

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY
(Former ATSF Railway Co.)

Case No. 401 – Award No. 401 (Baca)
Carrier File No. 14-10-0195
Organization File No. 150-13D2-107.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing July 22, 2010, when Claimant, Marvin J. Baca (6531883), was issued a Level S 30-day Record Suspension with 1 year probation, for falsification of time on July 22, 2010. The Carrier alleged violation of MOWOR 1.6 Conduct.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be compensated for his lost time and expense and otherwise made whole.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Marvin J. Baca, has been employed by the Carrier since 1984. On August 12, 2010, the Carrier charged Claimant to attend an investigation "for the purpose of ascertaining the facts and determining (his) responsibility, if any, in connection with (his) alleged falsification of time on Friday, July 22, 2010 at 4:28 p.m. while working as a Welder." The letter stated that the investigation would determine possible violation of Maintenance of Way Operating Rule 1.6 Conduct. Following the investigation, which

was held on September 2, 2010, the Carrier determined that Claimant had committed the violations alleged and assessed him a Level S 30-day record suspension and a one-year review period.

Maintenance of Way Operating Rule 1.6, Conduct, provides, in relevant part:

Employees must not be:

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4. Dishonest

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated.

Sherri Ellis, Roadmaster for Belen and Albuquerque, testified at the investigation that Claimant was her direct report at the time of the incident. She stated that the Carrier requires her to approve a time use review between the 1st and 5th of each month, and during her August 2010 review, she noticed some discrepancies between the actual events of July 22 and what had been reported for that date. Specifically, she noted that Claimant and his co-worker had paid themselves for one hour of overtime on July 22. The time review document was entered into evidence at the investigation. The document indicated that Claimant and Mr. Frias reported the overtime into the system the next morning, July 23.

Ms. Ellis explained that on the day in question most of the support gangs and welders were working in Track 7105 to support tie distribution for the rail gang which would begin working there the next week. She stated that she called in welders for overtime, and, at about 1550 hours, she had a truck delivery of plates. She added that at 1620 she went back to the depot to meet with various Carrier officers, and at that time she observed Claimant and Mr. Frias leave the property, at about 1630, in non-Carrier vehicles which she assumed were their personal vehicles. At a later point in the investigation, she clarified to state that she saw Mr. Frias leave at about 1628, and Claimant leave a few minutes later, at about 1632. Claimant's normal work hours were 0730 to 1600 hours.

Ms. Ellis further testified that she knew the two employees did not return to the property because at approximately 1645 or 1650 she returned to the jobsite to brief with the Track Supervisor and stayed about 45 minutes. She stated that she then left the jobsite to get dinner for the employees, returned, and was there until about just before 1900. She stated that she did not see Claimant at the jobsite. She added that she was not aware that any Carrier Officer had changed Claimant's assignment that day, and she was not aware that any employees were working at the 7105 crossing on the east end.

Track Supervisor Gerardo Gonzalez, Belen Yard, testified that on the day at issue he had employees working in the 7105 track distributing plates for a gang that would be coming in to re-lay some rail in the yard. He stated during the afternoon the employees took a break, and they were on the east end of the yard and were re-briefing. He stated that at about 2 p.m. he called Claimant and Mr. Frias to come to the east end of the yard to help distribute the plates in 7105. He stated that after that he left the premises at about 2:30 or 3 p.m., from the east end of the yard, and went back to the depot, and he never saw the two employees arrive at the east end, but was "pretty sure" that they had shown up there without his seeing them. He added that he did not return to that jobsite that day. He also stated that it was possible for another Track Supervisor to assign the employees to other tasks but they would have contacted him first. Mr. Gonzales testified that later that afternoon he was with Ms. Ellis in a conference room at the depot, talking about the next day's work.

A written statement from Mr. Gonzalez, dated September 1, 2010, was read into evidence at the investigation, over the Organization's objection. It recited that at about 1630, when he and Ms. Ellis were sitting in the conference room, they observed Mr. Frias pulling out of the parking lot and leaving the property. He stated that Ms. Ellis went to check on whether Claimant had done the same. He stated that he did not see or speak to Ms. Ellis again until the next day. Mr. Gonzalez confirmed in live testimony that he saw Mr. Frias' personal truck leave the property at about 1630.

Track Supervisor Ronald Fenstermacher testified at the investigation that at about 3 or 3:30 he saw Claimant and Mr. Frias at the east end of the yard assisting with throwing tie plates. He stated that he did not recall assigning them to any other tasks. Mr. Fenstermacher testified that he saw Claimant and Mr. Frias at the east end of the yard at about 3:30, but he left the area at the end of his day, at about 3:30 or 4, and did not see them again.

