

PUBLIC LAW BOARD NO. 4244

Award No. 234

Case No. 241

Carrier File No. MWE980903AB

Organization File No. 20-13D2-985.REI

Parties to Dispute:

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**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYES**

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BURLINGTON NORTHERN SANTA FE RAILWAY

Statement of Claim:

1. The Carrier violated the Agreement when on August 5, 1998, the Carrier issued a Level S, Suspension of 20 days to Mr. John Watts, for alleged violation of Rule 1.13- Reporting and Complying with Instructions, Rule 20.1- Submitting Time and Material Reports and other Reports as Required, and Rule 1.6- Conduct, of the Maintenance of Way Operating Rules, effective August 1, 1996, in connection with his alleged failure to comply with instructions from proper authority and payroll entry for time not worked on June 21, 1998.
2. As a consequence of the Carrier's violation referred to above, Claimant shall be reinstated to his former position with seniority restored, he shall be paid for all wages lost and discipline shall be removed from his record.

INTRODUCTION

This Board is duly constituted by agreement of the parties dated January 21, 1987, as amended, and as further provided in Section 3, Second of the Railway Labor Act ("Act"), 45 U.S.C. Section 153, Second. This matter came on for consideration before the Board pursuant to the expedited procedure for submission of disputes between the parties. The Board, after hearing and upon review of the entire record, finds that the parties involved in this dispute are a Carrier and employee representative ("Organization") within the meaning of the Act, as amended.

FINDINGS

On Sunday, June 21, 1998, the claimant, John Watts, was the foreman on Tie Gang TP07. The claimant's job responsibilities included overseeing the work of the gang, ensuring that the proper materials are at the work location, and quality control. On the date which is at issue in this case, the claimant performed various work activities and submitted a timeslip for 12 hours of work. The Carrier contends that the only overtime authorized for this particular weekend was for work to be performed on Saturday, June 20, 1998. Therefore, the Carrier contends that the claimant should not have been working on Sunday, June 21, 1998. Additionally, the Carrier argues that the claimant did not perform any work on this date.

However, the Claimant contends that he did indeed work on Sunday, June 21, 1998, and furthermore, the Carrier never instructed him that he should not work on this date.

The claimant was notified by the Carrier to attend an investigation for the purpose of ascertaining the facts and determining his responsibility, if any, in connection with his alleged failure to comply with instructions from the proper authority when he made a payroll entry for twelve (12) hours of pay at the overtime rate for Sunday, June 21, 1998, when he allegedly did not perform work on that date. As a result of the investigation held on July 7, 1998, the Carrier issued a twenty (20) day Level S suspension to the claimant for violating Rules 1.13, 20.1 and 1.6 of the Maintenance of Way Operating Rules (MWOR).

The Organization contends that the formal investigation hearing was not held in a timely manner. Rule 40 of the current agreement entitled "Investigations and Appeals," provides, in relevant part, as follows:

A. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, 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 (excluding employees of the Security Department) and except as provided in Section B of this rule.

The incident at issue in this case occurred on June 21, 1998 and the Carrier first obtained information regarding the matters of this case on June 23, 1998. The formal

investigation was held on July 7, 1998. The Board finds that the investigation was held in a timely manner as set forth in Rule 40. The Board will decide this case based upon the merits.

The following rules of the MWOR are applicable to the Board's decision in this case.

Rule 1.13 of the MWOR, entitled "Reporting and Complying with Instructions," provides:

"Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties."

