

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes
and
Burlington Northern and Santa Fe Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on January 31, 2003, when it dismissed the Claimant, Mr. R. D. Phillips, from service for allegedly violating Rules 1.3.1, 1.6, 1.9, 1.13, 1.18, and 1.26 of the Maintenance of Way Operating Rules, and rule S-26.1 of the Maintenance of Way Safety Rules by engaging in actions that allegedly created a conflict of interest.
2. As a result of the violation referred to in part (1), the Carrier shall return the Claimant to service with seniority intact, remove the discipline mark from his personnel record, and make him whole for all time lost. [Carrier File No. 14-03-0057. Organization File No. 120-13C4-021.CLM].

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the dispute herein.

The Claimant, Mr. Ricky D. Phillips, entered the Carrier's employment in 1977. He was a regularly assigned Track Supervisor at Lubbock, Texas on September 25, 2002, although on authorized paid vacation on that date. The record shows that he is a certified track inspector, qualified by training and experience to determine whether track meets the regulatory requirements of the U. S. Department of Transportation's Federal Railroad Administration ("FRA").¹

On December 19, 2002, he was sent a notice of investigation and charges by the Carrier's Road Foreman of Engines, reading as follows, in pertinent part:

¹Title 49, Code of Federal Regulations, (49 CFR) §213.7 prescribes the training and/or experience required of an individual designated to inspect track.

Attend investigation . . . on Monday, December 30, 2002, at 9:00 a.m., for the purpose of ascertaining the facts and determining your responsibility if any, in connection with your possible violation of Rules 1.3.1, 1.6, 1.9, 1.13, 1.18 and 1.26 of the Maintenance of Way Operating Rules, . . . and Rule S-26.1 of the Maintenance of Way Safety rules, . . . concerning your alleged engagement in another business or occupation which created a conflict of interest with your employment on the BNSF Railway, discriminated among railroad shippers, and placed the BNSF Railway's reputation and financial well-being at risk, when, without instruction from your Supervisor and on your own time, you inspected track for Mr. O. E. F____, a BNSF customer, representing yourself as an agent of the BNSF Railway, and certified Mr. O. E. F____'s track as meeting FRA Class I requirements, stating such in a letter authored by you on September 25, 2002; and your alleged disobedience of the instructions relating to conflict of interest from the Division Superintendent addressed to you in a letter dated June 28, 1993.

The rules in the above notice read as follows:

Maintenance of Way Operating Rule ("MWOR") 1.3.1

Safety Rules. Employees must have a copy of, be familiar with, and comply with all safety rules issued in a separate book or in another form.

Maintenance of Way Operating Rules. Employees governed by these rules must have a current copy they can refer to while on duty.

Hazardous Materials. Employees who in any way handle hazardous materials must have a copy of the instructions or regulations for handling these materials.

Employees must be familiar with and comply with these instructions or regulations.

Timetable/Special Instructions. Employees whose duties are affected by the timetable/special instructions must have a current copy they can refer to while on duty.

Classes. Employees must be familiar with and obey all rules, regulations, and instructions and must attend required classes. They must pass the required examinations.

Explanation. Employees must ask their supervisor for an explanation of any rule, regulation, or instruction they are unsure of.

Issued, Cancelled, or Modified. Rules may be issued, cancelled, or modified by track bulletin, general order, or special instructions.

Engineering Instructions. Employees governed by the Engineering Instructions must be familiar with and comply with all their provisions; additionally, a copy of Engineering Instruction No. 1 must be available for reference while on duty.

MWOR 1.6

Employees must not be

1. Careless of the safety of themselves or others
2. Negligent
3. Insubordinate
4. Dishonest
5. Immoral
6. Quarrelsome
or
7. Discourteous.

MWOR 1.9

Employees must behave in such a way that the railroad will not be criticized for their actions.

MWOR 1.13

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.

MWOR 1.18

Employees must not engage in another business or occupation that would create a conflict of interest with their employment on the railroad or would interfere with their availability for service or the proper performance of their duties.

