

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 4055

BURLINGTON NORTHERN RAILROAD COMPANY *
 (Former Frisco) *
 -and- *
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES *

CASE NO. 1

AWARD NO. 1

On January 21, 1986, the Brotherhood of Maintenance of Way Employees (hereinafter the "Organization") and the Burlington Northern Railroad Company (hereinafter the "Carrier") entered into an Agreement establishing a special board of adjustment in accordance with the provisions of Section 3, Second of the Railway Labor Act, Public Law 89-456. The Agreement was docketed by the National Mediation Board as Public Law Board No. 4055 (hereinafter the "Board").

This Agreement contains certain relatively unique provisions regarding the processing of claims and grievances under Section 3 of the Railway Labor Act. The Board's jurisdiction is limited to disciplinary disputes involving Carrier employees represented by the Organization. Although the Board consists of three members, a Carrier Member, an Employee Member and a Neutral Member, awards of the Board only contain the signature of the Neutral Member, and the parties have agreed that such awards will be final and binding in accordance with the provisions of Section 3 of the Railway Labor Act.

In accepting the assignment, the below-signed Neutral Member agreed to render awards in disputes submitted within thirty (30) days of the date required documentation was received from the parties.

In initiating a case before the Board, the parties have agreed that they will provide the Neutral Member, by mail, with the following documentation: the notice of investigation; the transcript of investigation; the letter assessing discipline; and, the correspondence exchanged on the property. The Board has the authority to require or permit the production of such additional written evidence as the Neutral Member may decide is appropriate for review. The above documentation shall constitute the record of proceedings before the Board. The parties have agreed that it is not necessary to have oral hearings in the cases presented to this Board.

The Board's review is limited to the documentation provided and any additional argument, evidence or awards which the Board might require after review of the initial submission of the dispute. In deciding whether the discipline assessed should be upheld, modified or set aside, the Neutral Member shall determine (1) whether there was compliance with the applicable provisions of Schedule Rule 91; (2) whether substantial evidence was adduced at the investigation to prove the charges made; and (3) if discipline is found to be appropriate, whether the discipline assessed was excessive.

Background Facts

Mr. William E. Lovelace, Jr., hereinafter the "Claimant", entered the Carrier's service on March 23, 1981 as a Steel Bridgeman Helper. He was subsequently promoted to First Class Bridgeman, and he was occupying this position when he was dismissed from the Carrier's service effective May 4, 1984. The Claimant was dismissed as the result of an investigation which was held on May 30, 1984 in Springfield, Missouri. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated General Rules 500 and 506 while assigned to Regional B&B Gang 823 which was working at Tenbrook Crossing on or about March 7, 1984. The Rules were cited because of alleged misappropriation and unauthorized sale of railroad ties belonging to the Carrier.

Findings and Opinion

On or about March 7, 1984, the Claimant was assigned to B&B Gang 823, which was engaged in renewing bridge ties on Bridge 18.9. Mr. J.B. Monaghan, Jr., was assigned as the Foreman of the Gang.

The Carrier was notified that rail ties were being sold and/or taken from its property in the Tenbrook Road vicinity in Arnold, Missouri without proper permission. The Carrier instigated an investigation. This investigation indicated that Foreman Monaghan sold forty nine (49) ties to a Mr. John L. Standridge for \$200 and 40 ties to a Mr. Charles T. Prokopf for an additional \$200. The Carrier then had a Special Agent interview Foreman Monaghan who acknowledged that he had sold the ties because, in part, he did not think that any of the ties sold were any longer usable for Carrier purposes. Mr. Monaghan also advised the Carrier's Special Agent that he divided the money he received with his crew, including the Claimant, as well as with Foreman Daniel Elliott and members of his crew. Foreman Elliott and members of his crew, after first accepting the money, returned it a few hours later to Mr. Monaghan. A Mr. Noel Blackwell, who was a member of Mr. Monaghan's crew, refused to accept the money when it was offered.

On or about March 7, 1984, the Claimant acknowledged that Mr. Monaghan had given him some money which Monaghan had received from the sale of railroad ties. In response to the direct question of whether Mr. Monaghan had offered him, the Claimant, money which came from the sale of railroad ties the Claimant responded as follows:

"He (Monaghan) had it laid out during the evening, after we got off work that evening he had some laid out. Then he went to, went somewhere, we went to a fish fry that night and we come back and there was some more money laying on the rack. The first time he'd told us it was for some ties he'd sold."

The Claimant then testified in response to a question regarding what he did with the money:

"I put it back in my wallet, I'd just come back to work from being injured, I just stuck it back in my wallet for hard times, in case I needed it or something, buy something for bunk cars, some extra food or something, eat a little better."

In response to questions from his Organization Representative, the Claimant testified that he did not know that Mr. Monaghan did not have authority to sell the ties; that he considered Mr. Monaghan his supervisor; that he assumed that Mr. Monaghan had permission to sell the ties; that at the time he did not think that he was doing anything wrong by accepting the money; that he did not sell any cross ties; that he did not know that Mr. Monaghan was going to sell

any ties; and that if he had the same opportunity today (the date of the investigation, May 30, 1984) he would not accept money for the ties.

There is substantial evidence in the record to establish that the Claimant knew or should have known that the acceptance of money for the ties was improper. The Claimant was also aware of the Carrier's general rules which provide that employees will not be retained in service who are dishonest (Rule 500) and that Carrier property must not be sold nor in any way disposed of without proper authority (Rule 506). The Board recognizes that the Claimant did not sell the ties. However, the Claimant knowingly received the benefit from that improper sale, and thus he is clearly implicated in the improper transaction. A number of his fellow employees, who were offered the same opportunity to accept a part of Mr. Monaghan's ill-gotten gains, refused to accept "their shares" of the monies. This fact substantiates our conclusion that the Claimant should have known that his acceptance of the monies was improper.

There is some reason to modify the penalty in this case. The Claimant had no part in the initiation or culmination of the improper sale; secondly, although he was a fairly short term employee at the time, his prior record is unblemished; and thirdly, the Claimant was forthright with the Special Agent and at the investigation and he demonstrated his repentance by an uncoerced offer of restitution. In these circumstances we find that the penalty of dismissal is excessive.

Accordingly, the Carrier is directed to reinstate the Claimant with seniority unimpaired, within fifteen (15) days of the receipt of this Award if the Claimant is able to meet the Carrier's physical requirements for return to service. The Claimant is entitled to no back pay, and the notation on his Personal Record shall be revised to indicate "Suspension from service for violation of Carrier rules 500 and 506".

Award The claim is sustained in part and denied in part in accordance with the above findings.

This Award was signed the 8th of May 1986 in Bryn Mawr, Pennsylvania.

Richard R. Kasher
Richard R. Kasher, Neutral Member
Public Law Board No. 4055