

PUBLIC LAW BOARD NO. 5850

**Award No.
Case No. 182**

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The Burlington Northern Santa Fe Railroad

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement when on February 7, 2001, Mr. M. W. Absher was removed from service and subsequently dismissed from service on March 27, 2001 for allegedly violating Maintenance of Way Operating Rule 1.12 in conjunction with his allegedly having a firearm in his possession while on duty and while on BNSF property on February 4, 2001.
2. As a consequence of the Carrier's violation referred to above Mr. Absher shall be returned to service, the discipline shall be removed from Mr. Absher's personal record and he shall be compensated for all wages lost, if any, in accordance with the Agreement.

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

This is no dispute. Claimant did have a firearm in his possession while on company property on duty and under pay without the authorization required by the Maintenance of Way Operating Rule 1.12.

He used that weapon to execute a citizen's arrest of two men who he had witnessed firing shotguns out of a truck cab window. There is no indication of what they

were firing at, but this did occur in an area suffering vandalism with shot up signals.

It developed that Claimant was, in addition to being a Track Patrolman for the Carrier, a California Correction Officer who was authorized by the state to carry a concealed weapon.

The controversy that must be resolved is whether some of the Carrier officials knew for some time that Claimant was carrying while on duty on company property even though Rule 1.12 bans such action unless the individual has authorization from the Carrier, which he did not have.

In addition to a Rule 1.12 violation, Claimant was charged with having employment away from the railroad without the proper authorization, but this charge was dropped when it was established that Carrier officials knew of this fact and the time to hold an investigation had expired.

It is interesting to note that in 1995, Claimant was granted a leave of absence from July 24, 1995 to September 3, 1995, for the purpose of attending the police academy.

Claimant argued that other officials on the property knew Claimant carried a concealed weapon while working, but he stated they were apprehensive of testifying fearing for their job. Claimant did introduce a statement from a retired Senior Special Agent of the Carrier. That statement reads in pertinent part:

"It was a known fact among BNSF Police personnel and other BNSF employees that Mace carried a concealed weapon while on duty with the BNSF Railway. He never displayed the weapon in all the time I've known him. As a sworn Peace Officer in the State of California, state law gives him authority to carry a concealed weapon.

BNSF rules state that each employee is responsible in protecting railroad property. Persons using firearms illegally in the Cajon Pass area quite regularly vandalize signal equipment and MOW equipment. I believe Mace ABSHER probably prevented who knows how many criminal acts

from being committed against the BNSF Railway. He should be commended instead of condemned for protecting BNSF Railway property."

In the investigation, the Chief Special Agent testifying for the Carrier read a letter he wrote the Division Engineer relaying the police report regarding the two people cited and apprehended by Claimant, which stated in part:

"...Although Absher's willingness to get involved is commendable his carrying an unauthorized firearm while on duty negates this...."

The letter then went on to say that this matter was being forwarded to the Division Engineer as Claimant did appear to be in violation of Rule 1.12.

Claimant, when asked if he believed he had written permission to carry a firearm, responded by saying the Rule is silent as to whether the authorization was to be written, and since others in supervisory status knew of Claimant's side line knew he carried a firearm either on his person or in the company truck, and not one person warned him that it was a Rule violation.

Under the facts adduced at the investigation, it is clear Claimant was in violation of Rule 1.12. If he had authorization, the party authorizing the weapon possession would have testified in Claimant's behalf, but this did not happen.

This Board under normal circumstances in determining guilt would have had no problem in upholding the discipline of dismissal. The Carrier cannot turn its back on a charge of being in violation of Rule 1.12, but this is a unique situation.

Claimant is a Corrections Officer for the State of California who can carry a concealed weapon most any place in the state other than on this Carrier even if he is trained in the use thereof. But Claimant did act in the best interests of this Carrier in effecting a citizen's arrest to trespassers on the Carrier's property. He has been both

praised and damned. His record consists of one discipline entry since he commenced service with the Carrier. It is also noted that others on the property knew Claimant was carrying but never warned him of the consequences even though Rule 1.12 is clear.

Under the circumstances unique to this case, Claimant is to be returned to service with all his seniority intact, but without any pay for time lost.

Claimant is warned that if he is found to be carrying a firearm either in the company's truck or in his own car while it is on company property or upon himself while on company property, he will be subject to the ultimate discipline of dismissal.

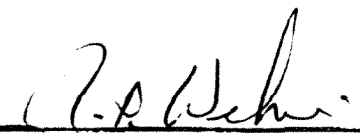
AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the award effective on or before 30 days following the date the award is adopted.


Robert L. Hicks, Chairman & Neutral Member


Rick B. Wehrli, Labor Member


Thomas M. Rohling, Carrier Member

Dated: Nov. 26, 2001