

PUBLIC LAW BOARD NO. 6538

**BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES)**

and)

BNSF RAILWAY COMPANY)

AWARD NO. 13

CASE NO. 13

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Mr. M. Klespitz on May 19, 2005 in connection with charges of alleged misconduct and misuse of BNSF Railway property, specifically cross ties, while working with the Seattle Commuter Construction Gang, and alleged violation of BNSF Maintenance of Way Operating Rules 1.6 ‘Conduct’ and 1.25 ‘Credit or Property’ was arbitrary, capricious, unwarranted, on the basis of unproven charges and in violation of the Agreement (System File S-P-1143-G/11-05-0206 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. M. Klespitz shall now receive the remedy prescribed by the parties in Rule 40(G).”**

FINDINGS:

Public Law Board No. 6538, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

On April 12, 2005, Claimant, a four year employee, was on vacation when he realized that he had mistakenly retained a company fuel card and cell phone. Assistant Abel Rodriguez went to the Claimant’s residence to retrieve these items. Upon arriving at the Claimant’s home, Rodriguez noticed what appeared to be new railroad ties placed along Claimant’s driveway for landscaping. When asked about the ties, Claimant told Rodriguez that his direct supervisor, Brian Hipol, Manager Roadway Planning, had given him permission to take the ties three years earlier.

The next day, Manager Hipol was contacted and asked if he could confirm Claimant's explanation. He stated that that he had not given the Claimant permission to take the ties. As a result, Claimant was notified to attend an investigation on the charge that he misused Carrier property. The investigation was held on April 21, 2005. Claimant subsequently was dismissed for violation of the following rules:

Rule 1.6. Conduct

Employees must not be:

1. Careless of safety of themselves or others.
2. Negligent.
3. Insubordinate.
4. Dishonest.
5. Immoral.
6. Quarrelsome.
7. Discourteous.

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the Company or its employees is cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated.

Rule 1.25 Credit or Property

Unless specifically authorized, employees must not use the railroad's credit and must not receive or pay out money on the railroad account. Employees must not sell or in any way get rid of railroad property without proper authority. Employees must care for all articles of value found on railroad property and promptly report the articles to the proper authority.

At the investigative hearing, both Rodriguez and Roadmaster Chris Yeoman testified that they took photographs of the railroad ties on Claimant's property on April 15, 2005 when the notice of investigation was delivered. The photographs were introduced in evidence at the hearing. Rodriguez and Yeoman agreed that the ties on Claimant's property appeared to be new and were not scrap ties that had previously been in service on the railroad.

Manager Hipol also testified. He affirmed that his earlier statement was correct and that he could recall no occasion when Claimant sought or obtained permission to take railroad ties off Carrier property for his own use. Manager Hipol testified that new, pre-plated railroad ties have a monetary value to the Carrier. Theft of these ties is viewed very seriously by the Carrier, he stated.

Claimant acknowledged that the railroad ties used to landscape his home had been obtained by him from the Carrier's property soon after he was hired. He stated that he asked Manager Hipol "in passing" if he could take unusable ties for his own use and that Hipol gave him a "positive response." Based on this exchange, Claimant insisted that he reasonably believed he had permission to take what in his view were scrap ties that were of no value or use to the Carrier.

Before proceeding to the merits of this case, we turn to the threshold issues raised by the Organization concerning due process.

First, the Organization contends that Claimant's rights of due process were violated because the conducting officer of the investigation hearing was not the individual who issued the Carrier's disciplinary determination. Instead, the decision was rendered by Division Engineer Boyce, the Charging Officer, who was not present at the hearing.

The same issue has been raised before on this property and it has been resolved against the Organization. In Third Division Award No. 33491, the Board held that the issuance of a disciplinary letter by an official who was not present at the investigation does not automatically deprive a claimant of his due process rights, particularly in the absence of any rule which sets forth who may or may not issue charge notices, conduct hearings or render decisions. That principle was affirmed in Public Law Board No. 5850, Award No. 195. We note, too, that in Third Division Award No. 31625, cited by the Organization, the Board stated:

The Organization's objection that the decision on discipline was rendered by a Carrier officer other than the officer who conducted the hearing has previously been rejected by this Board in prior awards involving these parties. See Third Division Awards 29775, 29584. We see no reason to depart from our prior precedent.

Based on the foregoing precedent, and the logic expressed therein, we find that the Organization has not shown in this instance that an independent review by a deciding official adversely affected the Claimant's right to a fair and impartial investigation.

Similarly, we are not persuaded that the transcription of the investigation hearing contains errors or omissions that were significant or rose to a level which would justify vitiating the discipline in this case. Overall, the Board is convinced, notwithstanding the Organization's assertions to the contrary, that Claimant was afforded all procedural rights under the Agreement and that he was provided a fair and impartial investigation in accordance with due process.

Turning to the merits, we have carefully reviewed and considered the record in this case. The cited rules prohibit dishonesty and further provide that employees are required to obtain permission before removing or selling Carrier property. Substantial evidence shows that Claimant violated the rules as charged. As the weight of the evidence demonstrated, the pre-plated ties on Claimant's property were not scrap. They had a substantial monetary value to the Carrier. Claimant concededly knew he was required to obtain permission to take useable ties of this kind. Based on his own testimony and that of his manager, we find that Carrier properly determined that Claimant did not have the authority to take the pre-plated ties.

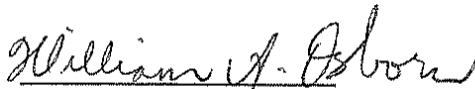
The Organization argues that the element of wrongful intent associated with rules prohibiting dishonesty and unauthorized taking of Carrier property is lacking on this record. There is no question that proof of intent is oftentimes a thorny evidentiary problem because it is based on a subjective state of mind. As a result, the element of intent must be inferred from an individual's conduct and all the surrounding circumstances. In this case, we find that the evidence is sufficient to support the inference that Claimant intended to take the ties for his own use without proper authority. Claimant's misconduct is not negated or excused simply because his actions were open and in full view.


There is no evidence that this particular violation of Carrier rules was tolerated as a common practice on the property. Dishonesty and theft are serious charges and, if proven, warrant dismissal. The Board finds no mitigating circumstances that could be considered. Therefore, the claim will be denied.

AWARD

Claim denied.


ANN S. KENIS, Neutral Member


Carrier Member
William A. Osborn


Organization Member
Roy C. Robinson

Dated this 28th day of June, 2007.