

D-2770-1

PUBLIC LAW BOARD NO. 5696
AWARD NO. 13
CASE NO. 13

BURLINGTON NORTHERN RAILROAD

PARTIES
TO DISPUTE:

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Greg Helton for his alleged failure to comply with the Burlington Northern's Rule when he was away from his work location without authority was unwarranted and without just and sufficient cause.
- (2) As a consequence of the Carrier's violation referred to above, Claimant shall be reinstated to his former position with all rights unimpaired, the discipline shall be removed from his personal record, and he shall be compensated for all wages lost.

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the

RECEIVED
GENERAL CHAIRMAN'S OFFICE
BUREAU OF INVESTIGATION
WASHINGTON, D.C.

subject matter.

Claimant, a track foreman with 2 1/2 years of service, worked on an Oklahoma City district gang at the time of his removal from service for misuse of company property in violation of Operating Rules 1.19 and 1.19.1 while in Tulsa on November 30, 1994. The investigation was originally held on December 23, 1994, but due to some problems with its transcription, was reconvened and held anew on March 3, 1995.

A review of both records reveals that Claimant's supervisor, Roadmaster Emberg, was out of town on November 30, 1994. A decision was made that some gang members would drive to Tulsa to get parts that were needed for the brush cutter that day. Claimant and trackman Brown left Oklahoma City between 9:30 a.m. and 10:00 a.m. and drove to Tulsa in the gang truck to retrieve the necessary parts. They arrived at Tulsa yard at around 11:45 a.m., where they met up with two other members of their gang who had driven in their own vehicle. Shortly thereafter, accompanied by the Roadmaster, they took the gang truck out to a restaurant for lunch a few miles south of the yard. After returning from lunch, they loaded the parts for the brush cutter onto the truck and went to the supply room to pick up other necessary items for the gang.

According to Claimant and another gang member, Claimant and Brown left the supply room around 2:30 p.m. Claimant, who lived in Tulsa at the time, testified that he had only \$2.00 left which was insufficient for the tolls going back let alone his expenses for the rest of the week, and that his automatic banking card did not work in the machines in Oklahoma City. Claimant stated that he asked Brown if he would mind stopping so he

could meet his wife to get some money, even though it might mean being on overtime. Brown said he had no objection.

The record reflects that Claimant drove the gang truck to a parking lot near Drysdale's Western Wear Store, which he testified was on the way toward the turnpike intersection but a few miles farther east. He parked the truck, called his wife from an adjacent cafe and asked her to bring him money and meet him in the store. Claimant indicated that he and Brown chose to wait in the store rather than in the truck, and that they looked around while they waited. During that time, Claimant bought a jacket, which he paid for by check.

Claimant testified that he waited about 15-20 minutes for his wife to bring him his money, and that he chose this spot as a common meeting ground since it was located close to the turnpike, and between his bank and where his wife had to pick up their son from school. Claimant stated that he did not stop at the store with the express intent to shop or buy anything. He estimated that it took about 10-15 minutes to get from the railroad yard to Drysdale's, and testified that they left that location between 3:00 and 3:15 p.m. to return back to Oklahoma City. It was agreed that they returned to the yard at about 4:45 p.m., and that Claimant did not put in for 45 minutes overtime pay for either himself or for Brown.

Brown testified that they left the Tulsa yard at 1:30 p.m., and that Claimant and his wife were in the store shopping for 1 to 1 1/2 hours. Brown also stated that Claimant never informed him that he was meeting his wife to get some money at the time. Brown testified that Claimant also drove by his home to drop something in the mailbox on their way back to

Oklahoma City.

At the investigation held on March 3, 1995, Brown admitted that he did not wear a watch, and that his time estimates were based upon the gang truck clock. He also confirmed that it took between 1 1/2 and 1 3/4 hours to drive on the thruway from Tulsa to Oklahoma City. Brown admitted that his time estimates could well have been between 30 minutes and 1 hour off, and that they could have left the supply depot at 2:30 p.m. and the store around 3:00 p.m.

A few days after the incident, Brown reported to Roadmaster Emberg what had occurred, indicating that Claimant had taken the gang truck to do some personal shopping some 16 miles out of the way and for a period of 1 to 1 1/2 hours while in Tulsa. Brown admitted during the investigation that the only reason he reported this was because Claimant had failed to pay him for the 45 minutes overtime on November 30, 1994. The record reflects that Brown received Claimant's foreman position via a bid after his removal from service.

