# Special Board of Adjustment No. 1112

## Parties to Dispute

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| Brotherhood of Maintenance of Way Employees' Division/IBT | ) | |
| vs | ) | **Case 83/Award 84** |
| Burlington Northern Santa Fe Railway Company | ) | |

## Statement of Claim

Appeal of a thirty (30) day suspension, and a three (3) year probation, assessed employee James P. Blackburn on January 17, 2005.

## Background

On December 15, 2004 the Claimant to this case, James P. Blackburn was advised by the Carrier to attend an investigation in order to determine facts and place responsibility, if any, in connection with allegedly leaving his assigned duties without proper authority on December 8, 2004, and with theft of a cell phone from the premises of an outside company doing business with BNSF at approximately 10:35 AM on that same date. Mr. Blackburn was withheld from service pending the outcome of an investigation.

After an investigation was held on December 23, 2004 in Seattle, Washington the Claimant was advised on January 17, 2005 that he was being assessed discipline of a thirty (30) day actual suspension, and that he was being put on probation for a period of three (3) years. He was also advised that if he "...commit(ed) another serious rule

violation during the tenure of (the) probationary period that he would be subject to dismissal." The suspension commenced on December 15, 2004. This was the first day Mr. Blackburn had been held out of service without pay upon receipt of the notice of investigation.

On February 25, 2005 the Claimant appealed the discipline in accordance with Section 6 seq. of an arbitration agreement signed on July 29, 1998 between the Carrier and the Organization which 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 accordance with Section 8 of the agreement creating SBA 1112, and in accordance with Section 3 of the Railway Labor Act.

## Discussion

Rule 40 of the parties' labor agreement is incorporated into this Award by reference and in toto.[1] A number of the Carrier's Operating Rules are cited at the investigation that was held on December 23, 2004 but the Claimant's discipline notice only states that he was only found guilty of violating Operating Rule 1.9. This rule is cited here, in pertinent part.

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[1]See Joint Exhibit 4.

**Rule 1.9**

Employees must behave in such a way that the railroad will not be criticized for their actions.

According to testimony at the investigation by Glen Gaz, the manager of budgets of commuter construction at the Carrier's Sound Transit Commuter Rail project he received a phone call at about 2:30 PM on the date of December 10, 2004 from a representative of a company by the name of Industrial Communications. The Carrier purchases cell phones from this distributor. Under an arrangement between Mr. Gaz's office and that company a representative of the latter is to call him personally prior to permitting any employee to purchase any item from this company under the Carrier's account. According to information provided to Mr. Gaz from the company representative the Claimant to this case was in the phone store at or about 10:30 AM on December 8, 2004. According to the company the Claimant took a prototype of a Nextel phone and walked out with it. This was confirmed on a surveillance tape, according to the company representative who called Mr. Gaz.. On December 8, 2004 the Claimant did not have a BNSF cell phone assigned to him. After receipt of this call Mr. Gaz contacted the BNSF special agent office and an investigation into the allegation that the Claimant had purloined a prototype phone from Industrial Communications was initiated.

Testimony by senior special agent Allen Nelson, who conducted the investigation, is that he obtained a video from a certain Jayne Barry who is the wife of the owner of Industrial Communications and who is also an employee working at company's

showroom. The video was obtained on December 13, 2004. According to Nelson's incident report the video shows a male standing at a display stand in the store. The video shows the male picking up a phone and walking to the right of the service counter. The video then shows this male placing the phone in his pocket, then briefly talking with another employee at Industrial Communication, and then exiting the store. The male in question is James Blackburn, who is the Claimant to this case.

It was established at the investigation that the stolen phone was not a real phone but a demo "look alike" facsimile with a value of about $40.00. A real phone of the same vintage has a retail; value of about ten times that amount.

Both of the employees at the showroom confirm in the incident report that the phone in question was on display prior to Blackburn's visit to the showroom, and that it was missing after he left. Thereafter Nelson interviewed the Claimant while BNSF supervisor Chris Yoeman was present. At that interview the Claimant denied taking any phone (real or look alike) from Industrial Communication.

