

PUBLIC LAW BOARD NO. 4244

Award No. 210

Case No. 220

**Parties to Dispute:**

## BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

-and-

# BURLINGTON NORTHERN SANTA FE RAILWAY

**Statement of Claim:** 1. That the Carrier's decision to issue a Level S Suspension for Southern Region, Track Foreman Mario C. Lopez, from service for forty (40) days was unjust.

2. That the Carrier now rescind their decision, pay for all wage loss and expunge all discipline and transcripts resulting from an investigation held 10:00 a.m., February 7, 1997 continuing forward and/or otherwise made whole, because the Carrier did not introduce substantial, credible evidence that proved that the Claimant violated the rules enumerated in their decision, and even if the Claimant violated the rules enumerated in the — decision, suspension from service is extreme and harsh discipline under the circumstances.

3. That the Carrier violated the Agreement particularly but not limited to Rule 13 and Appendix 11, because the Carrier did not introduce substantial, credible evidence that proved the Claimant violated the rules enumerated in their decision.

### INTRODUCTION

This Board is duly constituted by agreement of the parties dated January 21, 1987, as amended, and as further provided in Section 3, Second of the Railway Labor Act ("Act"), 45 U.S.C. Section 153, Second. This matter came on for consideration before the Board pursuant to the expedited procedure for submission of disputes between the parties. The Board, after hearing and upon review of the entire record, finds that the parties involved in this dispute are a Carrier and employee representative ("Organization") within the meaning of the Act, as amended.

### FINDINGS

The claimant, Mario C. Lopez, a track foreman from Willow Springs, was withheld from service on January 22, 1997, pending an investigation into charges the claimant committed an alleged theft of company gasoline in violation of Safety Rules 1.6 and 1.19. After several postponements, the formal investigation took place on February 7, 1997.

On the morning of the incident, January 22, 1997, the claimant had returned to Willow Springs from spending two days at Corwith. The claimant testified that when he arrived at Willow Springs and proceeded to take his clothing, rain gear and equipment into the tool house, he noticed a hose that was laying on the ground approximately two automobile lengths ahead of him. The hose led to a gasoline tank adjacent to the tool house. The claimant moved his vehicle forward approximately one and one-half car lengths, opened his

car door leaving the engine running, and attempted to place the hose and nozzle back onto the gas tank. However, the holder for the hose was defective so claimant simply placed the hose on the tank in as secure a position as possible. He backed up his automobile, unloaded some of his belongings into the tool house, and drove his vehicle to a location under a viaduct where other employees parked. The claimant denied ever placing the hose from the Carrier's gasoline tank into his car.

At approximately this moment, a signal supervisor, Arthur Clary, was approaching his office when he noticed an individual and a two-door car parked next to the tool house gas tank. Unable to recognize the individual at the tank, signal supervisor Clary turned his vehicle, and put on his bright headlights. The supervisor testified he observed the claimant toward the rear of the vehicle with the gas hose in his hand and the door to the vehicle's gas cap open. While he estimated that the claimant's vehicle was parked sufficiently close to insert the gas hose into his personal vehicle, Clary did not observe either the hose inserted into the vehicle, the pump for dispensing the gasoline to be operating, or the gas cap off of the claimant's vehicle.

The signal supervisor did not confront the claimant or speak with him. The supervisor notified the roadmaster, Ronald Ritter, that he believed the claimant was stealing gas. The roadmaster confronted the claimant who insisted that the gas hose was laying on the ground when he approached the tool house. The claimant told the roadmaster that he

purchased gas earlier that morning in Streator, Illinois. According to the supervisor, the claimant's gas gauge showed that the tank was approximately one-half full. The claimant disputed this testimony and claimed that his vehicle's gas tank was less than one-quarter full. After the roadmaster consulted with the division engineer, the claimant was immediately withheld from service and an investigation was scheduled.

The claimant testified at the formal investigation that the door flap that provides access to his older model vehicle fails to close properly, and remained open.<sup>1</sup> He identified a cash receipt dated January 22, 1997, for 8.403 gallons of gasoline purchased at Streator earlier that morning. He further reasoned that the gasoline in the Carrier's tank was contaminated with water, and because of known problems operating various pieces of small equipment using this gasoline, it made no sense that he would take the gas on a day with wind chills of twenty-five to thirty degrees below zero, and run the risk of a breakdown. The claimant testified to a specific date and time approximately one week prior to this incident when he notified the Carrier of quality problems with the gasoline from the tool house tank. This testimony was not refuted.

The roadmaster had no knowledge as to whether the gas in the tool house tank was usable or not. He further stated that as a foreman, the claimant would normally have

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1. A senior special agent was contacted at 11:15 a.m. on January 22 by the signal supervisor, Clary. The agent went to the location where the claimant had parked his vehicle. The agent noticed the door to the vehicle's gas tank was open, but he did not check to see if the door operated properly. The agent did not pursue the matter further based on a decision no criminal investigation was required.

possession of keys permitting him to enter the tool house. When the claimant was removed from service on January 22, all of the Carrier's keys in his possession were seized, but the roadmaster did not know whether any of the keys opened the tool house or operated the adjoining gasoline tank.

The Board finds the Carrier has failed to prove the claimant committed a theft of company gasoline from the Willow Springs tool house on January 22, 1997, as charged. A charge of theft requires far more than the quantum and quality of proof offered here. First, there is no evidence that anyone observed the claimant with the gas hose inserted in his personal vehicle. There is no proof that the gasoline tank at the tool house was operating when the signal supervisor appeared on the scene at 6:30 - 6:45 a.m. — he simply shined his headlights on the scene, but made no inquiry of the claimant at that moment.


The claimant offered a plausible explanation for his presence in the vicinity of the tool house. There was no showing that the gas holder was operating properly. There was no accounting of the quantity of gasoline in the tank or the quantity the claimant allegedly stole. The claimant further identified a reason the flap, or small door covering the gas cap on his personal vehicle, was open. Moreover, a special agent observed the claimant's vehicle with its gas tank flap (not gas cap) open the day of the incident which was consistent with the claimant's testimony that the flap was broken and would not shut. However, there was no inquiry or testing of the gas flap itself at any time.

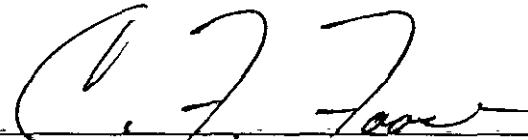
The Carrier's witnesses acknowledged that while the tool house would be locked, as a foreman the claimant would be in possession of a key to the tool house. The claimant produced proof of the purchase of gasoline before and after work which was never disputed or investigated. The nature of the inquiry into the quantity of gasoline in the claimant's personal vehicle on the morning of January 22, 1997, was admittedly subject to error, and the approximate conclusions as to the amount of gasoline was disputed by the claimant.

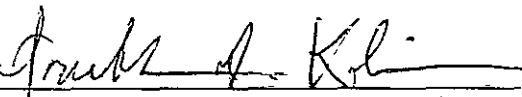
When the Board reviews the entire record, it finds the evidence is clearly insufficient to prove the Claimant committed a theft of company gasoline in violation of Safety Rules 1.6 and 1.19 as charged. Accordingly, the claim must be sustained.

**AWARD**

The claim is sustained. The Carrier will compensate the claimant for the net wage loss resulting from the forty (40) day suspension within thirty (30) days of this Award.

  
Greg Griffin, Carrier Member

  
Clarence F. Foose, Employee Member

  
Jonathan I. Klein, Neutral Member

This Award issued the 11 day of JUNE, 1997.