MWOR 1.26

Employees must not discriminate among railroad customers. Employees must not accept gifts or rewards from customers, suppliers, or contractors of the railroad unless authorized by the proper manager.

Maintenance of Way Safety Rule ("MWSR") S-26.1

No officers or employees of the company may have personal interests which might conflict or appear to conflict with the interests of the company or its affiliates or which might influence or appear to influence their judgment in performing their

duties. The outside activities and affairs of all officers and employees should be conducted so as to avoid loss or embarrassment to the company and its affiliates.

Employees must not engage in another business or occupation that would create a conflict of interest with their employment on the railroad or would interfere with their availability for service or the proper performance of their duties.

This policy is designed to foster a standard of conduct which reflects credit in the eyes of the public on the company, its officers, and its employees, and which protects the reputation and financial well-being of the company. There is no intent to interfere with the personal interests or activities of officers and employees.

By agreement, the investigation was postponed to and held on January 17, 2003. The Claimant testified in his own behalf and was represented by the Organization's Vice General Chairman. The Carrier's Superintendent of Operations, offered testimony and documentary evidence. Mr. F____, a businessman engaged in the sand and gravel trade, and Mr. M____, the owner of M____ Railroad Construction Company, a contractor performing track construction and repairs, appeared as witnesses for the Claimant. Mr. M____ testified that he is qualified to perform FRA track inspections. A transcript of testimony and evidence taken in the investigation is a part of the record before this Board.

Mr. M____ testified that his company had repaired a privately owned track connecting Mr. F____'s industrial facility with a short line rail carrier, and deemed the track met the FRA's Track Safety Standards. The short line's operator, a Mr. W____, nevertheless refused to serve Mr. F____'s facility, contending the track and/or connecting switch were in an unacceptable condition. In an effort to resolve the dispute, Mr. M____ proposed to Mr. F____ that a third, neutral party, an FRA-qualified inspector, examine the track and switch and render an informed opinion as to their fitness for service. Mr. M____ suggested the names of several track inspectors in the vicinity. Because his company frequently performed contract repair work on industry tracks served by the Carrier, he had made the acquaintance of the Claimant and other Carrier-employed personnel. Since the Claimant was located nearest the subject site, and was on vacation at the time, Mr. M____ offered to contact him. He also gave one of the Claimant's business cards to Mr. F____. Mr. M____ said he called the Claimant, who agreed to perform the inspection. Mr. M____ picked up the Claimant at his home and drove him to the inspection site.

The Claimant performed the inspection, deemed the track safe to be used, and presented Mr. F____ a handwritten statement (herein "inspection report") dated September 25, 2002, reading as follows:

To whom it may concern

I inspected switch 039D 9/25/02 and found that this switch and track qualifies under 213.53 class 1 under 213.63 class 1 qualifies

No defects under 213.133

qualifies under 213.143 class 1

qualifies under 213.135 class 1

qualifies under 213.109 class 1

This switch and Track qualifies as class one and found no defect to render this track out of service²

The Claimant signed this inspection report and added his employee number and title, "Track supervisor BNSF Ry. Co." Mr. M_____ testified that he asked the Claimant to show his qualifications on the inspection report, hence the entry of his job title under his signature.

Mr. M_____ further testified that Mr. W_____ still refused to accept his and the Claimant's appraisal of the track's condition. He therefore recommended that Mr. F_____ contact the Carrier, the short line's only connection to the nation's rail network, because Mr. F_____ anticipated a substantial volume of traffic which would benefit the Carrier, as well as the short line, if he could obtain rail service. Mr. M_____ stated that the inspection performed by the Claimant did not affect his relationship with the Carrier. He also stated that he did not hire the Claimant to do this work; that he had "never known of them [track inspectors] to charge anyone for looking at a track."

