

PUBLIC LAW BOARD NO. 2535

Joseph Lazar, Referee

AWARD NO. 9
CASE NO. 9

PARTIES)
TO)
DISPUTE)

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
and
BURLINGTON NORTHERN (Former Joint Texas Division)

STATEMENT
OF CLAIM:

1. That the Carrier violated Parties' Agreement when as a result of investigation conducted at 1:50 PM, May 24, 1982 they dismissed B&B Carpenter J. R. Collier, said dismissal being based on frivolous and capricious charges and in violation of due process.
2. That Claimant J. R. Collier be reinstated to service with seniority, vacation and all other rights unimpaired, and additionally, be compensated for loss of earnings suffered account the Carrier's improper action.

FINDINGS:

By reason of the Memorandum of Agreement signed November 16, 1979, and upon the whole record and all the evidence, the Board finds that the parties herein are employe and carrier within the meaning of the Railway Labor Act, as amended, and that it has jurisdiction.

B&B Carpenter J.R. Collier, on June 15, 1982, received dismissal notice from the Carrier: "You are hereby dismissed from the service of the Fort Worth and Denver Railway Company for violation of Burlington Northern Safety Rules 5, 564, 570, 571 and 252(c), in connection with your actions and attitude involving a switch key and your job; also, your activities while on duty April 21, 1982, on Bridge 76.62, namely, reading a magazine during the foreman's absence; also, your activities while purportedly absent because of illness on April 23, 1982; and your misuse of a motor car crank as a hammer on May 11, 1982, while employed as a B&B carpenter, as evidenced by a formal investigation

afforded you May 24, 1982.

"Inasmuch as you were dismissed June 11, 1982, as the result of a May 17, 1982, investigation, your subsequent dismissal will be effective if you are permitted to return to duty."

For the purposes of this Board, the Carrier has combined the matters of Case No. 8 (Award No. 8) and the instant Case No. 9 into one submission. The Organization has submitted the instant Case No. 9 separately.

The Carrier states that the charge of absence on April 23, 1982 was not proven, and no discipline therewith was assessed.

1. The April 5, 1982 incident of the switch key:

Burlington Northern Safety Rules and General Rules For 15001, Rule 564 reads: "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." The transcript shows that Claimant tossed his switch key to his Foreman rather than walk over to his foreman and hand the key to him:

"Q. During that day were you present when Mr. Harris the foreman asked for Mr. Gore and Mr. McDonald to turn in their switch keys?

A. Yes, sir.

Q. Did they turn in their keys?

A. Yes, sir.

Q. Did Mr. Harris ask for you to turn in your key?

A. No, I asked him if he wanted it.

Q. And his reply?

A. If you don't want to carry it. And, I heard that gas had been stolen in the motor car shed and I didn't want to be accused of that, so if I don't have a key I wouldn't have to worry about that.

Q. And did you hand it to him?

A. We were a few feet away and I was going from side to side on the track and I just kind of tossed it to him." (Tr., p. 14).

Apparently, the Claimant was engrossed in his own thoughts concerning his self-interest. He was not, apparently, involved in thinking about his foreman or how his foreman might feel at having the switch key just tossed at him. Civil behavior and courtesy require one to be considerate of another person's feelings, and Claimant simply failed to be considerate. On the other hand, the Foreman might well have exaggerated his emotional response to Claimant's discourtesy. In the particular circumstances of this case, the facts fail to warrant a determination that Claimant is in violation of Rule 564.

2. The April 21, 1982 incident on Bridge 76.62 :

The testimony of Claimant's gang is consistent and unequivocal: that Claimant continued his lunch break, reading, shirtless, while the other members of the gang had gone back to work; when the Foreman returned to the lunch site, after the break, and the other members of the gang were already on the job, only then did the Claimant put down what he was reading, put on his shirt, and join the gang at work. Although there may be some confusion in the testimony as to the exact time the lunch break started and ended, and there may be some question as to what the Claimant was reading, the Claimant does not, in fact, deny the gang's testimony.

The evidence is clear that Claimant was in violation of BN Safety Rules and General Rules, Rule 570: "Employees must report for duty at the designated time and place. They must be alert, attentive and devote themselves exclusively to the Company's service while on duty. They must not absent themselves from duty, exchange duties with or substitute others in their place without proper authority." Claimant was also in violation of Rule 571: "Employees subject to call must not absent themselves from their usual calling place without notice to those required to call them. While on duty employees must not read magazines, newspapers or other literature not concerned with their work. Employees must not have a radio or television on while on duty except those used in connection with their work." The Carrier also was warranted in finding the Claimant to be in violation of Rule 5: "Employees shall not work shirtless, but shall wear suitable clothing as required to provide protection from sun, insects, abrasions, or scratches. Tee shirts shall have at least quarter-length sleeves and cover torso."

3. The May 11, 1982 incident of the motor car crank:

The Claimant does not deny that on May 11, 1982, he used the crank handle to the motor car as a maul to beat the handles used to set motor off and on the track back into place as they were struck, and by using the crank handle as a maul he bent and twisted the

crank handle. At the time, the tool car was approximately seventy-five yards from the motor car. Although there is some question as to whether a maul to hit aluminum handles was the kind of tool for Claimant to obtain from the tool car, there is no question that the crank handle clearly was not the proper tool to use as a hammering device. The Claimant admits this. (Tr., p. 51). Under the circumstances, the Carrier was warranted in finding the Claimant to be in violation of Rule 252: "The following practices are prohibited...c. Using tools or machines for purposes other than those for which they are designed or authorized."


In the light of the evidence of record, the Board has found, as stated above, that the Claimant: 1. Was not in violation in connection with the April 5, 1982 incident of the switch key; 2. Was in violation in connection with the April 21, 1982 incident on Bridge 76.62; and 3. Was in violation in connection with the May 11, 1982 incident of the motor car crank. In the opinion of the Board, the violations by the Claimant fully warranted disciplinary action by the Carrier if considered separately and by themselves alone, although there is question as to the severity of the discipline if the violations are considered separately and by themselves alone. In the circumstances, however, in the context and setting of Case No. 8, (Award No. 8), the Board is not disposed to modify the discipline of dismissal.

A W A R D

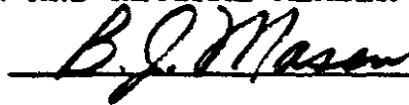
1. The Carrier is not in violation of the Agreement.
2. The claim is denied.



JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER



S. E. FLEMING, EMPLOYEE MEMBER



B. J. MASON, CARRIER MEMBER

DATED: 5-23-83