

PUBLIC LAW BOARD NO. 4244

Award No. 256

Case No. 263

Carrier File No. 14-99-0179

Organization File No. 30-13KCT-991.CLM

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

-and-

BURLINGTON NORTHERN SANTA FE RAILWAY

Statement of Claim:

1. The Carrier violated the Agreement when on August 17, 1999, Mr. R. H. Maasen was dismissed from service for allegedly violating Rule 1.6, 1.9, 1.25 and S-26.1 in conjunction with his alleged misappropriation of BNSF property and material.
2. As a consequence of the Carrier's violation referred to above, Mr. Maasen shall be reinstated with seniority, vacation, all other rights unimpaired, the discipline shall be removed from the Claimant's personal record, and he shall be compensated for all wages lost in accordance with the Agreement.

INTRODUCTION

This Board is duly constituted by agreement of the parties dated January 21, 1987, as amended, and as further provided in Section 3, Second of the Railway Labor Act ("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, after hearing and 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 Act, as amended.

FINDINGS

The claimant, track supervisor R. H. Maasen, performed service for the Carrier at Kansas City during the relevant period. In April or May 1999, the Carrier's Internal Audit Department requested that special agent L. L. Montgomery commence an investigation concerning numerous alleged improprieties by the Kansas City Terminal Maintenance of Way team. As part of his investigation, special agent Montgomery interviewed the claimant on August 13, 1999. At the conclusion of the claimant's interview, special agent Montgomery discussed his findings with the claimant's supervisors.

The Carrier subsequently instructed the claimant to attend an investigation for the purpose of ascertaining the facts and determining his responsibility, if any, in connection with

his alleged misappropriation of Carrier property and materials. As a result of the formal investigation conducted on September 7, 1999, the claimant was dismissed from service for violating Rules 1.6, 1.19, and 1.25 of the Maintenance of Way Operating Rules (MWOR) and Rule S-26.1 of the Maintenance of Way Safety Rules.

The following rules are pertinent to the Board's decision in this case. Rule 1.6 of the MWOR entitled "Conduct," provides as follows:

Employees must not be:

1. Careless of the safety of themselves or others
2. Negligent
3. Insubordinate
4. Dishonest
5. Immoral
6. Quarrelsome or
7. Discourteous

Rule 1.19 of the MWOR entitled "Care of Property," provides as follows: "Employees are responsible for properly using and caring for railroad property. Employees must return the property when the proper authority requests them to do so. Employees must not use railroad property for their personal use." Rule 1.25 of the MWOR entitled "Credit or Property," provides:

Unless specifically authorized, employees must not use the railroad's credit and must not receive or pay out money on the railroad account. Employees must not sell or in any way get rid of railroad property without property authority. Employees must

care for all articles of value found on railroad property and promptly report the articles to the proper authority.

Safety Rule S-26.1 entitled "Conflict of Interest," provides as follows:

No officers or employees of the company may have personal interests which might conflict or appear to conflict with the interests of the company or its affiliates or which might influence or appear to influence their judgment in performing their duties. The outside activities and affairs of all officers and employees should be conducted so as to avoid loss or embarrassment to the company and its affiliates.

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.

This policy is designed to foster a standard of conduct which reflects credit in the eyes of the public on the company, its officers, and its employees, and which protects the reputation and financial well-being of the company. There is no intent to interfere with the personal interests or activities of officers and employees.

The Organization contends that the Carrier failed to schedule an investigation within the time limits set forth in Rule 13 of the Agreement. The Carrier asserts that the investigation was scheduled promptly as prescribed by Rule 13 of the Agreement. Rule 13 entitled "Discipline," provides, in relevant part, as follows:

- (a) Investigations. Except as otherwise provided in Appendix No. 11 of this Agreement, no employee who has been in service more than sixty (60) calendar days will be disciplined without first being given an investigation, which will be promptly held, unless such investigation is waived and discipline is accepted in writing by the interested employee.

