not act as Hearing Officer"; that "when one Carrier Officer wears as many hats as in this case, it cannot honestly be argued by the Carrier that the employee was accorded a fair and impartial hearing as the right to due process guarantees the employee".

It is well established on the railroads that the same individual may act in the dual capacity of judge and prosecutor, and this is not, per se, forbidden by Agreement rule. It is possible, of course, that an individual serving in such dual capacity may become so involved in the matter as to become biased, losing the objectivity required for a "fair and impartial hearing." To the extent that the same individual, by reason of serving in such dual

capacity, becomes suspect, the integrity of the disciplinary process also becomes suspect, and in such instances, it is the clear duty of the Board closely to scrutinize the activities of the individuals involved. This Board has made every effort to do so. Having done so, it has found the overwhelming evidence, and the clear, detailed and specific admissions of the Claimant, to support the conclusion that the Claimant is in violation of the cited rules. The Board has considered the fact that the Carrier's officer involved in this matter also gave testimony; however, he was not a chief or principal witness, and his testimony did not relate to the witnessing of the events with which Claimant was charged. Accordingly, the results of such testimony did not affect the ultimate finding and admission of guilt by the Claimant.

A W A R D

1. The Carrier is not in violation of the Agreement.
2. The claim of B&B Foreman Vernon S. Baker is denied.



JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER



C. F. FOOSE, EMPLOYEE MEMBER



L. MARES, CARRIER MEMBER

DATED: December 17, 1985