Public Law Board No. 6204

Parties to Dispute

Brotherhood of Maintenance of Way Employees	)	
	)	
vs	)	**Case 25/Award 25**
	)	
Burlington Northern Santa Fe	)	

Statement of Claim

1. That the dismissal of track department employee J. E. Miller for alleged violation of BNSF Maintenance of Way Operating Rule 1.6 was without just and sufficient cause and a violation of the labor Agreement. (System File B-M-733-F/11-00-0202).

2. As a result of the labor Agreement violation by the Carrier the Claimant shall be shall be reinstated to service and all mention of an investigation be removed from his personal record. The Organization requests that the Claimant be made whole for all loss of pay suffered, all lost overtime opportunity, loss of retirement accreditation, loss of promotional opportunity and loss of vacation qualification accreditation until Claimant is allowed to return to work.

Background

The Claimant was advised on December 3, 1999 to attend an investigation in order to determine facts and place responsibility, if any, in connection with his alleged falsification of his timeroll for the date of December 1, 1999 while working as a surfacing crew foreman headquartered at Shelby, Montana. After an investigation was held on December 14, 1999 the Claimant was advised on December 27, 1999 that he had been found guilty of violating the Carrier's Rule 1.6 and he was dismissed from service. This discipline was appealed by the Organization, and denied by the Carrier, in the proper

manner under Section 3 of the Railway Labor Act and the operant labor Agreement up to and including the highest Carrier officer designated to hear such. Absent settlement of the claim on property it was docketed before this Board for final adjudication.

Discussion

The Claimant in this case is a five year employee who has held various positions in the track sub-department and on the date involved in this case held assignment as a crew foreman at Shelby, Montana. On the date of December 1, 1999 he was foreman of a surfacing crew. Shelby was a distance of more than seventy-five (75) miles from the Claimant's residence and home station. Under an agreement mutually negotiated between the Organization and the Carrier, which is dated August 13, 1999, the Claimant was entitled to a daily allowance, if he was "force assigned" to work more than 75 miles from his home station and residence. The language of this Agreement, which is applicable to this case, reads as follows in pertinent part. This Agreement provision is commonly referred to as the "M3" provision on this property after the pay code used for payment.

> Employees force assigned to a headquartered position which is located greater than 75 highway miles from both the employee's residence and the employee's home station will be eligible for double occupancy under the BNSF corporate lodging program for each day service is performed at the away-from-home headquarter location. Employees utilizing Carrier provided lodging under this provision will receive a meal allowance of $15.00 for each day on which service is performed and the employee is housed at Carrier expense at the away-from-home headquarter location.

The instant case centers on whether the Claimant fraudulently claimed the $15.00 meal allowance for the date of December 1, 1999 and whether he was in violation of the "M3"

provision of the August 13, 1999 Agreement between the parties.

Testimony at the investigation by the road master at Shelby, Montana on the date of December 1, 1999 is that on this date he stopped by the Comfort Inn in Shelby, Montana to contact the Claimant in order to check with him and clarify where the surfacing crew was to meet on the following morning for a conference call. There had been some misunderstanding among some of the workers about this matter and the road master wanted to make sure everyone understood that the meeting was to be in Chester, Montana. The road master stopped by the Comfort Inn at about 5:00 PM and went to the front desk to call the Claimant. The Claimant was checked in this motel but he did not answer the phone. The road master left a message for the Claimant to call him that night. The Claimant never did so. On the next morning at about 5:50 AM the road master stopped by the Comfort Inn again and discovered that the Claimant had not picked up his message at the front desk from the night before. After trying to ring the Claimant's room without success the road master asked if the room could be checked because of the road master's mounting concerns about the Claimant. The front desk attendant went personally to check the room with the road master. When noone answered after several knocks the room was unlocked and the desk clerk and the road master entered. According to the road master the bed had not been slept in. No towels had been used. The room had clearly not been occupied the night before. When the Claimant came to work on December 2, 1999 he did not volunteer anything to the road master about his absence from the motel on December 1, 1999. On December 3, 1999 the road master had a personal conversation

with the Claimant. According to the road master the Claimant "...at first...said...he had stayed in the room..." at the motel on December 1, 1999. After the road master told him about the information he had about the use of the room on that date the Claimant then changed his story. The Claimant then told the road master that he had gone bowling on the night of December 1, 1999 and did not come back to the motel. The road master ran a report for December 2, 1999. It showed that the Claimant was claiming pay under the "M3" code for the $15.00 bed and breakfast meal allowance for having staying in the motel on December 1, 1999 The Claimant had also filled out the Maintenance of Way Payment Form which showed that he was claiming the meal allowance for the date of December 1-3, 1999.The Claimant was the one in charge, in fact, of entering time for the surfacing crew.

Testimony by the Claimant at the investigation is that he bowls for a team and on the evening of December 1, 1999 he went to his motel room at about 5:00 PM and changed his clothes, cleaned up, and then drove to Great Falls to bowl. He returned the next morning to his motel room at about 6:30 AM and got ready for work which started at 7:00 AM. When he realized that he had made a mistake in punching in the time, after he had talked with the road master on December 2, 1999, he made a correction and removed his own "M3" code for December 1, 1999.