Rule 20.1 of the MWOR, entitled "Foremen, Track Supervisors, Track Inspectors, and Bridge Inspectors," provides, in relevant part, as follows:

Foreman, track supervisors, track inspectors, and bridge inspectors are responsible for:

- Ensuring the area is responsibility is inspected as may be necessary
- Submitting time and material reports, and other reports, as required
- Keeping their supervisor informed of plans and activities

Rule 1.6 of the MWOR, entitled "Conduct," provides as follows:

Employees must not be:

1. Careless of the safety of themselves or others
2. Negligent
3. Insubordinate
4. Dishonest
5. Immoral
6. Quarrelsome
- or
7. Discourteous

At the investigation, assistant roadmaster J. M. Bainter testified that he did not authorize the claimant to work on Sunday, June 21, 1998. In fact, Bainter testified that he specifically instructed the claimant not to work on Sunday. Bainter also stated that other Carrier supervisors did not authorize the claimant to work overtime on the date at issue. According to Bainter, only operator R. D. Younge was authorized by the Carrier to work overtime that day. Lastly, Bainter testified that assistant foreman D. L. Daniels was present when he instructed the claimant to not work overtime on Sunday.

Assistant foreman Daniels is responsible for keeping the records regarding the hours worked for employees on gang TP07. At the investigation, he testified that the claimant turned in twelve hours of overtime on Sunday, June 21, 1998. Daniels stated that he did not have any knowledge regarding whether or not the claimant actually performed work on this date. However, operator R. D. Younge, who worked for twelve hours on Sunday, June 21, 1998, testified that he observed the claimant on the property at least four times on this particular date. Daniels further testified that he was instructed by assistant roadmaster Bainter that no work was to be performed on Sunday. However, Daniels stated that the claimant was not present when Bainter issued this instruction. Additionally, Daniels admitted that he did not inform the claimant of the instructions regarding overtime which were issued by Bainter.

At the investigation, the claimant testified that he performed a pre-job survey on Sunday, June 21, 1998, for a job that was to begin on the following day. Claimant further testified that he did not receive instructions from assistant roadmaster Bainter stating that the only overtime which would occur on this particular weekend would take place on Saturday,

June 20, 1998. Additionally, the claimant testified that Bainter's instructions were not relayed to him by another employee. Lastly, the claimant asserted that he had no knowledge regarding instructions by Bainter which indicated that the pre-job survey would be conducted on Monday, June 22, 1998.

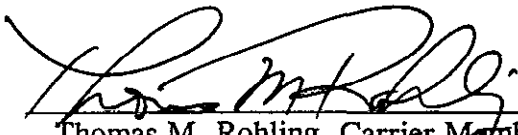
The Board finds the evidence of record establishes that the claimant was observed by another employee on the Carrier's property on Sunday, June 21, 1998. Additionally, the record further reveals that on Monday morning, the claimant was very knowledgeable regarding the work location. The Carrier has failed to present probative evidence which would indicate that the claimant did not work on the date at issue. Based upon this evidence, the Board finds that the Carrier did not meet its burden of proof that the claimant failed to perform work on Sunday, June 21, 1998. Accordingly, the Board finds that the claimant did not violate Rule 1.6 of the MWOR when he reported that he worked twelve (12) hours of overtime on Sunday, June 21, 1998.

The Board further finds the evidence of record in this case supports the conclusion that the Carrier has not satisfied its burden of proof that the claimant failed to comply with instructions from his supervisor. However, the Board finds that the claimant violated Rule 20.1 of the MWOR because he failed to keep his supervisor informed of his plans and activities. The claimant cannot take it upon himself to work overtime hours when the Carrier has not specifically instructed him to work such hours. Based upon these findings, and the fact that the claimant has only one prior work rule violation during his twenty-five years of


employment with the Carrier, the Board concludes that the discipline assessed the claimant shall be modified as set forth in the Award.

AWARD

The claim is sustained, in part, as follows. The claimant's twenty (20) day suspension is hereby reduced to a period of five (5) days, and he shall be compensated for the wage loss resulting from the balance of the suspension. The Carrier is to comply with this Award within thirty (30) days from the date of issuance.


Thomas M. Rohling, Carrier Member


R. B. Wehrli, Employee Member


Jonathan I. Klein, Neutral Member

This Award issued the 8th day of May, 1999.