On the following day, December 14, 2004 the Claimant was interviewed again with management personnel present. He again denied taking a phone from Industrial Communication on December 8, 2004 although he does not deny that he was on premises of that company on that day. He was shown the video of him putting a phone from a display in his pocket. The Claimant continued to deny that he had taken a phone but states that he had a hole in his pocket and that the phone shown in the film in his hand was his own phone. Upon further review of the video by Nelson on December 16, 2004

he testified that he concluded that the missing phone could only be explained by it having been taken by the Claimant as shown on the video.

There is a first, sworn affidavit in the record by the another employee who was working on December 8, 2004 for Industrial Communication. Her name is Amy Erhardsen. In it she states that the Claimant entered the showroom on that date, made inquiries about opening up a personal account with Nextel for a personal phone, and that she took measures to obtain personal information from the Claimant and to check his credit. To do the latter she went into her office for a few minutes while the Claimant was in the store. When she returned the Claimant asked her a few additional question and then left. He told her he would return on December 15, 2004 with a deposit for a phone. The phone the Claimant was interested in was a rather expensive one which was the same model as that of the prototype phone found missing.

A second affidavit by another employee at Industrial Communication, by the name of Heather Besso-Amos, states that at about 1:30 PM she realized that the "...1860 demo phone was missing..." from the display. She, along with the other two employees cited above, checked the store security video. After doing so, according to Besso-Amos, it was "...apparent that it was Mr. Blackburn who took the phone from our store..." at 10:30 AM when he was in the store.

The video tape was played at the investigation on a lap top computer. It shows basically what is described by testimony of the witness, and the affidavits, as outlined in the foregoing although there is some discussion at the investigation between officer

Nelson and the Claimant's representative about the proper interpretation of what was to be seen on the video.

The tape does show that what happened occurred between 10:30 and 10:40 AM on December 8, 2004. According to witness Nelson, the video shows that the Claimant picked up a phone, or apparently what he thought was a phone (instead of a dummy model) and put this object in his pocket. Nelson also reviewed about four other hours of video tape for the date in question. There was no other evidence on the tape to show how the phone in question might have disappeared from the showroom on the day in question. The agent states that he also searched the Claimant's car. He found three other cell phones in it but none of them were the missing "look alike" shell phone missing from Industrial Communication's showroom.

Testimony by road masters Indalecio Sandoval and Christ Yoeman, at the investigation, centers mainly on whether the Claimant had left company premises without permission and whether he was taking his lunch break at the wrong time while he was visiting the cell phone store at about 10:30 AM on December 8, 2004. Given the content of that testimony, as well as the Carrier's own conclusion that it would drop these charges, persuades the Board that most of the content of the record of the investigation which deals with these matters is moot. There is a narrow issue in this case and the Board will treat it accordingly. And that issue is whether the Claimant was in violation of Rule 1.9.

On December 8, 2004 the Claimant was working with fellow worker, Tom

Simchen, oiling switches in the south Seattle yard. The latter yard is some 8-9 miles from Stacy yard. Apparently the Claimant was assigned to the Stacy yard on December 8, 2004 but it is not uncommon for track workers to work on temporary assignments at locations other than those to which they are assigned. Testimony by the Claimant at the investigation is that he and Simchen drove to the Stacy yard on the morning of December 8, 2004, from the south Seattle yard, "...to have lunch...". According to the Claimant he stopped en route to Stacy yard at about 10:30 AM to visit Industrial Communications to inquire about a cell phone. Mr. Simchen was the driver of the truck but did not go into the phone store with the Claimant. Nor did Simchen testify at the investigation. The Claimant states that he did not know that Sandoval had a requirement that lunch was to be taken between 11:00 AM and 11:30 AM. The Board need not dwell on this point since witness Yoeman testified that this requirement is not fixed in concrete. The Claimant states that he had seen the store video, and he heard the accusations made against him. He states that it is his view that "...everyone is entitled to an opinion..." He states that he did not steal a cell phone (or a prototype) from Industrial Communications. In testimony dealing with a review of the video at the investigation itself the Board will observe that the Claimant's version of what happened is challenging to follow at times. The gist of his testimony, however, is that he did not take the cell phone (or the prototype) which he is accused of taking.