Mr. F_____ testified that after his privately owned track was repaired and deemed fit for service by Mr. M_____ 's company, the short line operator, Mr. W_____, said the connecting switch and the track were "bad and out of service and had been for a period of time," even though he was aware of the repairs made by Mr. M_____ 's company. Mr. F_____ then told Mr. M_____ that they needed another opinion. He testified that Mr. M_____ said he knew a Carrier-employed inspector who was on vacation. Mr. M_____ brought the Claimant to the site. Mr. F_____ said this was the first time he had seen the Claimant. He further testified that there was no exchange of money or any other compensation for the inspection; "We just shook hands and I thanked him." He denied that the Claimant represented himself as an agent of the Carrier for this inspection. When asked if the Claimant performed the inspection by using the Carrier's rules, or the FRA regulations, he answered:

I assumed it would be under the FRA. He had that little booklet and he read, you know, what everything's supposed to be. Of course, he already knew it, but, but

²These sections of 49 CFR Chapter II describe permissible track characteristics with respect to gage, surface, guard rails, crossties, etc.

anyway he read all the things and he was using. I never [saw] any that belong to Santa Fe, as far as I know. [Transcript Answer No. 189]

Mr. F_____ testified that the Claimant's business card was given him by Mr. M_____. When Mr. W_____ continued refusing service to Mr. F_____ 's facility, he attached the business card to the Claimant's inspection report, and submitted a photocopy, showing the attached card, to the Surface Transportation Board ("STB"), a Federal agency that Mr. F_____ had petitioned to resolve his conflict with the short line carrier, and to obtain service on the private track serving his facility. Mr. F_____ stated that this Carrier's, i.e., Burlington Northern & Santa Fe's, reputation is in no way diminished in his view. If he could establish service on his track, he would be able to offer a considerable volume of business to both the short line and the BNSF.

The Claimant testified that he was on vacation and received a call from Mr. M_____ on September 25, 2002. He described the contact:

It was just a spur of the moment thing. I received a phone call and asked if I'd be a tie breaker. Would I look at a switch that they felt was serviceable, and they were being told it was not serviceable, and if I would mind looking at a switch, and I agreed. [Transcript Answer No. 146]

He said he had never met Mr. F_____ before he arrived at the inspection site. He did not represent himself as an agent of the Carrier, and he did not give a business card to Mr. F_____. He did not charge for the inspection; he said he "did it for a handshake." There was no intent, nor even a realization, that his act would result in any adverse effect to the Carrier.

He testified that he based his conclusions on the track's condition "strictly" on the FRA's standards, it met all the FRA's standards for a Class 1 track, and he wrote the inspection report. His business card was not appended to the inspection report by himself. He showed his job title to attest that he was qualified to inspect track. He further testified that he was not directed by the Carrier to perform this inspection, nor did he seek permission from any Carrier officer to do so. He did, however, advise his immediate supervisor, a Roadmaster, after he completed his vacation. He gave this account of their discussion:

When I returned from vacation we were at the pancake house having a track supervisors meeting, and I told him that I had inspected that switch and wrote a statement up. And, he just sat there saying that it was their problem and he didn't want to get involved. And the witness to that was John Malone, I believe Steve Kaufman was there, a couple other guys, but I don't know to what extent of who all heard what. [Transcript Answer No. 152]

The Claimant alluded to several past instances of problems between himself and Mr. W_____, and suggested that Mr. W_____ was motivated by their previous disagreements, about which he supplied details.

The Carrier's Superintendent of Operations, (herein "Superintendent") testified that on December 10, 2002, he was contacted by the Carrier's Law Department, concerning an inquiry or complaint that the Claimant had represented himself as an agent of the Carrier while inspecting track on September 25, 2002. He said that the Law Department had told him that Mr. W_____ has threatened to file a lawsuit against the Carrier because of the Claimant's inspection. The STB had sent the Law Department a copy of the inspection report with the Claimant's business card stapled to the upper left corner. The Superintendent testified that by affixing his business card and by entering his employee number, his job title, and his employer's initials on the inspection report, the Claimant was representing himself as the Carrier's agent. These acts, he testified, subject the Carrier to possible lawsuit damages, criticism, and STB fines, and the Claimant risked the reputation and financial well-being of the Carrier.

