

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. 24
Carrier File No. 12-08-0098
Organization File No. B-2634-22
Claimant: Gina M. Lindsay

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on February 20, 2008, when Claimant Gina M. Lindsey was dismissed for violation of Maintenance of Way (MOW) Operating Rules 1.6 – Conduct, 1.4 – Carrying Out Rules and Reporting Violations, 1.25 – Credit or Property, and Company Vehicle Policy Manual Section VII – Fuel Purchasing.
2. As a consequence of the violation referred to in part (1) above, we request that the charges be removed from the Claimant's record, the Claimant be returned to work, and paid for all time lost.

This claim was discussed in conference between the parties.

NATURE OF THE CASE

The Claimant, Gina M. Lindsey was dismissed for violating Maintenance of Way Operating Rules 1.6- Conduct; 1.4 – Carrying Out Rules and Reporting Violations; 1.25 – Credit or Property; and Company Vehicle Policy Manual Section VII – Fuel Purchasing. According to the Carrier, the Claimant committed acts of dishonesty when she used a Company fuel credit card to purchase fuel other than for a Carrier vehicle. The Claimant was also charged with failing to follow instructions because she allegedly kept a Carrier vehicle several hours longer than was absolutely necessary to drive from her worksite back to the Carrier depot, where she had been told to park the vehicle. The Carrier characterizes this delay as serious misconduct sufficient to warrant terminating the Claimant's employment.

The Carrier also charged the Claimant with having failed to return a Carrier fuel card from February 1 to February 7, at which time she was recorded on videotape approaching the Carrier vehicle she had parked a week earlier and opening both tool boxes on the truck. Although this vehicle had been thoroughly searched by other Carrier employees looking for the missing fuel credit card, the card was found in one of the tool boxes on the truck on the morning after the Claimant was observed opening these boxes. On this basis, the Carrier determined that the

Claimant had engaged in dishonest conduct, and terminated her employment. The Carrier also contends that the Claimant violated Carrier policy by permitting her daughter to ride in the Carrier vehicle.

The Organization grieved the imposition of discipline as being without just cause. According to the Organization, the evidence submitted by the Carrier at the investigatory hearing failed to demonstrate persuasively that the Claimant had used the fuel card to purchase fuel for her personal use or that the Claimant had converted Carrier property for her own use by driving the Carrier vehicle to which she was assigned off route from her worksite to the depot where the vehicle was to be parked. The Organization further alleged that the imposition of discipline was procedurally defective because the Carrier's hearing officer improperly denied the admission of crucial evidence the Organization sought to enter into the record and blatantly intimidated a witness who had potentially exculpatory testimony to offer on behalf of the Claimant.

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

FINDINGS AND DECISION

Public Law Board No. 6986 (the Board) finds that the parties herein are Carrier and Employee Organization within the meaning of the Railway Labor Act, as amended. Further, the Board has jurisdiction over the parties and subject matter involved.

The evidentiary record in the instant case mandates a finding of substantial procedural defects caused by the Carrier, as well as a failure of proof that precludes the Carrier from meeting its burden of persuasion. Although the Carrier produced fuel purchase records purporting to show that gasoline purchases in the amount of \$70.82 and \$50.80 were made on February 1, 2008 at Kathy's Grocery in Jasper, Alabama using the Claimant's name and employee identification number in conjunction with a Carrier-issued fuel credit card, there is no independent proof that the Claimant had the fuel card in her possession when the improper charges were placed on the card.

The Carrier elected not to interview the Claimant before imposing discipline, and thus did not hear her highly plausible explanation until she testified during the investigative hearing. Moreover, the Carrier official who conducted the investigatory hearing improperly and arbitrarily refused to accept potentially exculpatory evidence from a gas

station employee concerning the return of two Carrier credit cards to the Claimant for transmission to the Company. Consequently, the evidentiary record does not establish with any reasonable degree of probability that the Claimant engaged in dishonest conduct by using a Carrier credit card to purchase fuel for her personal vehicle.

There is insufficient evidence to support the Carrier's contention that the Claimant bought the first fuel purchase in Truck 21698 and then returned with a personal vehicle for the second purchase, especially given the testimony that all employee identification numbers for her crew are posted prominently at the depot and provided to vendors at the time of purchase using a Carrier credit card.

Furthermore, the videotape evidence upon which the Carrier relied for buttressing its allegation of dishonesty based on the Claimant's returning the credit card on February 7 and placing it in the toolbox on Truck 21698 was unable to overcome the more persuasive testimony offered by the Claimant that she told her supervisor she was returning a credit card that had been given to her by a gas station attendant and placed the credit card in the toolbox because Truck 21698 was locked. The Claimant's contention regarding receipt of two credit cards from an attendant at Kathy's Grocery gas station must be accepted not only because of her apparently credible description of the event, but also

because of the misconduct of the investigatory officer, who intimidated a witness called by the Organization to corroborate the Claimant's testimony.

