

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 6986

BNSF RAILWAY COMPANY

(Former St. Louis – San Francisco Railway Co.)

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 6986 Case No. 14
Carrier File No. 12-08-0032
Organization File No. B-2807-7
Claimant: Kenny R. Avery

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on October 25, 2007, when Claimant Kenny R. Avery was dismissed for failure to acknowledge a conflict of interest in relation to the Claimant's violations of Maintenance of Way (MOW) Operating Rule 1.4 – Carrying Out Rules and Reporting Violations, MOW Operating Rule 1.6 – Conduct, and MOW Rule 1.26 - Gratuities
2. As a consequence of the Carrier's violation referred to in part (1) above, the Claimant shall be returned to service, charges removed from his record, and paid for all time lost.

This claim was discussed in conference between the parties.

An investigatory hearing was held in the above-entitled matter on November 7, 2007 in Amory, Mississippi before Gary Gaumer, Manager of Signals out of Springfield, Missouri. The claimant was dismissed from all service from his position as a Structure Foreman for violating Maintenance of Way Rules 1.4 - Carrying Out Rules and Reporting Violations, 1.6 - Conduct and 1.26 - Gratuities.

The parties were unable to resolve their dispute within the grievance procedure, and the matter was submitted for adjudication by Public Law Board No. 6986.

NATURE OF THE CASE

The Claimant was dismissed for aiding and abetting his supervisor in a scheme to defraud the Carrier of thousands of dollars by charging non-business related items on the Claimant's company-issued travel card and Pro Card. The Claimant admits to having carried envelopes of cash and checks from Smithville Hardware in order to pay the improper charges on his card after he received his monthly credit card bill. The Claimant asserts that, although he knew his actions were wrong, he participated in this scheme because he feared that he would lose his job or perhaps his life. He based this fear on comments made by his

supervisor, who boasted of connections to the Mafia, according to the Claimant's testimony at the investigatory hearing.

The Carrier determined that the Claimant had violated his duty of honest and fair dealing with his employer BNSF, and more particularly that the grievant had violated Maintenance of Way Rules 1.4, 1.6, and 1.26 by failing to report illicit activity of his supervisor that inured to the detriment of the Carrier.

The parties were unable to resolve the dispute within the grievance procedure, and the matter was referred to Public Law Board Number 6986 for adjudication.

FINDINGS AND OPINION

Maintenance of Way Rule 1.4 – Carrying Out Rules and Reporting Violations provides that:

Employees must cooperate and assist in carrying out the rules and instructions. They must promptly report any violations to the proper supervisor. They must also report any condition or practice that may threaten the safety of trains, passengers, or employees and any misconduct or negligence that may affect the interest of the Railroad.

Maintenance of Way Rule 1.6 – Conduct provides that:

Employees must not be:

1. careless of the safety of themselves or others
2. negligent

3. insubordinate
4. dishonest.

Maintenance of Way Rule 1.26 – Gratuities provides that:

Employees must not discriminate among railroad customers. Employees must not accept gifts or rewards from customers, supplier, or contractors of the Railroad unless authorized by the proper Manager.

The Claimant testified credibly at the investigatory hearing that he was fearful of losing his job if he did not comply with the illegal and improper demands made by his supervisor to turn over his Carrier credit card and to submit and pay for false invoices. The choice the Claimant confronted was undoubtedly a difficult one from his perspective. However, the underlying obligation of honesty he owed to his employer under the rules cited above, and as a general obligation inherent in his employment, does not provide an exception for speculative fear of retribution.

There is no way that the grievant reasonably could have misunderstood the nature of his supervisor's repeated requests that he carry envelopes laden with cash to his supervisor or that he pay his company credit card bill with a check made out personally to him by Smithville Hardware, especially as he admittedly knew that the proprietor of Smithville Hardware and his supervisor were splitting the fraudulent proceeds of phony invoices submitted to the Carrier for payment. The Claimant acknowledges that he understood this activity to

be contrary to the Carrier's interests and improper. Whether the Claimant consciously realized that the activity was also illegal, potentially subjecting all participants to substantial criminal penalties, is immaterial to determining his culpability under the collective bargaining agreement for his failure to bring this scheme to the Carrier's attention in a timely manner. There is no valid defense for this repeated misconduct.

The Claimant also acknowledged at the investigatory hearing that he was aware of the Carrier's toll-free hotline for reporting abusive situations. Although the Organization representative at the investigatory hearing stated that he advised employees not to use the hotline because their voices could be recognized if a supervisor heard a tape of the incoming call, this fear does not explain his failure to make an anonymous phone call to the hotline, to submit a written statement to the hotline, or to have someone else call the hotline to advise the Carrier of the illicit scheme. Thus, the Claimant has not cited a valid excuse for his decision to prolong his participation in the scheme.

Even if the Claimant believed that the two welders costing thousands of dollars that were charged on his Carrier credit card were legitimately being purchased for the Carrier's use and shipped to different crews, the Claimant was admittedly aware that many other aspects of his involvement in his supervisor's scheme to defraud the

Carrier were improper and violated Carrier rules of which the Claimant was well aware. These include delivering a washer and refrigerator to the supervisor's house and performing landscaping at his supervisor's residence. The Claimant's only putative defense to this misconduct is that he was afraid to speak up for fear of losing his job or his life because of his supervisor's bravado and both implicit and explicit threats uttered by his supervisor.

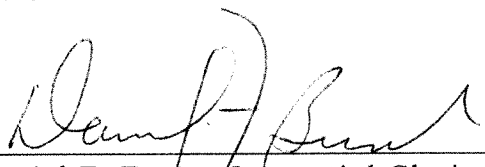
While the Claimant's fear of turning his supervisor in is understandable, the Claimant chose between fulfilling his duty of loyalty to the Carrier as his employer and risking the consequences of thwarting his supervisor versus risking his employment by the Carrier if his complicity in the scheme was discovered. Having made this fateful choice, the Claimant cannot now avert the consequences of his choice by claiming coercion, as nothing in the evidentiary record demonstrates that the Claimant was prevented from sending an anonymous letter to the Carrier or having someone else call the toll-free hotline.

The viability of the Carrier and the continued employment of the bargaining unit are jeopardized by the type of pervasive fraud committed by the Claimant's supervisor. His supervisor's bullying tactics in demanding that the Claimant apply for his Carrier credit card, and then turn it over to the supervisor, may have unfairly placed the claimant at

risk. However, the Claimant did not report this abuse as soon as it occurred, thereby nipping in the bud the looming situation that ultimately threatened his employment. His continuing complicity constituted dishonest conduct under any applicable any standard. Moreover, this was not an isolated incident, and the Claimant was a key player in this scheme. Even if he did not benefit directly, beyond his purported and unsubstantiated receipt only of a socket wrench set in the guise of a safety award, the Claimant's role was not simply that of an innocent messenger unknowingly conveying cash payments.

The manifest dishonesty repeatedly demonstrated by the Claimant can be neither ignored nor condoned. The sheer audacity of this scheme, if proved, justifies criminal prosecution of the supervisor. The Claimant has no meritorious justification for his involvement in perpetuating the implementation of this nefarious scheme. Consequently, there is no basis in the record to overturn the Carrier's decision to dismiss the claimant from all service. The instant grievance is hereby denied.

We so find.



Daniel F. Brent, Impartial Chair

Dated: October 24, 2008

I concur. I dissent.

Theresa Rogers
Carrier Member

Dated: November 12, 2008

I concur. I dissent.

R. C. Sandlin
Organization Member

Dated: Oct. 31, 2008