He placed in evidence the letter dated June 28, 1993, alluded to in the notice of investigation and charges. This letter, written over the signature of then-Superintendent K. W. Ross, and sent to the Claimant by Certified Mail, Return Receipt Requested, reads as follows:

I understand that you and Mr. Sadler on your off-duty time are in the business of performing track repairs for various industries located on Santa Fe's lines in the Texas/New Mexico area. I have been further advised that over the past several years you have performed such repairs for more than a dozen of Santa Fe's customers.

Your position as a section foreman in Santa Fe's Maintenance of Way Department empowers you to take the industry track of Santa Fe's customers out-of-service until appropriate repairs are completed and subsequently approved by you or someone in your position. Consequently, your operation of a business which engages in the repair of such tracks creates a serious and obvious conflict of interest with respect to your Santa Fe employment. Furthermore, the operation of such a business by you could be viewed as a violation of Rules L, 1006, 1007 and [sic] 1023, among others, of Santa Fe's General Rules for All Employees.

You are hereby directed to immediately cease and desist from soliciting, accepting or performing any type of repair work, track or otherwise, for customers located on Santa Fe's lines. If you desire to continue your track repair business for Santa Fe's shippers, then the Company will have no alternative but to remove you from service for a failure to obey instructions, a conflict of interest (Rule 1023) or various other rules violations.

If I misunderstand your outside business operations, please let me know and I will be glad to again review this matter. However, absent express written permission from Santa Fe's Chairman, President and Chief Executive Officer or Vice President - Law, you are henceforth prohibited from performing repairs for Santa Fe's customers, shippers and industries for as long as you choose to remain in Santa Fe's employ.

In response to a series of leading questions by the Conducting Officer with respect to the above letter, the Superintendent testified that the Claimant's inspection closely resembles the activity proscribed by Mr. Ross's letter, constitutes a conflict of interest, negligence, and insubordination, risked the Carrier's reputation with the STB and its customers, and placed its financial well-being at risk. He further asserted that the short line carrier itself and all its customers are customers of the Carrier, as the short line's exclusive connection. He therefore concludes that the Claimant's inspection and inspection report created a conflict among the Carrier, the short line, and the short line's customers. Although he was unable to state with certainty that the Carrier had lost any business as the consequence of the inspection, he testified that adversarial contact from Mr. W_____ 's attorney represents a loss of good will and affected the Carrier's reputation.

On January 31, 2003, the Road Foreman of Engines wrote the Claimant:

This letter will confirm that as a result of formal investigation held on January 17, 2003, you are dismissed from employment effective immediately for violation of Rule(s) 1.3.1, 1.6, 1.9, 1.13, 1.18 and 1.26 of the Maintenance of Way Operating Rules, . . . and Rule S-26.1 of the Maintenance of Way Safety Rules . . .

The Organization promptly appealed the Carrier's disciplinary decision to the Carrier's Labor Relations Department, and it was there denied. The dispute has therefore been referred to this Board for further consideration.

The Board must address a threshold procedural issue raised by the Organization. An objection to the investigation's timeliness was twice submitted by the Claimant's representative before any testimony was taken, reiterated at the investigation's close, and renewed by the Organization in its appeal.

The Organization argues, supported by the Claimant's testimony, that he told his immediate supervisor, the Roadmaster, in the presence of witnesses, of his inspection and written report on September 30, 2002, but the Roadmaster said "he didn't want to get involved." From this, the Organization concludes that the investigation was not timely held, the notice of charges coming more than two months later.

