

**PUBLIC LAW BOARD NO. 5850**

**Award No. 214**  
**Case No. 214**

**PARTIES TO DISPUTE:**  
**(Brotherhood of Maintenance of Way Employees**  
**(The Burlington Northern Santa Fe Railroad (Former**  
**(ATSF Railway Company)**

**STATEMENT OF CLAIM:**

1. The Carrier violated the Agreement on January 14, 2002, when it removed the Claimant, Mr. S. D. Harris, from service, and subsequently dismissed him for allegedly violating Rules 1.6, 1.19, and 1.25, of the Maintenance of Way Operating Rules; by misusing a BNSF Company fuel card to make personal purchases, from December 3-25, 2001.
2. As a consequence of the violation referred to in part (1), the Carrier shall return the Claimant to service with seniority and rights unimpaired, remove any mention of the incident from his personal record, and make him whole for any wages lost account of this incident.

**FINDINGS**

Upon the whole record and all the evidence, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

On January 3, 2002, the Carrier wrote Claimant advising him an investigation was being convened:

"...for the purpose of ascertaining the facts and determining your responsibility if any, in connection with your possible violation of Rules 1.6, 1.19 and 1.25 of the Maintenance of Way Operating Rules, in effect, January 31, 1999 as supplemented or amended, in connection with your alleged misuse of BNSF company fuel card, December 3, 2001 through

December 25, 2001, while working as Welder headquartered at Pampa, TX, on the Kansas Division."

The investigation was held as scheduled, and on February 12, 2002, Claimant was advised that for the reasons set forth in the notice of investigation, he was dismissed from the services of the Carrier (Claimant had been suspended from service on December 27, 2001, pending the findings of the investigation).

The matter of credit card misuse came to light when the Division Engineer was contacted by the Vehicle Fleet Department who advised Truck 93809 was in the shop for repairs and that the bill would be rather high. Since it was an older truck, would he want it repaired or was it due to be replaced shortly.

The Division Engineer did an audit of the vehicle as contained in the computer and found one notation that someone had put hydraulic fluid in with the brake fluid. The Division Engineer launched a further computer search to determine who the driver was, and found a paper trail of gas purchases made with the credit card assigned to the vehicle for dates he knew the truck was in for repairs. He found two employees who were assigned to the truck. He developed some further information, then called in the company police believing there might be some fraud being committed relating to the misuse of the credit card.

The company police investigated and found the card was used fraudulently some 14 times from at least December 6 through December 25, 2001.

The police went to several stations to determine if they could be assisted in their investigation by describing, if they could, the party who used the card or better yet, did the stations have any camera records. They found a station in Arlington, Texas, where the card was used at 0754 hours on December 16, 2001, that had the latest in

surveillance cameras and the station did furnish the company police what they needed to develop a video.

At that hour on that date, the video shows a blue Dodge Durango fuelling in on one side of the pump and a red SUV pull up to the opposite side which was driven by a person later positively identified as the Claimant by an experienced company police person. Claimant started pumping gas in the Durango, then switched the hose to the red SUV without shutting down the pump.

Claimant challenged the video as being too grainy for an adequate identification, contending the individual wore braids whereas he did not. The red SUV was never identified as belonging to Claimant, but he did own a blue Dodge Durango identical to the one in the video.

Claimant denied that neither the woman driver nor the younger girl who drove the Durango were any relation to him.

Claimant also produced a statement that on December 16, 2001, which reflects the use of his ATM card at Amarillo on December 16, 2001, which is about 350 miles from Arlington. Although an effort was made to determine the time the ATM card was used on December 16, 2001, the Board finds that Claimant was merely speculating that the figure 124900 was meant to be 1249 and no seconds.

The two drivers for Truck 93809 were Claimant and Lead Welder S. F. Hutton. The truck was released from the shops on December 21, 2001. On December 23, 2001, Lead Welder Hutton was called out and took Truck 93809 to complete the work required. He ran out of gas but had a 5 gallon can full in the truck and used that to get to a station in Pampa. After filling the tank, he could not locate the credit card that should have been

left in the truck. He called Claimant who, after checking his pockets, said he had the card and he would stop around on the 24<sup>th</sup> to settle the bill. He did not pay until the 25<sup>th</sup>. After he hung up the phone with the Lead Welder, Claimant said he discovered the card he had in his pocket was the ATM card and not the company credit card assigned to vehicle 93809. On the morning of the 25<sup>th</sup>, he said he went to the repair yard, got into the truck and dug out his other shirt or jacket he had wadded up and stuffed behind the seat. He found the card which he then used to pay the bill his partner had run up on December 23, 2001.

The only problem with Claimant's story at this juncture is that the card was used on December 22, 24 and a second time on the 25<sup>th</sup>, but as with the other two dates, i.e. 22 & 24, the card was used in Amarillo within one mile from Claimant's address. If it was in his shirt or jacket pocket wadded up behind the seat of the truck while it was at the repair yard at Pampa, then how could it be used in Amarillo by anyone? The only logical answer is that it was not stuffed in the jacket pocket wadded up behind the seat in the truck, but that Claimant did have the credit card when contacted by the Lead Welder.

Another fact of this matter is that each credit card is issued for a specific vehicle, plus it cannot be used without inputting an employee's work number. The work number used in each of the 14 cases of misuse is that of another Welder who Claimant had worked with briefly in the Summer of 2001. Somehow, Claimant obtained that number and it was used to activate the credit card. The party whose work number was used denied ever being at the places where the card was used on the dates it was used fraudulently.

It cannot be said for any certainty that Claimant used the card all 14 times, but

when considering the use on the dates of December 23, 24 & 25, 2001, when he did obviously use the card, it adds strong argument that he did so on the 16<sup>th</sup> and on the other dates as well.

The Organization raised a procedural argument contending the Division Engineer signed the notice of the investigation, testified at the investigation, and then issued the discipline; thus, Claimant was not afforded a fair investigation.

The Board does believe such handling should be avoided, but Claimant was not treated unfairly as there was an independent review of the investigation by the Labor Relations Department and they did concur with the Division Engineer's decision. This Board also concurs with the decision to dismiss. Theft cannot be tolerated and even a clean record does not mitigate the discipline.

**AWARD**

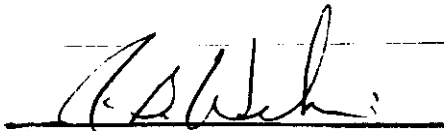
Claim denied.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.



Robert L. Hicks, Chairman & Neutral Member



Rick B. Wehrli, Labor Member



Thomas M. Rohling, Carrier Member

Dated: December 16, 2002