PUBLIC LAW BOARD NO. 5850

Award No.
Case No. 274

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes

(The Burlington Northern Santa Fe Railroad (Former (ATSF Railway Company)

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement on December 20, 2004, when it issued the Claimant, Mr. J. C. Sheppard, a Formal Reprimand for allegedly asking for favors from fuel suppliers in exchange for patronage, in violation of Maintenance of Way Safety Rule S-26.1, Conflict of Interest.

2. As a consequence of the violation referred to in part (1), the Carrier shall immediately remove any mention of this incident from his personal record, and make him whole for all wages lost account of this incident.

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.

On November 9, 2004, the Carrier advised Claimant that an Investigation was being established:

> "...for your alleged failure to avoid a conflict of interest, when you allegedly asked fuel suppliers for steaks, fish or hats in return for Burlington Northern Santa Fe business on June 28, 2004 in Burlington, IA and August 25, 2004 in Canton, MO, while assigned as Truck Driver on TP03, which was reported to this office on November 8, 2004."

After the Investigation, the Carrier on December 20, 2004, believed they had

established Claimant's culpability for the charges assessed and disciplined him by issuing a formal reprimand that is intended to stay in his discipline file.

The discipline reads:

> "Formal Reprimand...concerning asking fuel suppliers for steaks, fish or hats in return for BNSF business on June 28 & August 25, 2004."

Claimant at the time of the incident was and still may be a truck driver assigned to drive a fuel truck to ensure the vehicles and machinery the gang is using are properly fueled. He has been assigned a so-called "pro-card" which permits him to charge the cost of fuel and supplies to the Carrier .

Testifying as a Carrier witness was the owner of the Mendenhall Oil Company. He stated at the investigation as follows:

> "And then on Monday morning, Mr. Sheppard came into our office, took care of the paperwork, as he, as he normally does. And during the conversation asked, and, and you know, I want to be very up front, we've given baseball caps away before, previous years. Mr. Sheppard asked if we had any baseball caps, and I said no, we do not. They've become too expensive. We don't give them away anymore, And then on down, during the conversation, he indicated that some of his suppliers gave fish and, and steaks away, you know, if you kept coming back. And I said, well, I don't do that. You know, I don't, I don't even give caps away anymore. And, you know, my secretary was there when this conversation was going on. And she would verify that this, you know, same conversation. Anyway Mr. Sheppard indicated that he would, he would be back to buy more fuel because it was probably, they were working on what was called the K Line between Burlington and Quincy or Burlington and Hannibal. I'm not sure where it goes, and that they would be back to buy fuel and possibly motor oils. I didn't see him again. He didn't come back."

The aforequoted appears to confirm Carrier's charges, but this witness displayed an attitude of unhappiness with the Carrier and with his business in general. He at first indicated the Carrier was a good customer, then later complained he had special ordered material he had no real use for that some Carrier representative requested that was

never picked up and that he was stuck with. When asked if the Carrier promptly paid its bills, he admitted at times the payments for services were not that prompt.

Claimant testified that when he arrived on the property on June 28, he saw a for sale sign and inquired about it. The Carrier witness testified only the tank or truck business was for sale, but he still owned the bulk business. Claimant further testified that the witness related to him that he bought a large quantity of fuel at a very high price. This leads the Board to believe that this witness was perturbed by the high price of the fuel he purchased and was further disturbed when Claimant stated they would be working the area for the next several weeks. Perhaps, this witness was somewhat hostile when Claimant never returned so he could unload some of the high priced fuel.

The Carrier investigator could only find two instances of four dealers where Claimant asked for baseball caps and about receiving fish. That dealer stated his father was a commercial fisherman and that he did give out fish to his good customers. If the fish was in exchange for Carrier's business, it was never established.

The only reference to steaks was what Claimant allegedly said to the Carrier witness. No other validation for that charge has been established.

Claimant's accuser in his written statement alleged as follows:

> "Monday, June 28, he returned to our office to complete the paperwork. Asked if we had extra baseball caps to give away. Our answer was no, we don't give away caps any longer, too expensive. They asked if we had any fish fillets or steaks to give away instead. My answer was no, maybe you are in the wrong place."

Whereas in his testimony he said:

> "And then on down, during the conversation, he indicated that some of his suppliers gave fish and steaks away...if you kept coming back...."

Claimant may have left the impression that because the crew would be working in

the neighborhood, he would return for more fuel. Claimant did not return as the next day, June 29, he purchased fuel from another dealer for 27 cents less per gallon than Mendenhall was selling it for.

Perhaps, Claimant's chit chat would lead one to believe that he was using the Carrier's need for fuel and supplies to garner for himself some "freebies" such as steaks, fish and/or caps, but this Board believes there is no evidence of Claimant *directly using* his purchasing power to garner these freebies.

It is this Board's position that the record mark be removed from his disciplinary file and the reprimand placed in his general file to be considered nothing other than a cautionary letter.

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

William L. Yeck, Carrier Member

Dated: June 30, 2005