PUBLIC LAW BOARD NO. 5850

Award No.
Case No. 314

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 when Claimant, J. B. Martin, was assessed a 30-day Level S record suspension with a 12-month review period, on June 7, 2006 for alleged violation of Maintenance of Way Operating Rules 1.6, 1.19, and 1.25 for misuse of Company credit and equipment [leased front-end loader]; and

2. As a consequence of the violation referred to in part 1 the Carrier shall immediately return the Claimant to service with seniority, vacation and all other rights unimpaired, remove any mention of this incident from Claimant's personal record, and make Clamant whole for all time lost commencing June 7, 2006.

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 April 28, 2006, the Carrier wrote Claimant advising him an investigation was being convened:

> "...to determine the facts and place responsibility, if any, in connection with your possible violation of Rule(s) 1.6, 1.19 and 1.25, of the Maintenance of Way Operating Rules, in effect October 31, 2004, as supplemented or amended, concerning your alleged misuse of BNSF leased Front-End Loader and credit card when you allegedly used BNSF leased Front-End Loader for your personal use of various occasions in

2006.."

The Carrier following the investigation assessed Claimant a 30-day record assessment (no lost wages involved) and a review period of one year.

A review of the transcript finds Claimant, on several occasions, parked the front-end loader on his property and did use same for some hour and thirty minutes. This he freely admitted to. The use was personal. He did not profit from it.

It seems the practice of parking the front-end loader on his property on occasion (no testimony about how often this occurred or when it began) leads this Board to believe this may have been somewhat of a past practice that went unreported.

However, a past practice in violation of a Rule does not and cannot change a Rule. No Carrier's Officer can authorize a Rule violation yet this did occur, apparently, but there is no evidence the Roadmaster in charge at the time of the incident had any prior knowledge of the practice that started before she was assigned.

Because Claimant readily admitted his personal use of the equipment without authority, he is in violation of Rule 1.19 which reads in pertinent part, "Employees must not use railroad property for their personal use."

A review of Claimant's discipline record reveals two entries within two months for which nothing more than a record mark was assessed. Some eleven years later, another record suspension and a review after one year as was assessed in this instance.

Claimant has already been reviewed and a note of the discipline assessed recorded, however the reference to a misuse of a credit card must be deleted. There is no evidence of any such violation.

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

David D. Tanner, For the Employees

Samantha Rogers, For the Carrier

Dated: June 30, 2008