The investigation also revealed that it was common practice for employees to use the company truck to stop by their bank or homes to get items they needed without seeking prior approval of the Roadmaster. Claimant stated that he took it upon himself to make this stop to get money for the rest of the week since Roadmaster Emberg was not there for him to seek approval, and because he knew others did it regularly on their own. Emberg testified that he probably would have approved a short stop in Tulsa to get money if he had been contacted, and that he was available by cellular phone. The Roadmaster indicated that he would not have

approved a lengthy stop out of the way to go shopping, and that his action in removing Claimant from service was based upon the report he received from Brown as to what occurred and Claimant's admission that he had been to Drysdale's and purchased a jacket on November 30, 1994.

The Carrier argues that the facts clearly show that Claimant used a company vehicle for personal business without authorization in violation of the cited rules, and that his prior record supports the assessment of the type of discipline imposed. The Organization contends that it was unjust to remove Claimant from service for stopping to get money to live on while working out of town, when it was common practice for employees to do so in company trucks. It notes that the Carrier lost no more than 30 minutes of working time in order for Claimant to run his errand, and, since Claimant did not put in for overtime pay, argues that the Carrier did not lose any time for this incident. The Organization requests that Claimant be placed back in service with all rights intact and all lost days compensated.

After full consideration of all of the facts in this case, this Board is of the opinion that while the Carrier has established a technical violation of Operating Rules 1.19 and 1.19.1 in that Claimant did use a gang truck for personal business without authorization from his Roadmaster on November 30, 1994, there exist a number of factors which mitigate against upholding the severity of the penalty imposed.

First, Roadmaster Emberg based his removal on his understanding that Claimant stopped to do some personal shopping for a lengthy period of time, rather than stopped briefly to get some money from his wife for his expenses while away from home that week. He indicated that he probably

would have approved a short stop to get money, in line with what Claimant testified occurred on November 30, 1994.

Brown's testimony concerning the length of time they stopped at Drysdale's is suspect for a number of reasons. One, it is undisputed that they had to have left Tulsa no later than 3:15 p.m. to have returned to the Oklahoma City yard by 4:45 p.m. Two, Claimant's testimony that he left the supply depot at 2:30 p.m. was confirmed by another employee, and Brown admitted that they could have left at that time. Three, there is no disagreement that it took about 15 minutes to drive from the yard to Drysdale's. Four, Brown admitted not wearing a watch, and possibly being off on his time estimates up to one hour. Thus, substantial evidence in the record supports the conclusion that the stop over at Drysdale's was for no longer than 30 minutes, as testified to by Claimant. The agreed sequence of events would have left no time for Claimant to also have driven by his home to drop off some mail.

Second, there is no doubt that the reason why Brown reported this incident to the Roadmaster was because he felt cheated by Claimant when he was not paid for the 45 minutes overtime incurred on November 30, 1994. This fact, coupled with the chance of a promotion and a prior report by Claimant to the Roadmaster which could have gotten Brown fired, support the inference that Brown may well have exaggerated what occurred in his report to Roadmaster Emberg in order to get back at Claimant.

Third, the fact that Claimant did not attempt to receive compensation for himself or Brown for overtime on November 30, 1994 shows that it

was not his intention to benefit financially from the time spent on his errand in Tulsa to the detriment of the Carrier.

Fourth, the record clearly supports the conclusion that it is common at the Oklahoma City yard for employees to stop for short personal errands, such as going to the bank, while using a company vehicle, without seeking prior approval, and that this fact is known by the Carrier. It appears that Claimant relied upon this knowledge in deciding not to seek prior approval from the Roadmaster for his stop in Tulsa.

Under the circumstances of this case, we believe that Claimant's judgment in not seeking prior approval on November 30, 1994 was flawed for the following reasons: (1) the Rules requiring approval prior to using company vehicles for personal business are clear and were given to Claimant; (2) he chose to use the opportunity to purchase a new jacket for himself as well as getting the needed expense money; and (3) it appears that the Roadmaster was easily available by cellular phone.

However, even considering Claimant's prior disciplinary record, this Board cannot conclude that substantial evidence supports his removal from service for this incident. Having found the penalty imposed to be excessive, we will direct that he be returned to service without compensation for time lost.

AWARD:

The claim is sustained, in part. The Claimant shall be reinstated to his former position with all rights unimpaired but without compensation for the time lost as

penalty for his improper judgment and technical Rules violation.

Margo R. Newman

Margo R. Newman
Neutral Chairperson

Thomas M. Rohling

Thomas M. Rohling
Carrier Member

E. R. Spears

E. R. Spears
Employee Member

Fort Worth, Texas
~~December~~, 1996
January 2, 1997