The Board concludes that the investigation was not untimely held. Schedule Agreement Rule 13, the Discipline Rule, has two discrete time limit provisions. The second provision may be quickly disposed of. Rule 13 - (b) provides that the investigation will be held within thirty (30) calendar days after an employee is held out of service pending the investigation. Here, the Claimant was not withheld from service. In the alternative, Rule 13 - (a) provides, in part, "[N]o employe who has been in service more than sixty (60) calendar days will be disciplined without first being given an investigation, which will be promptly held." (Emphasis added). "Promptly" is an imprecise term, which must be interpreted from its context. From the record, it is apparent that the Roadmaster found no fault in the Claimant's inspection. Of course, he had not seen the inspection report submitted to the STB, with the attached business card and the Claimant's job title and the Carrier's initials. From the Claimant's account in the pancake house, there was nothing which sparked the Roadmaster's interest. The triggering event was the Law Department's receipt of the inspection report, referred by it to the Superintendent on December 10, 2002. The notice of charges was written on December 19, 2002, initially setting the investigation for December 30, 2002. The Board is persuaded, on this record, that the investigation was "promptly held" after the Carrier received information indicating a possible violation of its rules. The Board's determination here, however, is not intended to establish a hard and fast interpretation of Agreement Rule 13 - (a). Differing circumstances might dictate a different determination in another case.

Turning to the merits, the Organization argues that the inspection was carried out in conformity with FRA standards and the Claimant did not represent himself as a representative of the Carrier. He did not attach his business card to the inspection report, and indicated his employment status only for the purpose of showing that he was a qualified FRA inspector. The Carrier responds that when he identified himself as an employee of the Carrier, this constituted a conflict of interest not permitted by the Carrier's rules.

The record clearly proves that the Claimant did not give his business card to Mr. F _____. It was obtained by him from Mr M _____. Its attachment to the inspection report was not intended by, sanctioned by, nor even known to the Claimant. The Board is persuaded that the endorsement of his job title and the Carrier's initials on the inspection report was an unmindful or unguarded act intended only to establish his credentials as a competent, trained inspector. In retrospect, it was imprudent to do so, but the Board believes that the Claimant could not have foreseen at that time the adversarial reaction which followed.

The more important issue here is the Carrier's conclusion that the inspection constitutes a "conflict of interest." *Black's Law Dictionary, Sixth Edition*, West Publishing Co., (1990), defines "conflict of interest" as follows:

Term used in connection with public officials and fiduciaries and their relationship to matters of private interest or gain to them. Ethical problems connected there-

with are covered by statutes in most jurisdictions and by federal statutes on the federal level. The Code of Professional Responsibility and Model Rules of Professional Conduct set forth standards for actual or potential conflicts of interest between attorney and client. Generally, when used to suggest disqualification of a public official from performing his sworn duty, term "conflict of interest" refers to a clash between public interest and the private pecuniary interest of the individual concerned. . . . A situation in which regard for one duty tends to lead to disregard of another. . . . A conflict of interest arises when a government employee's personal or financial interest conflicts or appears to conflict with his official responsibility. . . . [Citations omitted]

Webster's New World Dictionary of the American Language, Second College Edition, Simon & Schuster, (1984), defines the term in this fashion:

[A] conflict between one's obligation to the public good and one's self-interest, as in the case of a public officeholder who owns stock in a company seeking government contracts.

When Mr. Ross wrote the Claimant in 1993,³ the Claimant's track repair business typifies the above definitions of a conflict of interest. From the text of that letter, it appears the Claimant was, for remuneration, repairing tracks connecting with his employer, and then in his capacity as an employee, he was in a position to approve the work that he himself had done as an outside contractor.

His actions in this instant case are easily distinguishable. The Board does not concur in the Superintendent's assessment that this "closely resembles" the business he was engaged in in 1993.⁴ The Claimant was not engaged in a "business" of repairing tracks. The use of the word "business" in Mr. Ross's letter denotes a commercial enterprise for profit. Furthermore, the Claimant was directed to cease and desist from soliciting, accepting, or performing repair work for customers located on Santa Fe's lines. Since the Claimant — according to his own testimony and that of two witnesses not in the Carrier's employ — received no remuneration from anyone, Mr. F____ could hardly be characterized as a "customer" of the Claimant. *Black's* defines a

³The Organization argued that the Claimant never received the 1993 letter. Lacking certain evidence that it was or was not received, the Board assumes that it was sent, for the purposes of this discussion.

⁴"Closely resembles" is not the Superintendent's words, but reflects his affirmative response to a leading question propounded by the Conducting Officer. (Transcript Question and Answer No. 56).