A statement from Bill W. Sanchez, who was apparently ill and did not appear at the investigation, was entered into the hearing record. In it, Mr. Sanchez states that he was tasked to work on a crossing on the east end of Track 5, and Claimant and Mr. Frias were sent to assist him, arriving at about 3:30 p.m. He recounted that they had a job briefing and then continued the work for about 45 minutes, leaving the site at about 4:30 p.m. He stated that he continued working, loading tie plates on another loader, until about 7 p.m.

Mr. Frias testified at the investigation that he was working as a welder, assisting Claimant, on the day at issue. He stated that he and Claimant had finished certain tasks and were heading to Belen when Mr. Gonzalez called them at about 2:45 or 3 p.m. to go to the east end of the yard to assist in distributing plates. He added that they did so, arriving about 3:15 or 3:20. He stated that they participated in a job briefing with Mr. Fenstermacher and were then sent to assist Mr. Sanchez in clearing a crossing, arriving there at about 3:45. He explained that the work took about 45 minutes, finishing at about 4:30 or 5 p.m. He added that they then needed to put the tools away, which took some time because the trucks were located a distance away. He stated that this work took until

about 4:45, so after they cleaned up and prepared to leave they left the property at about 5:05 or 5:07 p.m.

Mr. Frias testified that he and Claimant did not leave at 4:32. He added that there was no one present to inform that they were leaving, and he did not see either Ms. Ellis or Mr. Gonzalez at the depot. He stated that both Carrier Officers usually park their trucks in a visible location, and he did not see those trucks when he left for the day.

Claimant testified at the investigation that he was working as a welder at the time of the incident, and that Mr. Gonzalez has instructed him and Mr. Frias to work at Beavers. He explained that when they finished, and were heading back to Belen, Mr. Gonzalez asked them to go to the east end of the Belen Yard for a job briefing for the crew, which they did, arriving at approximately 1520 hours. He stated that they saw Ms. Ellis there when they arrived, but she left about 10 minutes later.

Claimant testified that a few minutes later Mr. Fenstermacher instructed him and Mr. Frias to assist Backhoe Operator Mr. Sanchez in clearing a road crossing at the east end of 7105. He stated that they did so for about 45 to 50 minutes, and it was about 1625 by the time they finished that work. He stated that with putting equipment away and related tasks, it was about 1635 to 1638 when they headed to the depot. He added that the trip to the depot took another seven or eight minutes, so they arrived at about 1645. At that point, he added, they need to perform tasks such as lockup, post trip inspection and logbooks.

Claimant testified that he left the property at about 1705. He specifically denied that he had left at 1632, explaining that at that time he was barely coming in from the east end of the yard. He stated that the Roadmaster had told him that it was acceptable to put in his time the following day.

The Carrier's Policy for Employee Performance Accountability (PEPA), provides that an employee involved in a serious incident, as enumerated in the policy's Appendix B, will receive a 30-day record suspension and may be offered training to correct the underlying behavior. Appendix B lists as serious violations numerous safety infractions as well as "other serious violations" of Carrier rules.

The PEPA provides that a second serious incident within a 36-month review period will subject the employee to dismissal, except that the serious-incident review period will be reduced to 12 months for employees who have completed at least five years' service and who have been injury and discipline-free for that period. The policy also states that the circumstances surrounding a serious incident may reduce an employee's personal culpability, and the matter may be handled according to the general guidelines, and if there is any doubt supervisors are to err on the side of leniency.

The PEPA also provides that certain aggravated offenses, listed in Appendix C, may subject an employee to dismissal for a single offense. Those violations include: 1) Theft or other act with intent to defraud the carrier of monies or property not due.

Claimant's personal record shows no discipline for more than 10 years prior to the incident at issue.

The Carrier asserts that this case is not complicated. Simply put, the Carrier states, Claimant put in for overtime he had not worked. The Carrier notes that the regular hours of Claimant, a welder, and his co-worker Greg Frias were 0730 to 1600 and, although Claimant claimed to have worked until 5:06 p.m. (1705), one eyewitness, Roadmaster Sherri Ellis, saw him leave at 1630 and another saw Mr. Frias leave at 1628. Thus, the Carrier argues, while Claimant claimed one hour of overtime in the Carrier's timekeeping system, he left Carrier property only 30 minutes after his usual quitting time.

