

AWARD NO. 2
Case No. 2

Organization File No.
Carrier File No.

PUBLIC LAW BOARD NO. 7701

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION,
) INTERNATIONAL BROTHERHOOD OF TEAMSTERS
TO)
)
DISPUTE) IOWA INTERSTATE RAILROAD, LTD.

STATEMENT OF CLAIM:

1. The Carrier's discipline [twenty (20) day suspension] of Mr. D. Gothard, issued by letter dated February 28, 2014, in connection with his alleged failure to comply with the Carrier's General Rules 1.1 and 1.6 and the Carrier's Policy 2.11 - Conflict of Interest in that he attempted to use his position as section foreman with the Carrier to solicit a kickback from Mr. Brandon Teske for work he performed for the Iowa Interstate Railroad in Tiskilwa, Illinois was arbitrary, capricious, excessive and without merit.
2. As a consequence of the violation referred to in Part 1 above, Mr. Gothard shall be paid for all lost wages, including but not limited to all straight time hours, overtime hours, paid and non-paid allowances and safety incentives, expenses, per diems, vacation, sick time, health & welfare and dental insurance and any and all other benefits to which entitled.

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated July 17, 2014, this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

At all times relevant to this dispute, Claimant was assigned as a section foreman on a territory that included Tiskilwa, Illinois. When a derailment occurred at that location in October 2013, damage was done to farmland adjacent to the right of way. The Carrier assumed responsibility for repairing the damage, but did not have the proper equipment to do so. Claimant advised Roadmaster Berhenke that Brandon Teske, an employee in his crew, had the equipment necessary to repair the field. The Carrier then contracted with Teske to perform this work, which was accomplished on one evening after his regularly work hours.

On February 5, 2014 Teske told Berhenke that Claimant had solicited a kickback from him for recommending him for the repair work. According to Teske, Claimant made the request several times, specifically asking for thirty (30) percent. Claimant was consequently directed to attend a formal investigation at which he was charged with soliciting a kickback. Following the investigation, Claimant was assessed a twenty-day suspension.

Upon our review of the investigation transcript, we find that the Carrier did not produce substantial evidence to support its charge against Claimant. In his testimony, Teske stated he did not know if Claimant was joking or serious. Claimant acknowledged that he had said something of this nature to Teske, but that it was a joke. Claimant denied citing a specific amount he asked Teske to pay. Upon being recalled as a witness, Teske testified as follows:

- Q. Mr. Teske, prior to February 5th did you and Mr. Gothard have an issue?
- A. Yes.
- Q. And after February - - and on February 5th you gave a statement to the company basically about this solicited a kickback; correct?
- A. They asked me about it.
- Q. They asked you about it?
- A. Yes.
- Q. But it wasn't an issue?
- A. Right. Well, I don't read into what goes on.

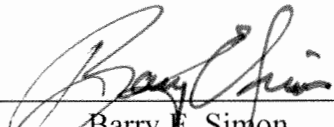
- Q. But at that time in October it wasn't an issue, so that's why you didn't say anything?
- A. Yes, and that's why I just played it off.
- Q. You just played it off as a joke or something?
- A. Just that I'm not going to pay you.


It is apparent that Teske took it as a joke until the two men later had other issues. That would explain why Teske made no mention of his conversation with Claimant for more than three months. It is more significant how Teske perceived the statement at the time it was made, than how he might have perceived it several months later after having an unrelated dispute with Claimant. Jokes of this nature are not unusual when someone might have assisted another in obtaining income. This was hardly the shakedown that the Carrier characterizes it to be. This case may be distinguished from those cited by the Carrier in that the cases involved an employee asking for favors in advance of providing some benefit.¹ Claimant did not tell Teske that he could procure the extra work for him if he received a kickback in return. It is our conclusion that the Carrier has not met its burden of proving that Claimant had engaged in conduct that warranted disciplinary action.

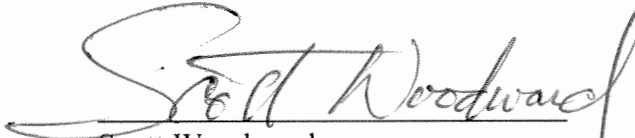
We will direct that the discipline be rescinded and that Claimant be made whole for wages and benefits lost as a result of his suspension, if any.

¹In particular, we also note that Special Board of Adjustment No. 1048, in Award No. 136, pointed out that the person solicited was a contractor for the Ohio Department of Transportation rather than a co-worker.

AWARD: Claim sustained. Carrier is directed to comply with this Award within 30 days.


Barry E. Simon
Chairman and Neutral Member


David Pascarella
Employee Member


Scott Woodward
Carrier Member

Dated: July 1, 2015
Arlington Heights, Illinois