"customer" as one who repeatedly or regularly has business dealings with a tradesman or business, or a buyer, purchaser, consumer, or patron. The Claimant performed this inspection work more in the manner of a favor for an acquaintance, Mr. M____, who in turn arranged the inspection for his customer, Mr. F____, as a "tie breaker." The Claimant was not engaged in a "business" which sought or solicited the inspection. Rather, it was a happenstance that the Claimant was known to Mr. M____, was available, and was nearby. In any event, Mr. F____'s track was not located on the Carrier's lines. Under the totality of these circumstances, the Board finds no conflict of interest and no disobedience of the instructions in the 1993 letter.

The Board has considered whether the Claimant could have or should have foreseen the chain of events resulting from his inspection report. The record does not show that he expected, knew, or intended that his business card (supplied by the Carrier) would appear on a document submitted to the STB in support of a petition involving a service dispute between Mr. F____ and the short line carrier. He did not give his card to Mr. F____, whom he met for the first time when brought to the inspection site by Mr. M____. While it was imprudent to put the Carrier's initials on the inspection report, the Board is persuaded that it was not intended to represent the Claimant as an agent of the Carrier. He testified, "The way I described myself was just for the qualifications to show that I was qualified to inspect track." (Transcript Answer No. 155).

The Claimant, or any person not privy to the apparent tension between Mr. F____ and Mr. W____, for that matter, could not have foreseen the repercussion which was forthcoming, i.e., the threat of a lawsuit. This reaction might be explained by reference to Mr. F____'s assertion that Mr. W____, himself, has a conflict of interest:

192. Q. Has this inspection by Mr. Phillips diminished BNSF's reputation in any way in your eyes?
A. No, not really.
193. Q. So, it hasn't affected you, your relationship with the BNSF in any way?
A. No, it hasn't.
194. Q. Your main conflict is with the shortline operator Mr. W____, himself, is that correct?
A. As far as I know that's the only conflict.
195. Q. And, this conflict arises from a side business that W____ is in and is in competition against you, is that correct?
A. That is my opinion. I think that's what the, what the reason he won't give me service. [Answers by Mr. F____]

The Board, of course, cannot know whether the witness's opinion is well-founded, but no better explanation has been offered for the short line's refusal to provide service to Mr. F____'s facility, after the track and switch were deemed to meet FRA Class 1 standards by both Mr. M____ and

the Claimant. It seems unlikely that a simple difference over the track's condition would have induced the short line operator's irascible reaction.

The Board must, unavoidably, consider the Claimant's account of some previous disharmony between himself and Mr. W_____. (See page 7, *supra*). At worst, one might speculate that the Claimant's inspection was a retaliatory gesture toward a person who had troubled him in the past. But such speculations are not proof. Without more persuasive supporting evidence, the Board is not warranted in imputing any such sinister motive to the Claimant.

The Board has carefully considered the sundry rules with which the Claimant was charged and found to have violated. MWOR 1.3.1 has broad application, and was not discussed in detail in the transcript. It does, however, require employees to be familiar with and obey all rules, regulations, and instructions. The Board finds no violation of this Rule.

MWOR 1.6 requires, among other injunctions, that employees must not be negligent nor insubordinate. The Superintendent testified that the Claimant was negligent in performing the inspection at Mr. F_____'s facility and writing the inspection report, placing the Carrier's reputation and financial well-being at risk. He also asserted that the Claimant was insubordinate when he disobeyed the specific instructions in the 1993 letter. The Board believes that the inspection and the consequent inspection report cannot be considered negligence, which connotes a lack of reasonable care to prevent damage or injury. The Claimant's acts do not constitute insubordination. The 1993 letter was the basis for the Superintendent's conclusion that he was guilty of insubordination. The Board finds no such disobedience, as discussed on page 10, *supra*.

