

PUBLIC LAW BOARD NO. 4244

Award No. 200

Case No. 205

Parties to Dispute:

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(**BROTHERHOOD OF MAINTENANCE**
(**OF WAY EMPLOYES**
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(**THE ATCHISON, TOPEKA AND**
(**SANTA FE RAILWAY COMPANY**
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Statement of Claim:

1. That the Carrier's decision to issue a Level 5 Suspension for Southern Region, Safety Assistant F. C. Ferguson from service for thirty (30) days was unjust.
2. That the Carrier now rescind their decision and pay for all wage loss as a result of an investigation held 9:00 a.m., July 24, 1995 continuing forward and/or otherwise made whole, because the Carrier did not introduce substantial, credible evidence that proved that the Claimant violated the rules enumerated in their decision, and even if the Claimant violated the rules enumerated in the decision, suspension from service is extreme and harsh discipline under the circumstances.
3. That the Carrier violated the Agreement particularly but not limited to Rule 13 and Appendix 11, because the Carrier did not introduce substantial, credible evidence that proved the Claimant violated the rules enumerated in their decision.

INTRODUCTION

This Board was duly constituted by agreement of the parties dated January 21, 1987, as amended, and as further provided in Section 3, Second of the Act, 45 U.S.C. Section 153, Second. This matter came on for consideration before the Board pursuant to the expedited procedure for submission of disputes between the parties. The Board, upon review of the entire record, finds that the parties involved in this dispute are a Carrier and employee representative ("Organization") within the meaning of the Railway Labor Act ("Act"), as amended.

FINDINGS

The claimant, Frank C. Ferguson, was notified to attend a formal investigation into allegations that on or about April 12, 1996, while on company time and with company equipment, he dismantled and loaded used company material for personal use. It was further charged that claimant's involvement with another company influenced his judgment in obtaining the materials, thereby creating a conflict of interest with his employment by the Carrier. A formal investigation was conducted on July 24, 1996, and by letter dated August 14, 1996, the claimant was issued a Level 5 suspension of thirty (30) days and placed on a one year probation for violation of Rule 1.6, Section 4, and Rule 1.15 and 1.18 of the Safety Rules and General Responsibilities for All Employees, effective January 31, 1996.

Rule 1.6, Section 4 provides that employees must not be dishonest. Rule 1.15 contains the following provisions:

Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority.

Employees must not be absent from duty without proper authority. Except for schedule vacation period, authorized absence in excess of ten (10) calendar days must be authorized by formal leave of absence, unless current agreement differs.

Rule 1.18, entitled "Unauthorized Employment," states:

Employees must not engage in another business or occupation that would create a conflict of interest with their employment on the railroad or would interfere with their availability for service or the proper performance of their duties.

An investigation into claimant's activities was triggered by a telephone tip with regard to Structures Gang 28619. A senior special agent who was assigned to investigate concluded that on April 12, 1996, the claimant was involved in loading up railroad ties from a bridge on behalf of a company in which the claimant had a financial interest. The day in question, a Friday, was purportedly a work day for the claimant during which he was assigned to perform safety audits. The information brought to the attention of the Carrier was that claimant went to Bangs, Texas on April 12, and at the location of bridge 357.6 he used a company back hoe to disassemble and load thirty ties on company time.

It appears that the ties in question were treated by Carrier as scrap material without value. The ties were given to claimant's partner via undated releases or

authorizations for pickup issued by the supervisor of structures out of the roadmaster's office located in Brownwood, Texas. The claimant's business partner is named as the "buyer," and the pickup authorizations were signed by supervisor of structures, R. L. Brooks.

The special agent concluded as a result of his investigation that the bridge material was loaded on company time, and company equipment was used to load the material. On further direct examination, the agent acknowledged that his previous testimony that company vehicles were used to load the material onto company vehicles was incorrect. Instead, Claimant's business partner supplied his own trailer and truck, but a company owned backhoe and boom truck were used to load the material onto the trailer. When questioned if the claimant was present during the loading operation, the agent testified he "never could verify either way." (Tr. at 16). On cross-examination, the special agent acknowledged that his investigation uncovered the fact Brooks was aware the ties were to be picked up from bridge 357.6 whether or not this was to occur on April 12, 1996.

The claimant provided the special agent with a written statement dated June 26, 1996. In his statement the claimant outlines the commencement of his business of bridge repair work in 1993. He acknowledges furnishing seventy-four bridge ties to the South Orient Railroad which were obtained from bridge scrap at Bangs, Texas. Claimant stated the material was picked up on his days off, and denied doing so on company time or using company equipment to load the scrap material.

