

AWARD NO. 23  
CASE NO. 23

**PUBLIC LAW BOARD NO. 4402**

**PARTIES }  
TO }  
DISPUTE }** **BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES  
BURLINGTON NORTHERN RAILROAD COMPANY**

**STATEMENT OF CLAIM**

1. The disciplinary suspensions imposed upon Section Foreman K. E. Akset and R. J. Bartunek and Sectionman R. M. Koch for thirty (30) days each and the ten (10) days suspensions imposed upon Truck Drivers R. L. Hayes and R. G. Ehman, Machine Operator E. D. Robinson and Sectionman M. D. Lemkau, for an alleged '... violation of Rule 580 of the Burlington Northern Safety Rules and General Rules, 532 and 550 of the Burlington Northern Railroad Rules of the Maintenance of Way Department.' was without just and sufficient cause, arbitrary, based on unproven charges and in violation of the Agreement (System File #8 Gr./GMWA 87-4-29A).
2. The Carrier shall clear the Claimants' records of the charges leveled against them and they shall be compensated for all wage losses suffered.

**OPINION OF BOARD**

As a result of charges dated October 7, 1986, investigation eventually held commencing on November 3, 1986 and by corrected letters dated December 26, 1986, Claimants, who held seniority in the Carrier's Track Subdepartment and were assigned to the Hastings, Nebraska Section Gang 233-004 and District Maintenance Gang 233-006 headquartered in Fairmont, Nebraska, were issued the following discipline for misappropriation of the Carrier's material, unauthorized use of the Carrier's equipment and failure to devote themselves to the Carrier's service while on duty:

Foremen Akset and Bartunek and Laborer Koch - 30 day suspensions.

Laborer Lemkau, Machine Operator Robinson and Truck Drivers Hayes and Ehman - 10 day suspensions.

After Roadmaster T. M. Mroczek issued instructions to clean up the Hastings Section headquarters, on September 30, 1986 Trainmaster C. R. Torrence observed

Claimants removing ballast from the Carrier's property and delivering that material during working hours to the home of Claimant Koch.

Initially, the Organization asserts that Claimants did not receive a fair investigation. We have considered the Organization's arguments on that issue and find them to be without merit.

With respect to the merits, the record shows that the material involved was scrap and, although the material could have been used on the Carrier's property, the material had little or no value; Roadmaster Mroczek's instructions to clean up the property contemplated the removal of this type of material; the foremen had authority to determine that the material was scrap and could sign the permits authorizing the removal and disposal of that scrap; and the removal of the material using the Carrier's equipment during working time was authorized and directed by Foreman Akset.

Based on the above, we do not find substantial evidence supports the Carrier's actions against Laborer Lemkau, Machine Operator Robinson and Truck Drivers Hayes and Ehman. Those employees were working under the instructions of their supervisors and were obligated to follow those instructions. We shall therefore sustain the claims for those Claimants.

With respect to Foreman Akset and Bartunek and Laborer Koch, substantial evidence supports the Carrier's determination that rule violations occurred as alleged. The Organization focuses upon the alleged lack of value of the material. However, giving the Organization the benefit of the doubt that the material had little or no value, under the substantial evidence standard to which we are confined, the value of the material (or lack thereof) is not a determinative factor when deciding if the Carrier's rules were violated. Clearly, substantial evidence supports the conclusion that during working hours and through use of the Carrier's equipment, Carrier-owned material was delivered to Laborer Koch's home.


However, while substantial evidence may support the Carrier's determination that rules violations occurred with respect to Foremen Akset and Bartunek and Laborer Koch, we find the amount of discipline imposed to be excessive. In this phase of the inquiry, the fact that the material was legitimately determined to be scrap by those empowered to do so and was removed in accord with clean up instructions given by Roadmaster Mroczek serve to mitigate the amount of discipline issued to Akset, Bartunek and Koch. Considering the unique circumstances presented in this matter, we believe that the 30 day suspensions given to these Claimants should be reduced to letters of reprimand.

Common sense should dictate the employees' actions in the future. If an employee desires to take unwanted Carrier property for personal use or if a foreman desires to give such property as a gift, a simple check with the appropriate Carrier official for permission is all that is required.

#### AWARD

The claims on behalf of Laborer Lemkau, Machine Operator Robinson and Truck Drivers Hayes and Ehman are sustained in their entirety. The 10 day suspensions given to those employees shall be rescinded and those employees shall be made whole.

The claims on behalf of Foremen Akset and Bartunek and Laborer Koch are sustained in part. The 30 day suspensions given to those employees shall be reduced to letters of reprimand and those employees shall be otherwise be made whole.

  
Edwin H. Benn  
Neutral Member

  
E. J. Kallinen  
Carrier Member

  
P. S. Swanson  
Organization Member