The investigative officer badgered the gas station attendant and, in effect, threatened her with exposure to harm by having to testify as a necessary witness in unrelated criminal proceedings if she testified in the Carrier's investigation. This overbearing and discouraging conduct clearly dissuaded the witness from testifying about the fuel cards. The hearing officer at the investigative hearing failed to ask the gas station attendant whether she subscribed to the veracity of the statement, typed for her by a friend, that she had signed for submission by the Claimant. The investigator's fixation on whether the witness had typed the document herself introduced an irrelevancy that deprived the Claimant of an important opportunity to refute the theory upon which the imposition of discipline was predicated.

The hearing officer's repetitive and biased attempts to dissuade the gas station attendant from offering testimony that might be helpful to the grievant cannot be disregarded. These efforts preclude the Carrier from disputing the Claimant's contention that she was given two credit cards by M.M., the gas station attendant and that she then returned these cards to the Carrier. Thus, this element of the instant case must be

dismissed. Moreover, the testimony regarding another employee's denial that he bought fuel in the interim is irrelevant to determining whether the Claimant was dismissed for just cause. Finally, the statement obtained by the Carrier after the investigative hearing was potentially tainted by the hearing officer's conduct.

The Claimant's explanation of why her daughter was observed on February 7, 2008, when the Claimant returned Truck 21698 to the depot, was credibly explained by her contention that her daughter was on the Carrier's premises because she came with the Claimant's husband to take the Claimant home after she dropped the truck at the depot. Clearly, the Claimant needed some form of transportation home. The evidentiary record does not establish that all pedestrian movement into and out of the depot would have been captured on videotape. Thus, there was insufficient credible evidence to prove that the Claimant's daughter was ever in the Carrier vehicle, which would have constituted a violation of Carrier policy that, if justifying any discipline, would not justify discharge in the instant case.

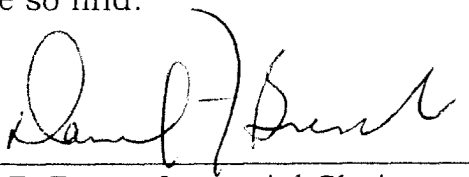
The Claimant testified in the investigatory hearing that she had kept the truck while she ate lunch before returning the truck on January 31, as she had not yet had a lunch break. She explained that part of the delay in returning the truck was attributable to dropping co-

workers off so they could retrieve their belongings before moving to another work location, and that she was in no particular hurry to get back to the depot because her husband could not pick her up until after six o'clock. The Claimant's candid admission of delay would subject her to a written warning or, at most, a one-day suspension for failing to drive directly from her worksite to the depot. This element of her conduct does not, however, justify substantial discipline.

The Organization asked that Matt Green be produced by the Carrier. The Carrier's failure to do so, or even to make a reasonable attempt to produce him at the hearing, hampered the Organization's ability to defend the Claimant. Furthermore, the Carrier's failure to produce Matt Green to testify at the investigatory hearing substantially impeded the Carrier's ability to meet its burden of persuasion, especially regarding the records that show that Mr. Green purchased gas on a day that he contends he did not drive the Carrier vehicle in question. All employee identification numbers are listed on a sheet on the wall at the depot, and thus could be used by any employee to falsify a purchase. Consequently, the Carrier's failure to produce Mr. Green at the investigative hearing further erodes the Carrier's ability to prove its case.

In summary, the Claimant's candid and credible explanation for her delayed return of Truck 21698 on February 1, 2008 and her subsequent visit to the truck on February 7, 2008, when she placed one or more credit cards in the tool box of the truck, depicted a more plausible explanation of the events underlying the instant case than the convoluted interpretation offered by the Carrier at the investigative hearing. Furthermore, the interference by the Carrier's hearing officer at the investigative hearing rose to a level analogous to prosecutorial misconduct that was sufficient to defeat the Carrier's case. For all these reasons, the Board finds that there was not just cause for the dismissal of the Claimant, Gina M. Lindsey.

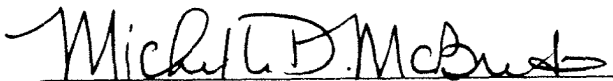
The dismissal of the Claimant, Gina M. Lindsey, is reduced to a ten-day record suspension, plus a one year probation period from February 20, 2008 through February 19, 2009, and the Claimant is hereby returned to her former employment, with uninterrupted seniority and fringe benefits, and with full back pay, less substitute interim earnings. We so find.



Daniel F. Brent, Impartial Chair

Dated: 12-30-09

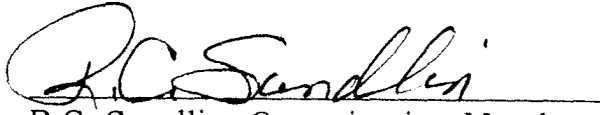
() I concur. () I dissent.



Michelle D. McBride, Carrier Member

Dated: 1/11/2010

(☒) I concur. () I dissent.


R.C. Sandlin, Organization Member

Dated: 1/15/2010