A structure mechanic, Robert P. Johnson, testified that he saw the claimant in a vehicle with his partner on April 12, 1996, but did not actually observe claimant load scrap material at bridge 357.6 that date. Johnson could not testify as to what claimant did on April 12, 1996, and he had no direct knowledge of claimant performing service for his own company while working as an employee of the Carrier. Johnson did provide a written statement to the special agent whereby he alleged that other gang members discussed claimant going to bridge 357.6 on April 12, 1996 to salvage ties using a company back hoe while on company time.

On recall, Johnson testified that on April 11 he operated the back hoe at bridge 357.6. He was instructed by his foreman to leave the back hoe at the job site, although it was normally transported to Brownwood. He was approached by claimant's partner who inquired where the key for the back hoe could be found. The next day Johnson was called in from his regularly scheduled day off with other members of the gang. Claimant was present in a vehicle operated by his partner, Reasoner. On the following Monday morning when the gang reported to work at bridge 357.6, the keys to the back hoe were not present in the location where Johnson had left them on April 11. The back hoe keys were delivered to the bridge later that day by the foreman.

The claimant testified that he reported to work on April 12 to perform his safety assistant posting work. Claimant stated he left work early due to an unwritten policy permitting him to utilize compensatory time off for time spent teaching safety classes. The

claimant stated he did go to bridge 357.6 on April 12, 1996, but denied use of a company back hoe to load the ties. Instead, claimant asserted he used a back hoe which his company rents to load the ties and caps. This backhoe was situated seven to eight miles from Brownwood, and claimant went to retrieve the backhoe for the loading of the ties. He denied performing personal business on Company time, or engaging in work which represented a conflict of interest. Claimant also denied that anyone else was at bridge 357.6 when the ties were removed on April 12.

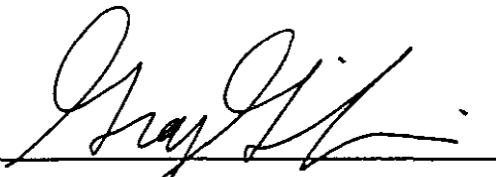
The Board finds the evidence insufficient to substantiate the charge that claimant performed work for personal gain on company time on April 12, 1996, or engaged in unauthorized employment. There is evidence to support a finding that the material in question, a number of railroad ties and caps, had been authorized for release to the claimant or his partner, and his presence on Carrier's property for this purpose cannot be considered improper or without authority. There is no evidence the removal of the ties was an act of theft.

However, the Board does find sufficient credible evidence that the claimant utilized company equipment, i.e., a company back hoe left at the bridge site to load the ties and caps on April 12, 1996. The Board fails to find the claimant's explanation of the means by which the ties in question were removed from bridge 357.6 to be credible. The evidence, although circumstantial in nature, supports a finding that claimant improperly used company equipment for his personal business. In addition, the Board finds that claimant's use of

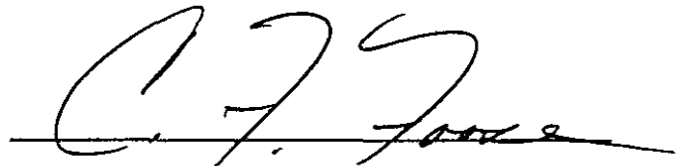
company equipment interfered with the ability of other employees to report for duty on April 15, 1996, with the equipment necessary to perform their work assignments. (See, Testimony of Johnson, Tr. at 32-33). Based upon the foregoing findings, the discipline assessed is hereby modified to a fifteen day suspension as more fully set forth in the Award, below.

AWARD

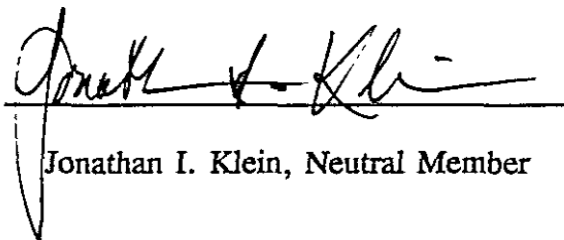
The claim is sustained, in part, as follows. The claimant's suspension is reduced to a fifteen (15) day suspension, and he shall be compensated for the net wage loss suffered as a result of the balance of the suspension as served, with his seniority rights unimpaired.



Greg Griffin, Carrier Member



Clarence F. Foose, Employee Member



Jonathan I. Klein, Neutral Member

Award issued the 13 day of January, 1996.