

PUBLIC LAW BOARD NO. 6540

AWARD NO. 19

CASE NO. 19

Organization File: D020111.01

Carrier File: 71-02-0232

PARTIES TO
THE DISPUTE:

Brotherhood of Locomotive Engineers

vs.

The Burlington Northern Santa Fe Railway Company

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim sustained in accordance with the Findings.

STATEMENT OF CLAIM:

"That Engineer J. D. Eickbush's (the Claimant's) discipline be reversed, that he be reinstated and made whole for any and all time and benefits lost, including time attending the investigation, and that the notation on his personal record as a result of this incident be removed."

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant was dismissed for violating Carrier Rule 1.18, which prohibits conflicts of interest, and Rule 1.15, which pertains to reporting for duty assignments. At the time of his dismissal, Claimant had approximately seven and one-half years of service. His prior work record was clear of any previous similar discipline.

The basic facts are not in dispute. Claimant took a second job at the Jacobs Ranch Mine at Gillette, Wyoming, which is part of the Kennecott Energy Company. According to Claimant's testimony at the investigation held on October 30, 2001, he had held the part-time job for approximately one month. He asserted that the mine job did not interfere with his availability for continued service as an engineer for the Carrier. Although he held a position as an unassigned pool engineer at Gillette, he described how he had never laid off or marked off as an engineer to work on the mine job. All of his missed time in September and October resulted from either nasal surgery, oral surgery, or a sick child. He admitted he did not inform his supervisor that he had taken on an additional job nor did he seek the Carrier's permission to do so.

According to the Carrier, it heard a rumor that Claimant had taken another job. Upon examining attendance records, Claimant's supervisor saw that Claimant had performed no work as

an engineer from September 26 through October 16, 2001. He also noticed that Claimant had laid off six times during that period. It is undisputed, however, that the amount of Claimant's absenteeism did not violate the Carrier's attendance guidelines in effect at the time. The supervisor inquired of the Kennecott human resources operations manager whether Claimant was employed by Kennecott. The manager emailed back to confirm that Claimant "... is currently listed as an employee at Jacobs Ranch Mine."

The relevant rules read as follows:

1.15 Duty – Reporting or Absence

Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority.

1.18 Unauthorized Employment

Employees must not engage in another business or occupation that would create a conflict of interest with their employment on the railroad or would interfere with their availability for service or the proper performance of their duties.

Claimant's supervisor acknowledged that Claimant's outside employment violated Rule 1.18 only if it created an actual conflict of interest or interfered with Claimant's availability for engineer service – merely having a second job would not *per se* violate the rule.

Given the text of the applicable rules, we do not find the record to contain substantial evidence in support of the discipline. With respect to Rule 1.18, the Carrier's evidence shows only that Claimant had the additional job. It does not explain what the job was. Nor does it provide any correlation whatsoever between the days Claimant laid off and his part-time mine job. This is because the record fails to establish the dates or number of hours he worked on his mine job. Thus, there is no proper basis upon which to conclude that the mine job interfered with Claimant's availability for engineer duties. While his supervisor undoubtedly had strong suspicions about Claimant's activities, that is all they are – suspicions. Such supposition is not proof and does not support a conclusion that Rule 1.18 was violated.

It is also clear from the record that Claimant did not violate Rule 1.15. No actual work assignments were made to Claimant during the relevant time frame because he was laid off for personal or family disability. Thus he was not required to report at "... the designated time and

place..." Accordingly, no violation of Rule 1.15 is supported by the record.


Given the foregoing findings, the Claim must be sustained. For the remedy, Claimant must be offered reinstatement to his former employment status with seniority unimpaired. If Claimant accepts reinstatement and performs thereafter for ninety calendar days without any demonstrable conflict of interest or interference from outside employment, he must be made whole for all losses resulting from his unwarranted dismissal.

AWARD:

The Claim is sustained in accordance with the Findings.


Gerald E. Wallin, Chairman
and Neutral Member


Stephen D. Speagle,
Organization Member


Nick Markos,
Carrier Member

Date: 6-1-04