

Joseph Lazar, Referee

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
TO) ... AND
DISPUTE) BURLINGTON NORTHERN RAILROAD (Former Fort Worth
& Denver Railway Company)

1. That the Carrier's decision to dismiss Track Laborer D. J. Maxwell was in violation of the current Agreement, in abuse of discretion, unjust, excessive and based on unproven charges.
2. The Carrier will now be required to reinstate Claimant to his former position with seniority and all other rights restored, with compensation for all wage loss suffered and the charges be stricken from his personal record.

Claimant Trackman D. J. Maxwell, with seniority date of January 21, 1975, was a regularly assigned employee working on the Channing, Texas section. Under date of July 29, 1985, Claimant was notified that:

"As a result of the investigation afforded you at 8:00 A Friday, July 19, 1985, at Amarillo, Texas, effective this date you are hereby dismissed from the services of the Burlington Northern Railroad Company for violation of Rules 564, 575 and 580 of the Burton Northern Safety Rules and General Rules as was indicated by you unauthorized possession of railroad tools and attempt misuse of rai road credit card in March, April and May, 1985 as was disclosed in testimonies at the investigation."

The transcript of investigation shows the following answers by Claimant:

"Q. Mr. Maxwell, Rule 575 of the Burlington Northern Safety Rules reads as follows:

"Theft or vandalism shall be considered sufficient cause for dismissal from railroad service. All cases of robbery or attempted robbery, theft of property belonging to or in charge of the railroad, or other unusual occurrences at or in the vicinity of stations must be promptly reported. Unauthorized possession of railroad tools, equipment and materials including commodities in transit is prohibited."

Do you understand that under the requirements of this rule that unauthorized possession of tools is prohibited?

A. Yes, sir, I do.

Q. Do you understand that under the requirements of this rule theft of railroad property is considered cause for dismissal?

A. Yes, sir.

Q. As a trackman assigned to Channing Section, Channing, Texas, in March, April and May of 1985, did you comply with the requirements of this rule?

A. No, sir.

Q. You also understand that under the requirements of this rule you must not sell railroad property or pawn it when it is not yours do so?

A. Yes, sir.

Q. Rule 580 of the Burlington Northern Safety Rules reads as follows:

"Unless specifically authorized, employees must not use the railroad's credit and must neither receive nor pay out money on the railroad account. Property of the railroad must not be sold nor in any way disposed of without proper authority. All articles of value found on railroad property must be cared for and promptly reported."

Do you understand that under the requirements of this rule you must neither receive nor pay out money on railroad credit cards?

A. Yes, sir.

Q. Do you understand also that under the requirement of this rule you must not sell or pawn railroad property when it is not yours to do so?

A. Yes, sir.

Q. As a trackman assigned to Channing, Texas, in March, April and May of 1985, did you comply with the requirements of this rule?
A. No, sir.

Q. Mr. Maxwell, Rule 564 of the Burlington Northern Safety Rules reads as follows:

"Employees will not be retained in the service who are careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who conduct themselves in such a manner that the railroad will be subjected to criticism and loss of good will."

Do you understand that under the requirements of this rule that employees will not be retained in service who are dishonest?

A. Yes, sir.

Q. As a trackman assigned to the Channing, Texas Section in March, April or May of 1985, did you comply with requirements of this rule?

A. Yes, sir.

Q. Did you solicit cash for personal use based on presentation of a railroad credit card to Mr. Thompson during that period?

A. I don't quite understand; could you repeat it again?

Q. Did you in the period of March, April or May of 1985 solicit cash for personal use from Mr. David Thompson, based on your presentation of a BN Railroad Company credit card?

A. Well, if solicit means attempted, yes, sir.

Q. Did you request that Mr. Thompson prepare a bogus invoice in connection with your presentation of the credit card for a cash advance for personal use?

A. As I said earlier, I do not remember exactly what I asked him to write down on the credit card for cash.

Q. During that period also did you take home a Homelite chainsaw without authority?

A. Yes, sir.

Q. Did you take home a McCullough chainsaw without authority?

A. Yes, sir." (Tr., pp. 28-30).

The transcript of investigation shows the following testimony by gasoline station employee David Thompson:

"About 4 months ago this young man (Claimant) driving an orange pickup belonging to the Burlington Northern Railroad came into the station about 5 o'clock in the afternoon on a Sunday. He told me he had to go to Dalhart to straighten a wheel that Big Jr. had bent. He said

PLB 2529

AWARD NO. 31 (p.4)
CASE NO. 40

he wanted me to give him fifty dollars on his bank card. I told him I couldn't do that because we don't ring up credit cards and the register would not balance." (Tr., p. 13).

"On a Saturday night at about 6:30 PM I came to the station and Maxwell was there talking to the black attendant. The attendant turned around and said, "There he is now." I walked in the station and he said he had to go out of town again. He asked me for a hundred dollars. "I want you to fix me up a ticket. I have the card with me now." He said, "I know how to do it. I'll tell you what to put on it." "Make out 2 tickets and I'll tell you how many gallons to put down." He said, "Show 30 gallons hydraulic oil." He said, "Show the rest in wash or whatever it takes to make a hundred dollars."...I told him I will not pad your bill." (Tr., p.

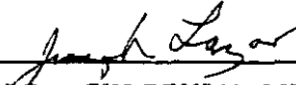
The evidence is clear and convincing that Claimant was in violation of Burlington Northern Safety Rules 564, 575, and 580. The Claimant admits to the violations. There was nothing arbitrary or capricious about the Carrier's decision to terminate Claimant for these serious offenses.

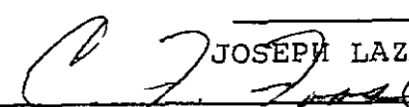
The Organization points out that Claimant's drug addiction should be seen as an illness or disease and that "this involvement was the motivation for Claimant's so-called wrong doing." Further, the Organization points out that "There has been a long standing philosophy which was developed over the years in the world of Industrial Relations whereby employees who have rehabilitated themselves in an endeavor to become more productive and reliable employees and take their rightful place in society, such employees are deserving of consideration from their employers."

In effect, the philosophy put forward by the Organization is a plea for mitigation or leniency on behalf of the Claimant. Claimant's hard-won struggle to rehabilitate himself is commendable and is deserving of consideration here, but it is well-settled by numerous awards that leniency is a matter for the Carrier to determine and not for Board.

A W A R D

1. The Carrier is not in violation of the Agreement.
2. The Claim is denied.


JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER


C. F. FOOSE, EMPLOYEE MEMBER


L. MARES, CARRIER MEMBER

DATED: 12/5/21