

## Special Board of Adjustment No. 1112

### Parties to Dispute

Brotherhood of Maintenance of Way	)	
Employees' Division/IBT	)	
	)	
vs	)	Case 981Award 99
	)	
Burlington Northern Santa Fe	)	
Railway Company	)	

### Statement of Claim

Appeal of discipline of dismissal assessed Claimant J. W.Weyer on November 28, 2005.

### Background

On July 26, 2005 the Claimant to this case, J.W. Weyer was advised by the Division Engineer, Northwest Division to attend an investigation in order to determine facts and place responsibility, if any, in connection with his alleged misuse of company assets from March 31, 2005 through May 18, 2005 that the Carrier's supervision became aware of in July of 2005. The Claimant was accused of receiving over \$300.00 in collect calls on a company phone from a member of his family. The Claimant was advised that he was being withheld from service pending an investigation.

After postponement an investigation was held on November 2, 2005. On November 28, 2005 the Claimant was advised, as stated in the foregoing, that he had been found guilty as charged, and he was assessed discipline as stated in the Statement of Claim. The Claimant was advised that he was dismissed from service in view of having

been found guilty of the charges levied against him.

The discipline was appealed by the Claimant in accordance with Section 6 seq. of an arbitration agreement signed on July 29, 1998 between the Carrier and the Organization that created Special Board of Adjustment (SBA) 1112 under the authority of the National Mediation Board. In accordance with the provisions of that agreement this case is now properly before SBA 1112. The neutral member has been granted **final** and binding powers to issue an Award on this case based on the criteria outlined by the parties in Section 8 of the agreement creating SBA 1112, and in accordance with Section 3 of the Railway Labor Act.

### **Discussion**

Testimony at the investigation by the road master of the Carrier's Oregon **Trunk** line who oversees maintenance of that line is as follows. Collect phone calls were received at the Carrier's Madras depot and he learned of this from the foreman at Madras after the July phone bill was sent to that location. According to the road master employees are not permitted to receive collect calls on company phones. This was the first incident, in this witness' recollection, that collect calls had come in on any of the phones over which he had supervision.

Testimony at the investigation by a special agent working for the Carrier is as follows. His **office** was contacted in July of 2005 about collect calls made to a company phone which originated **from** a correctional institution in eastern Oregon. It is called the

Snake River Correctional Institute. Investigation by this special agent shows that the calls made to the Carrier's phone were made by a certain Vincent Weyer, who **turned** out to be the brother of the Claimant to this case. Mr. Vincent Weyer was identified as an **inmate** at the Snake River institution. A review of the phone records at the institution shows that Vincent Weyer attempted many calls to the BNSF phone at the Madras depot but only completed 28 of them. The **officer** who testified also had a copy of recorded conversations between Vincent Weyer and the Claimant. Sufficient information is provided to permit conclusion that the two brothers were talking on the phone in question.

At the investigation it is **stipulated** by the union that such conversations did take place.

Explanation was also given on the protocols on how collect calls could be accepted on the BNSF phone at Madras when one came in. There were also instances when the collect calls coming in were forwarded to the Claimant's personal phone so that he could receive them when he was traveling or at his mother's home and so forth. The information gathered by the special agent shows that all of the collect calls were received by the Claimant.

The cost of the calls on the phone bill was \$307.32. A review of the phone bill received by BNSF from the phone company which is TCG Payphone, Inc. from San

Antonio, Texas shows that the full bill was \$338.30 including all taxes.’

Testimony by the Claimant is that he did receive the collect phone calls **from** his brother on the BNSF phone. He states that he was not aware that he was not permitted to receive such calls. He also states that he was not aware that these calls would have to be paid for by his employer. He admits that he had some of the collect calls forwarded to his personal phone. The Claimant intimates that he thought that because it was a corporate line he did not think that there would be a charge for the collect calls. When he was advised that a bill had run up, and was pulled from service, the Claimant states that he then tried to make restitution and he asked to pay for the phone calls because before that he was not aware that they were getting charged. He states that when he tried to pay the money back he was advised that there "...**was** no method of paying that back.,,“.

### **Finding**

A procedural objection raised by the union has been studied by the arbitrator. According to this objection the time-lines in Rule 40 were violated by the Carrier since the investigative notice was issued more than 15 days after the alleged incident(s) took place. The last date when the Claimant allegedly purloined company funds by misusing a company phone was on May 18, 2005 and the notice of investigation was not issued until July 26, 2005.

A review of the language of the contract at Rule 40 (A.) shows that it states the

following. "...except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the company...". According to the record, formation on the alleged misuse of company property by the Claimant was finalized by the company on July 25, 2005 after an investigation by the Carrier's security personnel had been completed. The notice of investigation was issued the following day. This objection raised by the union is, therefore, dismissed,

On merits, the Claimant is charged with violation of the following Rule 1.25 of the Maintenance of Way Operating Rules which states the following in pertinent part.

**Rule 1.25**

Unless specifically authorized, employees must not use the railroad's credit and must not receive or pay out money on the railroad account...

There can be little doubt that the Claimant did violate this rule when he received collect calls from his brother on the dates in question on the company phone.

This is an idiosyncratic case.

On the one hand it is hard to believe that the Claimant, who never denied that he did what he did, did not understand that collect calls by definition had to be paid for by the receiving party. It is also hard to believe that he was totally naive, as he seems to suggest, about how phones worked since he was at the same time astute enough to know how to forward calls from the BNSF phone to his personal phone.

On the other hand, that he would have been caught using improperly a company phone in the **manner** in which he did was transparent: all that had to be done was for the

phone bill to come in and for supervision to have scrutinized why the bill was what it was. This is exactly what happened. It is difficult for the arbitrator to conclude that this Claimant used devious premeditation when he violated the rule cited in the foregoing. What he did was simply waiting to be discovered. But he violated the rule in question nevertheless.

The arbitrator observes that the Claimant immediately attempted to pay back the money owned to the company. This in and of itself, however, does not alleviate him of any guilt. This is a common tactic used by those who purloin employers' goods or resources when they get caught.

With respect to the reasonableness of the quantum of discipline, the arbitrator has examined this employee's prior record. He is a nine year employee. There is nothing in the record to warrant conclusion that he was not a good employee. There are no other disciplinary marks in his file. These are all things to his credit and they are commonly used by arbitrators when framing rulings on the quantum of discipline.

Given the full record outlined in this case, albeit theft in any form is an extremely serious offense both in this industry and others, the arbitrator concludes that this is one of those rare instances wherein an employee ought to be given an additional chance to show his worth to his employer.

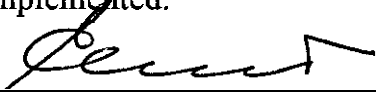
This ruling by this forum is not made on leniency basis, which it has no authority to grant, but on basis of extenuating circumstances as outlined in the foregoing.

The Claimant shall be returned to work without back pay for time held out of

service but with seniority unimpaired. He shall be required to take an return-to-work physical if such is required by company policy. Obviously, should the Claimant engage in violation of the rule at bar in this case at some point in the future, dismissal would be appropriate.

Award

The claim is sustained only in accordance with the Findings. Implementation of this Award shall be within thirty (30) days of its date. The arbitrator holds jurisdiction over this Award until it is implemented.

  
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Edward L. Suntrup, Chair &  
Neutral Member

Date: 3/20/06