* * *

Although an investigation by the Carrier commenced in April or May 1999, the record reveals that the claimant's supervisors first became aware of the claimant's possible rule violations on August 13, 1999. Prior to their discussion with special agent Montgomery on that date, the claimant's supervisors had no knowledge of any wrongdoing by the claimant. The claimant was promptly issued an investigation notice on August 17, 1999, which provided that an investigation would be held on August 26, 1999. Thereafter, the investigation was postponed and subsequently conducted on September 7, 1999. Based upon these facts, the Board concludes that the Carrier scheduled and conducted an investigation in accordance with Rule 13 of the Agreement.

The record establishes that the claimant utilized a Carrier backhoe, a Carrier employee and ballast belonging to the Carrier in order to construct a parking area at his residence. According to the claimant, this parking area was for a Carrier vehicle and was constructed with the authorization of his supervisor, roadmaster Crocker. However, the claimant acknowledged that his use of Carrier equipment, employees and material constituted a violation of the Carrier's rules and policies. (Tr. at 19). Accordingly, the Board finds that the claimant violated Rule 1.19 of the MWOR due to his personal use of Carrier property

The record further establishes that the claimant utilized a Carrier vehicle to transport equipment which he utilized for private railroad construction. Additionally, the claimant transported himself in a Carrier vehicle to and from his assignments as a vehicle washer with a

private contractor. The Board finds that these actions by the claimant constitute further violations of Rule 1.19 of the MWOR. Additionally, the claimants acts of dishonesty violated Rule 1.6 of the MWOR.

The claimant testified at the investigation that he permitted the credit card issued to him by the Carrier to be utilized by the employee who relieved him from duty. According to the claimant, this was done so in accordance with the policy set forth by roadmaster Crocker. However, the claimant acknowledged at the investigation that his actions violated Carrier rules and policies. Based upon the record, the Board finds that the claimant violated Rule 1.25 of the MWOR in connection with the use of his Carrier issued credit card by other employees. Furthermore, the Board finds that the claimant violated that part of Rule 1.25 which provides "employees must not sell or in any way get rid of railroad property without proper authority" due to his utilization of Carrier owned ballast at his residence even if its purported use was to support a Carrier vehicle stored at the claimant's residence.

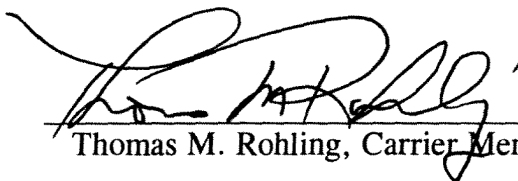
At the investigation, the claimant acknowledged that he engaged in outside employment with a private contractor which entailed washing Carrier vehicles on the KCT Railway. However, the claimant testified that he had authorization from roadmaster Crocker, to engage in such employment. Additionally, the claimant stated that he did not claim payments from the Carrier for time when he was washing vehicles for the private contractor. At the hearing, the Carrier failed to present evidence which would contradict the claimant's testimony concerning his outside employment.

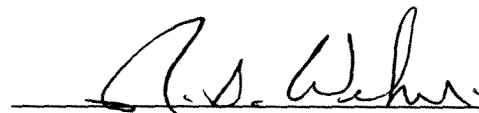
Based upon the record, the Board finds that the Carrier failed to present evidence which would indicate that the claimant's employment with the private contractor created a conflict of interest with his employment by the Carrier. Additionally, the Carrier failed to demonstrate with any specificity that the claimant's employment with the private contractor interfered with his availability for service or the proper performance of his duties. The Board further finds that the claimant's outside employment created no loss or embarrassment to the Carrier. For each of these reasons, the Board concludes that the Carrier has failed to satisfy its burden of proof that the claimant violated Safety Rule S-26.1.

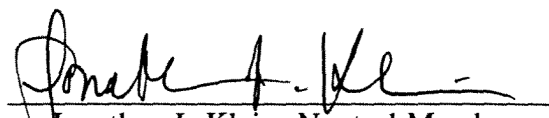
However, based upon evidence of the claimant's proven violations of Rules 1.6, 1.19 and 1.25 of the MWOR, the Board finds that the discipline assessed the claimant was justified under the facts and circumstances of this case. Accordingly, the claim is denied.

AWARD

The claim is denied.


Thomas M. Rohling, Carrier Member


R. B. Wehrli, Employee Member


Jonathan I. Klein, Neutral Member

This Award issued the 28th day of August, 2000.