File: MWB-22-4-26B
P-P-589C

Public Law Board No. 4161

Parties to Dispute

Brotherhood of Maintenance of Way Employees)
)
vs)
)
Burlington Northern Railroad)

Case No. 10

Award No. 9

STATEMENT OF CLAIM

1. The dismissal of Section Foreman P. L. Bradford for alleged 'violation of Rules 700(B) and 706 of the Rules of the Maintenance of Way Department' was arbitrary, capricious, without just and sufficient cause and on the basis of unproven charges.

2. The Claimant shall be reinstated to service with seniority and all other benefits unimpaired and he shall be compensated for all wage loss suffered.

FINDINGS

On August 13, 1981 the Claimant was advised to attend an investigation on August 18, 1981 to determine facts and place responsibility, if any, in connection with his alleged theft of cross ties belonging to the Carrier. This alleged theft took place from August of 1979 to July of 1981, and specifically on the date of Augus 4, 1981 according to the notice of investigation. After request for postponement the investigation was held on August 21, 1981. On September 11, 1981 the Claimant was advised that he had been found guilty as charged and he was dismissed from service for violating Carrier's Rules 700, 700(B) and 706. After the discipline was appealed on property up to and including the highest Carrier officer designated to hear such this case was docketed before this Public Law Board for final adjudication.

The record establishes that the Claimant sold used railroad ties to one Linnton Feed and Seed Store, Portland, Oregon at various times from 1979 through 1981. There is also no dispute of fact that the Claimant was in the process of delivering more ties to this same store on August 4, 1981 when his private truck was seen by a Sgt. R. J. LaGoe of the Portland Police Department on the propert of the store "...backed up to a stack of used railroad ties". Accordin to the record the ties were sold by the Claimant for 50¢ per running foot to the owner of the store. During the 1979-81 time-frame the Claimant had sold $3,048.00 worth of these ties to this retailer.

The only issue to be resolved in this case is whether the Claimant was in violation of Carrier policy when he took used ties from the Carrier's property and sold them for his personal gain.

The report by the Carrier's Division Special Agent dated August 11, 1981 relative to the August 4, 1981 delivery of the ties to the Linnton Feed and Seed Store states that the Roadmaster under whom the Claimant worked stated that "...he had previously given (the Claimant) permission to pick up used ties for his own use only, and that they were not to be sold". During the investigation this Yardmaster testified to the same effect when he stated that "...I always instruct (employees) that (ties) are for their own personal use only". It was company policy, according to the Yardmaste to divide used ties into those which were saleable and those which were "completely worthless...(to be)...hauled to the dump". The saleable ones were then either given away to either employees for their own use, or to institutions for charitable purposes, or sold through the company's material department.

The Claimant was aware of this policy, and when he made request for used ties prior to August 4, 1981 he was "explicitly"told, according to the Yardmaster, that ties he took were for personal use only. According to his own testimony, relative to this policy, the Claimant states during the investigation that he was reminded

of it "about a year" before he received notice for this investigation by both the Yardmaster, and by a Carrier Special Agent who told him that he could not "sell ties".

Did the Claimant, therfore, sell ties for his own profit in violation of company policy which he both understood and which he was reminded of a year before the investigation? According to information provided by the retail store where the ties were sold, there is no doubt that the Claimant did sell ties to this store which had been taken from his employer from August of 1979 through approximately August of 1980 (Carrier's Exhibit No. 13). The Claimant states in hearing that he did not know, prior to his talk with the Yardmaster and the Special Agent, that he was not supposed to sell the ties for personal gain. In addition to individual instructions on this matter given by the Yardmaster to both the Claimant and other employees, the Carrier's store department had issued written instructions, according tothe record, some two and a half years prior to August of 1981, on the disposition of used ties. In view of this the testimony of the Claimant must be considered gratituous with respect to his knowledge of what used ties could be used for. Further, a Board such as this, by long established precedent, cannot set itself up as trier of fact when it is a question of conflicting evidence of record so long as evidence presented by the Carrier is not so clearly devoid of probity that its acceptance would be per se arbitrary and unreasonable (Third Division 10791, 16281, 21238, 21612). There are clearly reasonable grounds in the record which point to the fact that the Claimant, a Section Foreman, was aware of company policy about used ties well before he started selling them in 1979. Secondly, the Claimant states in the record, with respect to the delivery of the August 4, 1981 load of ties to the retailer, that he had bought the ties earlier and that he was just delivering them in exchange for others which he had taken back from the store, in a "deal" with the owner, to "build a compost box for a friend". There are two evidentia problems in the record with this version of the facts by the Claimant.

The first is that the Special Agent testified that the owner of the store stated to him that he had made a "...purchase of ten ties" from the Claimant on that date. Since this issue is of considerable importance to the Claimant it would have been a fairly simple matter for him to have corraborated such story by documentary evidence from the store owner. Absent such evidence, and in view of conflicting testimony bythe Special Agent, the credibility of such version of the facts by the Claimant cannot be accepted (Third Division 10791 et al. Supra).[1/] Secondly, since the evidence of record points to a sale by the Claimant to the store owner on August 4, 1981 the Claimant was still in violation of the Carrier's policy even if the ties had been purchased since he was selling them for personal gain. According to the Claimant the load consisted in ten 8 foot ties. He purchased them for $10. At 50¢ per running foot to the retailer, he stood to profit $70.

There remains the issue of whether the ties sold to the retailer from September 1980 through August of 1981, in addition to those delivered to the feed store on August 4, 1981, were property of the Carrier or whether the ties were used property given to the Claimant by another railroad, the Union Pacific. According to the Claimant, the ties all came from the Union Pacific during this time period when he sold them to the feed store and/or from some other source such as the Port of Vancouver. Although the Claimant does not corraborate these statements in the record, they must be accepted prima facie since the Carrier does not prove, according to substantial evidence criteria, that it was actually missing any used ties during the

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1/ The Yardmaster also testified that in conversations with the store owner the owner had indicated to him that he had purchased the ties from the Claimant on August 4 1981.

time period: September, 1980-August, 1981 which were the result of sales made to the feed store by the Claimant, in addition to those taken from the property on August 4, 1981.

On merits, the Claimant is found guilty by the Board with respect to violation of company rules for having sold used ties at a profit to the Linnton Feed and Seed Store from August, 1979 through August of 1980, and on August 4, 1981. The Rules at bar read, in pertinent part,as follows.

Rule 700: Employees will not be retained in the service who ...are...dishonest...

Rule 700(B): Theft or pilferage shall be considered sufficient cause for dismissal from railroad service.

Rule 706: ...Property of the railroad must not be sold nor in any way disposed of without proper authority...

Dishonesty by employees has always been considered a serious offense by arbitral forums in the railroad industry (Second Division 7519, 7570, 7575; PLB 4161, Award No. 8). In given cases there may be extenuating circumstances which may move a Board to amend the discipline of dismissal. Study of the complete record before it warrants the conclusion by this Board, in the instant case, that such circumstances are either totally absent or present to such minimal degree herein that amending the discipline is not reasonably justified. The profits made by the Claimant for violating company Rules and policy were the result of actions which were long-term and the result of forethought. In addition the actual profit made was considerable. Such considerations cannot be off-set by others, such as the fact that the Claimant is a fairly long-term employee. On merits the claim cannot be sustained.

AWARD

Claim denied.

Public Law Board No. 4161 (Award No. 9; Case No. 10)

Edward L. Suntrup, Neutral Member

B. W. Potter, Carrier Member

Karl P. Knutsen, Employee Member

Date: March 9, 1987