**Findings**

The Claimant was found guilty of violation of Rule 1.9 for behaving in a way that would bring criticism to the railroad. This is a reputational rule which is not uncommon as a written policy at many large companies in the U.S.

How was this rule violated by the Claimant? According to the Carrier, the company's reputation was harmed by the Claimant having engaged in a dishonest act on premises of a company with which it does business.[2]

Whether the Claimant was ever charged in a court of law for theft is not known to this forum. The special agent testified at the investigation that this could happen if certain conditions are met but never he did testify that this was pursued. Actions by courts of law do not have to be known by this Board which is charged only with ruling on whether the Claimant violated the company rule at bar by his actions on December 8, 2004 when he went to visit a cell phone distributor by the name of Industrial Communications. There is no other issue in this case.

There is a sworn affidavit in the record to the effect that a cell phone prototype disappeared from the premises of the distributor during a time-frame approximating the

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[2]There are conceivably other Carrier rules with which the Claimant could have been charged but they are not mentioned by the Carrier in its letter of discipline. Only Rule 1.9 is. There is a specific company rule dealing with dishonesty. There is also one dealing with leaving assigned duties without authority. Neither rule is cited in the letter of discipline. Even if the one dealing with leaving one's assignment had been cited the Board is of the view that there is insufficient evidence in the record of this case to warrant holding that such rule was violated by the Claimant in either case. On the face of it the Board interprets the actions by the Carrier in this case as simply dropping that charge as it notes in discussing the testimony by the two road masters.

Claimant's visit to the store. The phone was the same that the Claimant expressed interest in when he visited the store for some 10 minutes or so while on his way to lunch on December 8, 2004. There was a security camera in the store. A review of a video by employees at the store, and a BNSF security officer, all corroborate that the video shows that the Claimant had purloined what he must have thought was a real phone, instead of a prototype, and put it in his pocket and then exited the store. The Claimant denies that he took the phone before leaving the store.

A close scrutiny of Claimant's testimony at the investigation shows that it amounts to little more than a simple denial by him that he took the phone, irrespective of what the video shows. Curiously enough, the Claimant also fails to bring up in his testimony important information that he gave to the BNSF special agent when he was interviewed but several days after the incident, and which is outlined in the officer's incident report, namely that the Claimant did have a phone in his hand but that it was his own phone because he had a hole in his vest pocket. What the Claimant told the special agent about this crucial matter and what he testified to at the investigation, is inconsistent. Nor does his testimony, nor earlier information he provided to the special agent and to supervision, account for the fact that the prototype was in the store before his visit and was gone after his visit. Perhaps someone else could have taken it. But this hypothesis is tested by the special agent viewing some 4 hours of the video covering the time-frame from before the Claimant's visit until the early afternoon of December 8, 2004. There was no other suspicious activity to be observed.

Upon the record as a whole conclusion is warranted that the Claimant was guilty as charged. On basis of evidence of the type permissible in forums such as this the claim must be denied on merits. Rulings in forums such as this are based on substantial evidence. Such evidence has been defined as such evidence "...as a reasonable mind might accept as adequate to support a conclusion...".[3] As moving party to this case the employer has sufficiently borne its burden of proof.[4]

In view of the Claimant's prior record as outlined in the record before the Board there is insufficient extenuating circumstance to disturb the Carrier's determination in this case as being other than proper. All other criteria pertinent to a ruling on this case as outlined by the parties' arbitration agreement have been considered. The Board must conclude that the claim cannot be sustained.

**Award**

The claim is denied.

Edward L. Suntrup, Chair &
Neutral Member

Date: April 4, 2005

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[3] Consol. Ed. Co. vs Labor Board 305 U.S. 197, 229. See also Second Division 6419, 8130; Public Law Board 5712, Award 4 inter alia.

[4] See Second Division 5526, 6054; Fourth Division 3379, 3482; Public Law Board 3696, Award 1 inter alia.