

Public Law Board No. 4161

AUG -3 1987.

Parties to Dispute

Brotherhood of Maintenance of)	
Way Employees)	Case No. 18
)	
vs)	Award No. 16
)	
Burlington Northern Railroad)	

STATEMENT OF CLAIM

1. The dismissal of B&B Foreman M. W. Middleton for alleged violation of Rules 700, 702(B), 702 and 461 of the Maintenance of Way Department for insubordination, failure to comply with instructions to discontinue use of unauthorized communication device at about 3:15 PM, May 24, 1982 and 7:35 PM, May 25, 1982 at Portland, Oregon absence from duty without proper authority and unauthorized use of company vehicle about 10:04 PM, June 8, 1982 was excessive, unwarranted and without just and sufficient cause.
2. Claimant M. W. Middleton shall be reinstated with seniority and all other benefits unimpaired and he shall be compensated for all wage loss suffered.

FINDINGS

The Claimant was advised by two different notices to attend investigations to determine facts and place responsibility, if any, in connection with his alleged failure to comply with Carrier instructions and with allegedly being absent from duty without proper authority and with alleged unauthorized use of a company vehicle. After these hearings were held on June 9 and 15, 1982 the Claimant was advised that he had been found guilty as charged and he was discharged from service.

A review of the record shows that the Claimant was assigned to the Portland Terminal as a B&B Foreman when the incidents alleged to in the notice of investigation took place. While employed for the company the Claimant also owned a business which was located in North Portland. The name of the business was "Middleton Leasing Company". According to testimony given at the investigation by the B&B Supervisor under whom

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the Claimant worked in May of 1982 the Claimant was instructed on two different dates to discontinue carrying a "beeper". These dates were May 24, 1982 and May 25, 1982. According to testimony by the Carrier's witness, and by admission of the Claimant himself, he refused to follow this instruction. According to additional testimony, at an investigation, by the Assistant B&B Supervisor at Portland Terminal the Claimant was found on June 8, 1982, after it had been ascertained that he was missing from work without permission, at the location of Middleton Leasing Company in North Portland on Marine Drive. He had driven there from his assignment location --- some eight (8) miles --- in a company vehicle. The Claimant did not deny that he had a company vehicle at his personally owned business during time when he should have been covering his assignment in June of 1982. The testimony by the Claimant at the investigations centered on why he continued to carry a beeper, and why he had the truck off-property when he did. According to this testimony it was done to assuage his wife's concerns about her mother's illness. If such were indeed the case it is unclear to the Board why the Claimant testified that when the beeper did go off "there is only one person who has the phone number". And that person is not his wife, but "a friend of (his)". There is sufficient evidence in the record as a whole to permit the reasonable conclusion that the beeper, which the Claimant admits was bought from profits from his leasing company, was directly related to the running of that company and not for any other reason. The record also clearly states that the Claimant simply refused to obey an instruction from a superior when he refused to quite wearing the beeper while covering his assignment. The Claimant testified that the reason he was away from his assignment on June 8, 1982 was because he had gotten an emergency call from his wife about her mother and he had to straighten out some personal business. If such were indeed the case it is unclear why the Claimant, who was an experienced employee of the company, did not use a telephone on company premisses, which was readily available according to the record, to resolve the problem until he was off assignment, or why he did not request permission to leave under emergency conditions if the condition of his mother-in-law merited such. The Claimant did neither.

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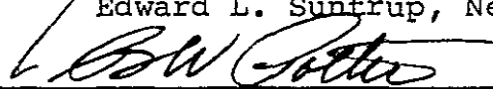
It is clear from the record of both investigations that the Claimant had made a major outside commitment to his personal business and he had taken personal leaves of up to ninety (90) days---and had been refused other personal leave requests by management---to conduct this business. It is also reasonable to conclude from the total record before this Board that the Claimant was continuing to conduct this business while on assignment with the Carrier and that he simply violated a number of Carrier Rules to do so. At the end of the second investigation the Claimant alleges that it was not conducted in a fair and impartial manner and that it was but "...harassment" of him personally. A study of the record fails to warrant such conclusion, in the mind of the Board, and on merits there is insufficient evidence to sustain the claim. In effect the Claimant was in non-compliance with Carrier's Rules which arbitral forums have precedentially ruled to be subject-matter for discharge (Second Division 8052, 8237, 8406).

AWARD

Claim denied.



Edward L. Suntrup, Neutral Member



B. W. Potter, Carrier Member



Karl P. Knutsen, Employee Member

Date: July 28, 1981