MWOR 1.9 directs employees to behave in such a way that the Carrier will not be criticized for their actions. Understandably, when the Superintendent saw the inspection report bearing the Claimant's business card and other identification, it appeared that the Claimant had represented himself as an agent of the Carrier. The Superintendent concluded that because the Carrier received criticism from the short line and the STB, even a threatened lawsuit, the Claimant violated MWOR 1.9. (Transcript Question and Answer No. 39). The Board does not concur in this conclusion, in light of all the evidence and testimony. The inspection and the inspection report were not unlawful. On their face, they were not confrontational. It was only the short line operator's reaction that engendered the tempest. That an action results in a negative response does not, of itself, prove that the act was somehow wrong. The Claimant could not have foreseen the outcome. In today's litigious society, no person or entity is immune from threatened lawsuits, whether or not based on facts, good evidence, or sound judgment.

MWOR 1.13 requires employees to comply with instructions from their supervisors and managers of other departments when they apply to their duties. The Superintendent testified that

the 1993 letter came within the coverage of this Rule. The Board has already discussed the 1993 letter and is persuaded that the Claimant did not disobey that letter, nor MWOR 1.13.

MWOR 1.18 prohibits employees from engaging in another business or occupation that would create a conflict of interest. The Board, for reasons discussed above, finds no conflict of interest by the Claimant.

MWOR 1.26 prohibits employees from discriminating among railroad customers. The Carrier concluded that the Claimant's inspection and qualification of Mr. F____'s track constitutes discrimination between Mr. F____'s interests and those of Mr. W____. The problem with this analysis is that the alleged discrimination is solely the product of Mr. W____'s reaction to the inspection. On its face, an honest, unbiased assessment of a privately-owned track does not rise to the level of prohibited discrimination. The discrimination must be obvious, not hidden from the observation of guileless persons. It must arise from the clean hands of the one asserting discrimination. While not finally determinative, Mr. F____'s testimony alluding to Mr. W____'s other business interest casts a shadow of insincerity over his concern about the condition of Mr. F____'s track, and suggests that his refusal to service this facility did not have its genesis in purely safety issues.

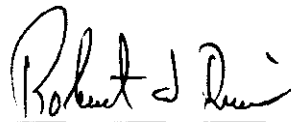
MWSR S-26.1 prohibits employees from having personal interests which conflict or appear to conflict with those of the Carrier. Outside activities are to be conducted so as to avoid loss or embarrassment to the Carrier. It also repeats MWOR 1.18, word for word, with respect to engaging in other businesses or occupations which create a conflict of interest with their employment by the Carrier. It further states that these rules are designed to protect the reputation and financial well-being of the Carrier. The ultimate question is whether the Claimant could have reasonably foreseen the end game which resulted from his inspection and inspection report. Certainly, he did not go as a representative of the Carrier, and Mr. W____'s erroneous conclusion that he did is based on the business card and his identification of himself as an employee of the Carrier. This was ill-advised, in the brilliance of hindsight, but it does not rise to the level of misconduct which warrants severe discipline, much less dismissal from the Carrier's service.

Although the Board has determined that the investigation was "promptly" held, the Claimant's account of his conversation with the Roadmaster on September 30, 2002, serves to reinforce the Board's conclusions about the chain of events which culminated in the charges against the Claimant. When the Claimant told the Roadmaster about his inspection, this candid disclosure confirms that the Claimant had no realization of wrongdoing. The Roadmaster's indifference to his disclosure further indicates that no misconduct was clearly in evidence. The Board is persuaded, therefore, that it was Mr. W____'s reaction, not the inspection, of itself, which caused the Carrier's Road Foreman of Engines to draw up charges against the Claimant.

The Claimant has more than 25 years' service with the Carrier. His only disciplinary entry was in 1990, an accumulation of demerits cleared by good conduct. He received a quality performance entry in 1994. The 1993 letter is not remarked in his personal record. The Board cannot find that the Claimant violated the several rules with which he was charged. The claim will be sustained.

AWARD

The claim is sustained. The Carrier is ordered to comply with this Award within thirty (30) days from its date.



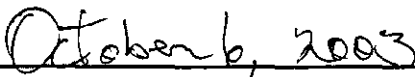
Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



William L. Yeck, Carrier Member



Date