

NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 4055

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BURLINGTON NORTHERN RAILROAD COMPANY \*  
(Former Frisco) \*  
-and- \* CASE NO. 4  
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES \* AWARD NO. 4  
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On January 21, 1986, the Brotherhood of Maintenance of Way Employees (hereinafter the "Organization") and the Burlington Northern Railroad Company (hereinafter the "Carrier") entered into an Agreement establishing a special board of adjustment in accordance with the provisions of Section 3, Second of the Railway Labor Act, Public Law 89-456. The Agreement was docketed by the National Mediation Board as Public Law Board No. 4055 (hereinafter the "Board").

This Agreement contains certain relatively unique provisions regarding the processing of claims and grievances under Section 3 of the Railway Labor Act. The Board's jurisdiction is limited to disciplinary disputes involving Carrier employees represented by the Organization. Although the Board consists of three members, a Carrier Member, an Employee Member and a Neutral Member, awards of the Board only contain the signature of the Neutral Member, and the parties have agreed that such awards will be final and binding in accordance with the provisions of Section 3 of the Railway Labor Act.

In accepting the assignment, the below-signed Neutral Member agreed to render awards in disputes submitted within thirty (30) days of the date required documentation was received from the parties.

In initiating a case before the Board, the parties have agreed that they will provide the Neutral Member, by mail, with the following documentation: the notice of investigation; the transcript of investigation; the letter assessing discipline; and, the correspondence exchanged on the property. The Board has the authority to require or permit the production of such additional written evidence as the Neutral Member may decide is appropriate for review. The above documentation shall constitute the record of proceedings before the Board. The parties have agreed that it is not necessary to have oral hearings in the cases presented to this Board.

The Board's review is limited to the documentation provided and any additional argument, evidence or awards which the Board might require after review of the initial submission of the dispute. In deciding whether the discipline assessed should be upheld, modified or set aside, the Neutral Member shall determine (1) whether there was compliance with the applicable provisions of Schedule Rule 91; (2) whether substantial evidence was adduced at the investigation to prove the charges made; and (3) if discipline is found to be appropriate, whether the discipline assessed was excessive.

#### Background Facts

Mr. R. D. Mouser, hereinafter the "Claimant", entered the Carrier's service on or about December 14, 1981 as a B&B Helper, and he was occupying that position when he was dismissed from the Carrier's service effective May 4, 1984. The Claimant was dismissed as the result of an investigation which was held on May 30, 1984 in Springfield, Missouri. The investigation, originally scheduled for May 18, 1984, was postponed at the Organization's request. The Claimant appeared at the investigation and he was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated General Rules 500 and 506 while assigned to Regional B&B Gang 823 which was working at Tenbrook Crossing on or about March 7, 1984. The Rules were cited because of alleged misappropriation and unauthorized sale of railroad ties belonging to the Carrier.

#### Findings and Opinion

This case is, in almost all substantive and procedural respects, a companion case to Case Nos. 2, 3 and 4, decided contemporaneously this date, which cases involve the dismissals of fellow members of the Claimant's gang as well as Gang Foreman J.B. Monaghan, for their alleged participation in the misappropriation and unauthorized sale of rail ties.

On or about March 7, 1984, the Claimant was assigned as a member of Gang 823, which was engaged in renewing bridge ties on Bridge 18.9.

The Carrier received information that rail ties were being sold and/or taken from its property in the vicinity of Tenbrook Crossing in Arnold, Missouri. The Carrier instituted an investigation, using the services of its Special Agents. As a result of that investigation, the Carrier dismissed the Claimant from service, on May 4, 1984, for his alleged misappropriation and unauthorized sale of railroad ties, and scheduled the May 30, 1984 investigation referenced above.

In all material respects except for one, which will be discussed at a later point in this opinion, the facts in this case are identical to those related in Case No. 1 decided by this Board this date. The record establishes that the Claimant did not know that his Foreman did not have authority to sell rail ties; that the Claimant did not sell ties himself; that the Claimant's Foreman, Mr. J.B. Monaghan, who was directly responsible for selling the ties, owed the Claimant some money; and, that prior to the investigation the Claimant offered to return the money that he had received from his Foreman.

As this Board has previously found in Case No. 1, employees in the position of the Claimant knew or should have known that they were not entitled to receive money, over and above their rates of pay, which was derived from the sale of railroad property. Even if the Claimant's Foreman had proper authorization to sell the ties, why would any of his gang members be entitled to the profits from that sale? If permission had been properly obtained for the sale of rail ties then the monies received for that sale would either belong to the Carrier or would belong to the Foreman, in the event he had paid the Carrier for the ties or had received the ties from the Carrier without charge. There is no showing that the Claimant, or his fellow gang members, performed any work in the loading, delivering or preparing the ties for sale.

The only thing that distinguishes the Claimant's situation from those of the other members of the gang, who accepted money from Foreman Monaghan, is the fact that Mr. Monaghan owed the Claimant some money. If it had been established that the Claimant, in good faith, believed that the money Mr. Monaghan gave him was in payment of the outstanding debt, then there would be no basis to find that he, the Claimant, knowingly accepted money which came from the sale of Carrier property.

However, the following colloquy establishes that the Claimant knew that the money Monaghan gave him was not in payment of the outstanding debt:

"Q. How much money did Foreman Monaghan give to you?

A. I believe there was \$60.00 on my bed. He owed me some money and, I think he owed me about \$20.00 at that time, and there was \$60.00 altogether on my bunk.

Q. Did he indicate to you the source of that money?

A. Yes sir.

Q. What did he indicate?

A. He said here's some money from some ties I sold."


Although the Organization attempted to rehabilitate this admission, this Board is convinced that the Claimant knew that the money he received from Foreman Monaghan was more than any outstanding indebtedness and that he was not entitled to the "profits" from the sale of Carrier property.

Accordingly, we find that the Carrier has presented substantial evidence implicating the Claimant in the misappropriation and unauthorized sale of Carrier property. For the same reasons that we modified the discipline in Case Nos. 1 and 3, that is in view of the fact that the Claimant had no part in the initiation or culmination of the improper sale, his prior unblemished record, and his forthrightness when confronted by Carrier investigators, we find that the penalty of dismissal, in the peculiar circumstances of this case, should be converted to a disciplinary suspension without pay.

Accordingly, the Carrier is directed to reinstate the Claimant with seniority unimpaired, within fifteen (15) days of the receipt of this Award, if the Claimant is able to meet the Carrier's physical requirements for return to service. The Claimant is entitled to no back pay, and the notation on his Personal Record shall be revised to indicate "Suspension from service for violation of Carrier Rules 500 and 506".

Award The claim is sustained in part and denied in part in accordance with the above findings.

This Award was signed the 8th day of May 1986 in Bryn Mawr, Pennsylvania.

  
Richard R. Kasher, Neutral Member  
Public Law Board No. 4055