The Carrier states that it well established that in cases such as this one, where there is conflicting testimony, the Hearing Officer must make credibility resolutions and resolve that conflict. The Hearing Officer credited the testimony of the Carrier witnesses, the Carrier stresses, and that determination should not be disturbed by this Board. Thus, the Carrier urges, it has proven Claimant's guilt by substantial evidence.

With respect to the penalty, the Carrier asserts that Claimant was dishonest, and such an offense is stand-alone dismissible under the Carrier's PEPA. Thus, the Carrier concludes, there is no reason for this Board to overturn the lesser penalty it assessed against Claimant.

The Organization raises procedural and substantive challenges to the discipline assessed against Claimant. First, the Organization notes that the investigation notice refers to Claimant's alleged violation as occurring on Friday, July 22, 2010, but July 22 was in fact a Thursday. This confusion should cause the discipline to be overturned, the Organization urges, as Claimant and his representative were not able to prepare a proper defense. The Organization further argues that the Hearing Officer erred when it allowed the introduction of an obviously coached and rehearsed written statement from Carrier Officer Gerardo Gonzalez, who was present at the investigation to testify. The statement, the Organization notes, was dated 41 days after the events at issue, and shows that Ms. Ellis' testimony was questionable as she apparently determined that she needed this corroboration. Thus, the Organization urges, Claimant was denied his right to a fair and impartial hearing.

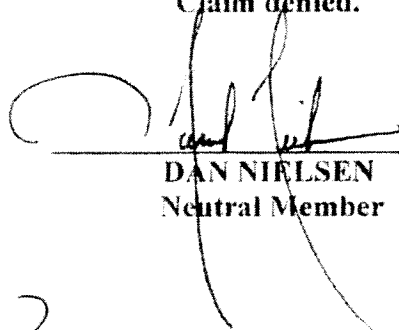
On the merits, the Organization asserts that the Carrier's case against Claimant is based upon questionable statements, not concrete evidence sufficient to establish his guilt. The Carrier notes that Ms. Ellis claimed to have discovered Claimant's violation when she reviewed time slips some 10 to 15 days after the incident, and her contention that she had absolute recall that he left the property at 1632 that day is not credible. The Organization also notes that Ms. Ellis conceded that she was not aware of any job assignment changes for Claimant that day, which would explain why she did not see him at the job site distributing plates and instead assumed he left early. The Organization also points out that Ms. Ellis' memory as to exact times was much better when she was questioned by the Hearing Officer than by the Organization representative. The Organization concludes that the Carrier has not proven by substantial evidence that

Claimant violated any Carrier rule. Even if such violation had been proven, the Organization concludes, the discipline issued is excessive in proportion to the alleged violation, and should be overturned by this Board. The Organization requests that the claim be sustained.

We have carefully reviewed the record in its entirety. First, we find no evidence of any procedural irregularity which denied Claimant his right to a fair and impartial investigation. On the merits, the instant case presents a classic case of competing factual versions of an event. Claimant and Mr. Frias were working together at all times. Two Carrier officers state that they saw Claimant leave the property approximately one-half hour after his usual quitting time, and one Carrier officer also testified firmly that she saw Mr. Baca leave at about the same time. The two employees put in for one hour of overtime pay, and both contended that they worked more than one extra hour and did not leave the property at the time alleged by the Carrier. The record also includes a written hearsay statement from another employee, who did not testify at the investigation, bolstering Claimant's account. Thus, the facts of this case turn upon the credibility resolutions of the Hearing Officer, who credited the accounts of the Carrier witnesses. It is well established that credibility resolutions are not the province of this Board absent evidence that the Hearing Officer's determinations are unreasonable or lacking in record support. There is no such showing here. There is room for disagreement, but the Carrier offered live testimony from two supervisors to the effect that the Claimant and his co-worker left earlier than they claimed. This provides a reasonable basis in the record for the Hearing Officer's determination. Thus, based upon the accounts of its witnesses, the Carrier has proven Claimant's guilt by substantial evidence. The discipline was assessed in accordance with the PEPA, and we cannot say that it represents an unfair or arbitrary exercise of the Carrier's discretion to determine penalties.

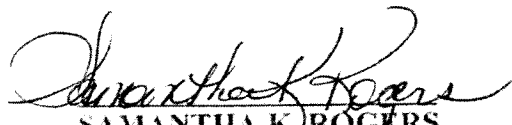
AWARD

Claim denied.



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DAN NIELSEN
Neutral Member



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SAMANTHA K. ROGERS
Carrier Member



A handwritten signature in black ink, appearing to read "David Tanner", is written over a horizontal line.

DAVID TANNER
Organization Member

Dated this 20 day of Feb, 2012.