Procedural Ruling

The Carrier objects to the entry into the record of on-property handling

correspondence which is dated October 24, 2001. This correspondence contains appeal arguments by the Organization, pertinent to the instant case, which was sent to the Carrier's General Director of Labor Relations. According to the Carrier this correspondence should be barred on grounds that it was sent to the Carrier after the instant case was docketed before this Board. As such, according to the Carrier, this correspondence represents materials which have been inappropriately inserted into the record of this appellate forum

A review of the record by the Board shows that there was a preliminary attempt by the Carrier on the date of September 18, 2001 to establish a "...special adjustment board, as a Public Law Board, to resolve (this, among others) disputes..." and that to accomplish this the Carrier was "...notifying the NRAB of this request...".[1] After further negotiations between the parties over this matter it was mutually decided to docket this case, instead, before an existing PLB which is the instant one. The agreement to do so was reached on the date of October 12, 2001 and the "...Carrier's September 18, 2001 request for a new Public Law Board to hear (this case was) withdrawn...". The letter agreement to docket the instant case before this Board is signed by both a Carrier and an Organization representative. But there is no evidence that this agreement about adding new cases to this Board was sent to the NMB on that date.

This Board's own files show that on December 3, 2001 the Carrier sent

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[1]Carrier's Exhibit 8A. This should read that the Carrier was notifying the "NMB" of the request. The NRAB does not process requests for establishing PLBs or SBAs.

correspondence to the NMB, with carbon copy to this Board's sitting neutral member, advising the NMB that the "...parties have agreed to add three additional cases to be heard by...Board (6204)..." and that those cases were listed in accompanying Attachment "A" to that letter. Attachment "A" includes the instant case under Organization's file B-M-733-F and Carrier's file 11-00-0202 which was designated as Case No. 25.[2]

A Section 3 case under the Railway Labor Act (RLA) is not docketed before any board of adjustment (PLB or SBA), or before the NRAB, until the parties advise the NMB that they wish to docket it. An agreement between the parties among themselves to docket a case before a Board is one thing. Advising the NMB that they have reached such an agreement and that they wish, in fact, to docket a case and proceed to arbitration is another. The latter alone establishes the time-line for implementation of RLA Section 3 appellate procedures. In view of these considerations the objection raised by the Carrier is denied. The instant case was docketed before this Board under date of December 3, 2001 and it was administratively added to this Board, according to the neutral member's files, under NMB stamped approval date of December 4, 2001. In view of these considerations the Organization's arguments on appeal which were sent to the Carrier on October 24, 2001 are properly part of the record and the Board rules accordingly. The objection raised here by the Carrier is dismissed.

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[2]An earlier case had also been listed and docketed before PLB 6204 (Case No. 22) which has no bearing on the issues discussed here.

Findings on Merits

A review of the "M3" language of the August 13, 1999 Agreement persuades the Board that reasonable minds would interpret it to mean that a meal allowance would be paid when an employee does, in fact, stay in a company paid motel or hotel facility at a location which is 75 highway miles or more away from their residence and headquarter's point. This interpretation is supported by the language found on the form which is filled out by the employees when they wish to collect a M3 allowance. That form clearly states that the employee filling it out understands and attests to the fact that he or she is working the required distance away from home and headquarters and that they have, in fact, "...stayed in company provided lodging..." which entitles them to the $15.00 allowance. It is clear from the evidence here that the Claimant made an attempt to collect the M3 allowance and that he had not stayed in a company provided residence on the date for which the allowance was requested. It is also clear that the Claimant would have been successful in this attempt had he not been caught. The record shows that the Claimant attempted to equivocate about his actions on the night of December 1, 1999 until he realized that the road master had evidence that he had not stayed at the motel as he first stated to the road master that he did. Only then did the Claimant change his story. It is true that the Claimant later made changes in his payroll entry for December 1, 1999 when it became clear to him that he had been caught, and that he never collected, in fact, the $15.00 allowance. But this does not alleviate his culpability for having attempted to

improperly purloin it in the first place. The Claimant intimates in his testimony that his having filed for the M3 payment for December 1, 1999 was a mistake and an act of negligence. The evidence of record warrants conclusion that this was only viewed as a mistake by the Claimant, however, after it was discovered that he was trying to collect monies from the company which were not owed to him.

The Rule cited from the Maintenance of Way Operating Rules when the Claimant was disciplined is the following

Rule 1.6

Employees must not be:

.....

4. Dishonest

It is clear from the evidence of record in this case that the Claimant was in violation of this Rule. By the fact that he held responsibility for entering the time for the surfacing crew in the PATS system but exacerbates his guilt.

Obviously, the amount of money which the Claimant tried to misappropriate to himself in this case is not large. Forums such as this have never viewed, however, the amount of a theft to be as important as the fact of stealing which cannot be tolerated on the part of employees in this or any other industry. This Board is in accord with NRAB Second Division Award 7570 which has stated: "It is a universally accepted tenet in this industry that dishonesty is a dismissable offense. Carrier has the right to expect honest employees, and has no obligation to retain in its service those, who by their own

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admission, are not."[3]

Award

The claim is denied.

Edward L. Suntrup, Neutral Member

Thomas M. Rohling, Carrier Member

Roy C. Robinson, Employee Member

Date: October 22, 2002

[3]On this issue see also Second Division 6814, 7519 & 7570 as well as Third Division 13130 inter alia. Obviously the level and extent of theft being discovered, in given instances, on the part of corporate American at the time this Award is being issued but puts in relief the importance of the principle of honesty. It should be observed that those corporate executives who are being caught are not only losing their employment, but in given instances, if public reports are credible, will be subject to criminal charges under criminal statutes.