

PUBLIC LAW BOARD NO. 4244

Award No. 257

Case No. 264

Carrier File No. 14-00-0012

Organization File No. 50-13D2-9912.CLM

Parties to Dispute:

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYES**

-and-

BURLINGTON NORTHERN SANTA FE RAILWAY

Statement of Claim:

1. The Carrier violated the Agreement when on November 22, 1999, Mr. J. H. Goff was issued a Level III suspension of twenty days and a three year probationary period for allegedly violating Rule 1.6, part 4; Rule 1.13; and Rule 1.25 in part of the Maintenance of Way Rules, effective January 31, 1999 as revised, in connection with this alleged unauthorized purchase of jackets and alleged unauthorized use of procurement card while he was assigned as a Foreman.
2. As a consequence of the Carrier's violation referred to above, Mr. Goff shall be reinstated with seniority, vacation, all other rights unimpaired, the discipline shall be removed from the Claimant's personal record, and he shall be compensated for all wages lost in accordance with the Agreement.

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, foreman J. H. Goff, was assigned by the Carrier to rail gang RP23 during the relevant period. On September 29 through October 7, 1999, numerous jackets which cost a total of \$3,642.00 were purchased from a vendor known as The Company Store for employees assigned to rail gang RP23. The orders for the jackets were placed by assistant foreman J. D. McMillan, and the cost for the jackets was charged to several Pro-Cards issued by the Carrier to employees assigned to rail gang RP23. The Carrier subsequently determined that the purchase of these jackets for employees assigned to rail gang RP23 was unauthorized.

The Carrier instructed the claimant to attend an investigation on October 25, 1999, for the purpose of ascertaining the facts and determining his responsibility, if any, in connection

with the unauthorized purchase of jackets and the unauthorized use of procurement cards, as discovered by assistant roadmaster A. D. O'Neal on October 11, 1999. The investigation commenced as scheduled on October 25, 1999, however, the parties mutually agreed to postpone the investigation until November 5, 1999, due to the claimant's absence. As a result of the formal investigation conducted on November 5, 1999, the Carrier issued the claimant a twenty-day Level III suspension for violating Rules 1.6(4), 1.13 and 1.25 of the Maintenance of Way Operating Rules (MWOR). As discussed herein, the Board cannot sustain the discipline assessed the claimant.

Rule 1.6 of the MWOR entitled "Conduct," provides, in pertinent part, as follows:
"Employees must not be: . . . 4. Dishonest . . ." Rule 1.13 of the MWOR entitled "Reporting and Complying with Instructions," provides as follows: "Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties." Rule 1.25 of the MWOR entitled "Credit or Property," provides as follows:

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 articles to the proper authority.

The Organization contends that the Carrier failed to conduct the investigation within the time limits set forth in the 1982 Agreement. However, the Carrier asserts that it scheduled and subsequently held the hearing in accordance with the language set forth in Rule 40 of the 1982 Agreement. Rule 40 of the 1982 Agreement entitled "Investigations and Appeals," provides, in pertinent part, as follows:

- A. An employee in service sixty (60) days or more will not be disciplined or dismissed 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) and except as provided in Section B of this rule.

* * *

- J. If investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employee shall be considered as having been dismissed.

* * *

Rule 40 (A) clearly provides that the investigation concerning the claimant's alleged misconduct must be conducted within fifteen days from the date the Carrier obtains information regarding such misconduct. The record reveals that on September 29, 1999, the claimant's supervisor, assistant roadmaster A. D. O'Neal, received a jacket which was ordered for him by assistant foreman J. D. McMillan. The record further indicates that assistant roadmaster O'Neal telephoned McMillan on October 8, 1999, and placed an order for three additional

jackets. However, assistant roadmaster O'Neal claims that he had no knowledge that these jackets were purchased with Carrier issued credit cards until October 11, 1999.

Based upon the date when he received his jacket, and the date of his subsequent order for additional jackets, the Board finds substantial evidence that assistant roadmaster O'Neal knew or should have known the source of funding for these jackets prior to October 11, 1999. The record indicates that he was present at meetings during which the purchase of the jackets with Carrier issued credit cards was discussed. There is substantial evidence that O'Neal feigned ignorance of the source of monies used to purchase the jackets despite being a direct participant and beneficiary of the unauthorized purchase of the jackets.¹ Therefore, the Board

1. The following responses by O'Neal to questions from Vice General Chairman Wheeler are most revealing on this issue:

109. Q. How about on September 29, did you not receive a jacket yourself?
A. Yes sir, I did.

110. Q. And did you not also ask to get jackets so you could mail them to other employees?
A. No sir, I didn't.

* * *

114. Q. You never questioned anybody where they come from or how they procured them?
A. Yes I did. Yes sir, I did.

115. Q. And what were [you] told then?
A. I was told that they weren't coming from, or, to not worry about it that they weren't coming from a source that I would ever know about.

116. Q. So what did you ascertain that that meant?
A. I did not know.

117. Q. Like I said, the, and you did not investigate that?
A. No sir, I did not.

* * *

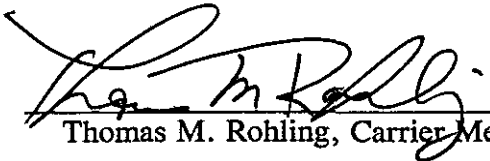
123. Q. And then on October the 8, you did call Mr. McMillan and tell him to order more jackets for roadmasters that are around the area?

(continued...)

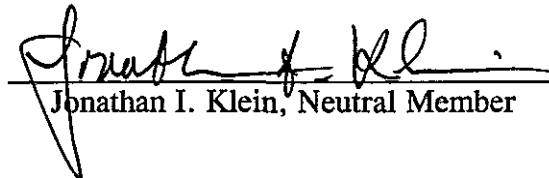
finds that the Carrier had knowledge of the claimant's alleged misconduct for a period of time greater than fifteen days prior to October 25, 1999, the date originally scheduled for the formal investigation. As such, the Carrier violated the time limit provision set forth in Rule 40 (A) of the Agreement. In accordance with Rule 40 (J), the charges against the claimant are considered dismissed, and the claim must be sustained.

AWARD

The claim is sustained. The Carrier shall comply with this Award within thirty (30) days from the date of issuance.


Thomas M. Rohling, Carrier Member


R. B. Wehrli, Employee Member


Jonathan I. Klein, Neutral Member

This Award issued the 17th day of January, 2000.

1(...continued)

- A. Yes sir, I did.
124. Q. And you didn't, even at that time wonder, how these jackets were gonna be paid for that you'd instructed this man to order?
- A. No sir, I didn't.

(Underlining supplied) (Tr. 26-27).