

NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NUMBER 7048

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BNSF RAILWAY  
(former ATSF property)

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 7048 Case No. 9  
Carrier File No. 14-06-0254  
Organization File No. 100-13D2-065.CLM  
Claimant: Jimmy Montalbo

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The Claimant was discharged from his position as a Welder Helper by letter dated July 31, 2006 for alleged theft of Carrier material at Caldwell, Texas on June 14, 2006. An investigative hearing was held at the Superintendent's Office at Temple, Texas on July 11, 2006 before

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~~Erik K. Frohberg, Assistant Director of Maintenance Production. The~~

Claimant appeared with his Organization Representative, the Assistant General Chairman for the UTNSF System Federation, and was afforded an opportunity to examine witnesses and to offer testimony on his own

behalf. The parties were unable to resolve their dispute, and the matter was appealed to Public Board No. 7048 for adjudication.

#### STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing June 19, 2006 when Claimant, J.M. Montalbo, was withheld from service for alleged violation of Maintenance of Way Operating Rule 1.6-Conduct. The Carrier dismissed Claimant for theft of company material located at Caldwell, Texas; and
2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate the Claimant with all seniority, vacation, all rights unimpaired and pay for all wage loss commencing June 19, 2006, continuing forward and/or otherwise made whole.

This claim was discussed in conference between the parties.

#### NATURE OF THE CASE

The Claimant was terminated for complicity, with his cousin, in the theft of wire on June 14, 2006 from the Carrier's right of way outside of Caldwell, Texas. The Investigating Officer testified that the Claimant and his cousin were confronted by local police on the right of way, that wire

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~~connecting Carrier signal equipment was missing, and that the Claimant~~

had been arrested with the pilfered wire in his truck. The Claimant denied any involvement in this incident. The Carrier discounted the Claimant's denial, and the Claimant was dismissed from all service.

The parties were unable to resolve their dispute, whereupon the matter was appealed to Public Law Board 7048 for adjudication.

FINDINGS AND OPINION

The Carrier offered credible testimony by the Investigating Officer establishing that wire had been cut from the Carrier's right of way outside of Caldwell, Texas on June 14, 2006. The Investigating Officer also related his understanding of official local Caldwell Police Department reports indicating that the stolen wire was found in the Claimant's pick-up truck while the Claimant and his cousin were present. The Claimant's explanation of his presence on the Carrier's right of way outside of working hours because he was searching for his lost knife, which he admittedly found in his first trip to the right of way earlier in the day, and his explanation for his purpose in bringing his cousin to this remote location, were inherently incredible. Therefore, the Carrier had a reasonable basis to believe that the Claimant was complicit regarding the pilfered wire was found in the Claimant's possession.

Whether the Claimant or his cousin was the individual who cut the wire and put it in the truck is immaterial, as the Claimant knew, or reasonably should have known, the nature of his cousin's activities and the source of the wire because of the proximity to the Carrier's property in a remote section of right of way. If the wire was in the Claimant's pickup truck while the Claimant was driving it, possession of stolen Carrier property can reasonably be imputed to the Claimant. Therefore,

the Carrier reasonably construed the Claimant's participation in transporting his cousin with stolen Carrier property as complicity in theft of Carrier property, an offense which justifies summary termination of his employment.

The Claimant was unable to offer any mitigating circumstances or to establish any evidentiary basis for discounting the police reports, which are records kept in the ordinary course of business. These records were not submitted at the investigatory hearing, purportedly because the Carrier's security official who investigated the incident was unable to obtain the police reports while criminal charges were pending against the Claimant and his cousin. Unless the Claimant or the Organization can demonstrate that the testimony of the Senior Special Agent of the Burlington Northern Santa Fe Railroad Resource Protection Unit was fabricated or inaccurate, the Carrier has demonstrated just cause to terminate the Claimant's employment, notwithstanding documentary evidence in the record below of the nature of the criminal charges brought against the Claimant and the outcome of those charges, as the Claimant could have refuted any inaccuracy in the Investigating Officer's testimony.

The Claimant testified that he would not have knowingly participated in any activity adverse to the Carrier's interests as he was sixty-one years old and only five months short of retirement at the time of the incident. The Claimant contends that he had not previously been disciplined, and would not have jeopardized his twenty-six years of employment with the railroad in order to steal a piece of wire. There is logical merit to this assertion. However, people do not always behave logically or rationally in their own best interest. The inability of this Board to assess in person the Claimant's sincerity and credibility precludes invalidating the discipline imposed.

Although the criminal matter had not been adjudicated at the time of the investigatory hearing, sufficient time has elapsed since July 11, 2006, for the matter to have been determined in a criminal proceeding. If the Claimant was convicted of a criminal offense arising from the June 14, 2006 incident, then the Carrier was entitled to rely on this judicial outcome as a valid basis for terminating his employment or, in the alternative, for suspending him pending outcome of the judicial outcome. If the Claimant was subsequently acquitted of any criminal wrongdoing in connection with this incident, the Claimant shall be given an opportunity to supplement the record in the instant case, and the Board will re-consider its decision. Such acquittal is not binding on the Board, as circumstances that do not meet the criminal standard of proof

beyond a reasonable doubt may nevertheless satisfy the applicable standard of proof necessary to demonstrate just cause in an arbitration proceeding.

In any event, the Carrier reasonably relied on the evidence collected by its investigator, including hearsay statements by officers of the Caldwell Police Department that the Claimant and his cousin had been arrested by Officer Latrell of the Caldwell Police Department in or adjacent to the Carrier's right of way and that the Carrier's wire that had been removed was in their possession when they were arrested. Absent exoneration by subsequent events, the Carrier's initial determination was sufficiently valid that it must be respected by the Board as a reasonable exercise of management's prerogative summarily to discharge employees who engage in manifest dishonesty, especially theft of Carrier property.

In its letter to the Carrier dated September 19, 2006, the Organization contends that the Carrier failed to comply with applicable provisions of the Maintenance of Way Agreement, specifically Rule 13 and Rule 14, which define the procedures for discipline issues. However, the investigative hearing in the above-entitled matter was held within thirty days of the Claimant's arrest, and there is no evidence in the record that a copy of the stenographic report of the investigation was not furnished to the duly accredited representative of the Brotherhood of

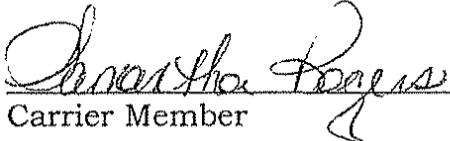
Maintenance of Way Employees, who acted as a representative for the Claimant. In view of the nature of the offense with which Mr. Montalbo is accused, the decision to remove to remove him from all service pending adjudication of his discipline was neither arbitrary nor capricious.

Therefore, based on the evidence submitted, the instant grievance is hereby denied. We so find.

  
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Daniel F. Brent, Impartial Chair

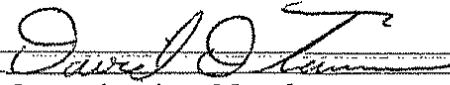
Dated: 9-29-08

( ☒ ) I concur.      ( ☐ ) I dissent.

  
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Carrier Member

Dated: 10/31/08

( ☒ ) I concur.      ( ☐ ) I dissent.

  
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Organization Member

Dated: 10/13/08