

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employes
and
Burlington Northern and Santa Fe Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on January 30, 2002 when it dismissed the Claimant, Mr. A. Ben, from service for allegedly violating Rule 1.6 **Conduct**, items, 3-Insubordinate, 6-Quarrelsome, and 7-Discourteous; Rule 1.13 **Reporting and Complying with Instructions** and 1.14 **Employee Jurisdiction** of the Maintenance of Way Operating Rules.
2. As a result of the violation referred to in part (1), the Carrier shall return the Claimant to service with seniority intact, remove the discipline mark from his personnel record, and make him whole for all time lost." [Carrier File No. 14-02-0036. Organization File No. 120-1311-018.CLM].

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the dispute herein.

The Claimant, Mr. Alison Ben, was hired by the Carrier on July 17, 1992. He was working as a machine operator and designated van driver on Maintenance of Way Gang RP16 on December 10, 2001, the date of the incidents which ultimately resulted in this disciplinary action.

On December 11, 2001, the Claimant was served with a notice of investigation to be held on January 8, 2002, "to determine all facts and circumstances concerning report alleging a confrontation with Foreman Mark Ramirez." This notice also advised the Claimant that he was being withheld from service pending results of the investigation. Several Maintenance of Way Operating Rules were cited as possibly being violated:

Rule 1.6 requires that employees not be insubordinate, quarrelsome, or discourteous.

Rule 1.13 requires that employees comply with instructions from supervisors who have the proper jurisdiction.

Rule 1.14 states that employees are under the jurisdiction of the supervisors of the railroad they are operating on, and governed by the operating rules, timetables, and special instructions of that railroad.

The investigation was held on January 8, 2002. The Claimant was represented by an officer of the Organization. At the beginning of the investigation, his representative objected to the Claimant's removal from service pending the investigation, and requested that the Claimant be returned to service and paid for all losses. The objection was entered into the record. The objection was again voiced at the close of the investigation, and again entered into the record.

Mr. Mark Ramirez, Foreman on Gang RP16, gave this account of the events which resulted in the charges against the Claimant: Since this gang was working shorthanded on December 10, 2001, he instructed the Claimant, a machine operator running a machine identified in the record as a "gooper" or a "grouper," to leave the machine in charge of a trainee machine operator, and to assist another employee removing old tie plates from the track structure. Sometime later in the morning, as Mr. Ramirez was overseeing the gang's work, he noticed that the Claimant was not working at his assigned task, removing tie plates. The Claimant was found moving a van used to transport the gang. The Claimant then returned to his task of removing tie plates.

Still later in the morning, Mr. Ramirez again noticed the absence of the Claimant, and also observed that the van had again been moved. He went to the van, opened the back door, and found the Claimant and another employee sitting in the back of the vehicle. The Claimant was directed to return to the job, and he complied.

A third time, Mr. Ramirez noticed the Claimant's absence from his assigned task. He observed the Claimant getting into the van, and moving it to a different site. He continued to watch the van and timed his observation, stating that the Claimant sat in the van for 15 minutes. Mr. Ramirez then approached the van and asked the Claimant to go back to his job. There followed an exchange of words between the two of them. Mr. Ramirez stated he could not remember all they had said, but he did quote the Claimant as saying, "I don't care, fire me, I have a bad record anyway," to which Mr. Ramirez responded, "Do you know what you're saying? What about your family?" He stated that the Claimant said he didn't care. After further conversation, the Claimant returned to his assigned duties, and Mr. Ramirez called his immediate supervisor, Roadmaster Phil Heusler, and reported the incidents with the Claimant.

Mr. Heusler testified that he received a call from Mr. Ramirez, who said he had had three confrontations with the Claimant about leaving the work site to sit in the van, and on the third occasion, Mr. Ramirez related their conversation, which was similar to Mr. Ramirez's own account.

Mr. Heusler said he went to the work location of the gang and took the Claimant aside for a private discussion, asking the Claimant what had happened in the reported incidents. He said the Claimant at first indicated that nothing had happened, but when Mr. Heusler told the Claimant what Mr. Ramirez had related to him, the Claimant admitted that Mr. Ramirez's account was correct. Mr. Heusler advised the Claimant that such behavior is not acceptable, and reminded him of past indiscretions. Mr. Heusler then told the Claimant he was being taken out of service pending an investigation.

Mr. Heusler transported the Claimant back to the hotel where the gang was quartered. He said that the Claimant left his hard hat and safety vest in the vehicle and when Mr. Heusler asked him if he didn't want them, the Claimant made a face and a gesture with his hand indicating that he didn't want them, and he walked away.

Mr. Ben's account of the events of December 10, 2001, was drawn out in questioning by the Conducting Officer and his representative. He stated that he left the plate-moving assignment and voluntarily moved the van on three occasions, to forestall the need to walk a long distance to recover the van, as the gang's work progressed along the right of way. On the second occasion when he moved the van, he tacitly admitted he was quarrelsome or insubordinate:

"...[W]ere you insubordinate or quarrelsome with him?"

"Yeah. We exchanged words. He told me to get out of the van, slammed the door on me." [Transcript page 34].

Upon further questioning, the Claimant said that he could not remember what words were exchanged between himself and Foreman Ramirez:

"We exchanged words. I can't remember that. It happened so fast. It just got to me. I wanted to work with the gooper where I was working, where I was assigned to, instead of working the labor." [Transcript page 39].

While the testimony of these three witnesses is not totally congruent, which is not surprising, on one point there is sharp disagreement. Foreman Ramirez testified that on the three occasions when the Claimant left the work site to move the van, the gang had track and time limits and was working. (Transcript pages 28, 32, and 33). The Claimant, on the other hand, asserted that the gang was idle or he was precluded from doing his work by another track machine at the times he left to move the van. (Transcript page 36).

Another point of disagreement is the motivation for moving the van. The Claimant indicated that he moved the van from time to time to keep up with the gang's progress, so he

would not have to walk a long distance to recover the van to transport the crew at lunch or the day's end. (Transcript page 34). But Roadmaster Heusler stated that that was not an issue, because the Claimant could have been transported back to the van's location by the Foreman or Assistant Foreman, or even himself, if he was present at the time. (Transcript pages 16-17).

On January 30, 2002, Roadmaster J. J. Palacios, the officer who conducted the investigation, addressed a letter to the Claimant confirming that as a result of the investigation on January 8, 2002, he was dismissed from the Carrier's employment. This letter read as follows, in pertinent part:

"...[C]oncerning your confrontation with Foreman Mark Ramirez at approximately 1400 hours on December 10, 2001, after repeatedly being instructed not to sit in the van, but rather to stay on the siding and assist the gang, you are dismissed from employment for violation of Rules 1.6 (Conduct), items (3) Insubordinate, (6) Quarrelsome and (7) Discourteous; Rule 1.13 (Reporting and Complying with Instructions) and 1.14 (Employee Jurisdiction) of the Maintenance of Way Operating Rules . . ."

The Carrier's decision to dismiss the Claimant from its service was promptly appealed by the Organization to the Carrier's highest designated officer by the Organization's General Chairman.

The Organization first charges that the Carrier failed to provide a fair and impartial hearing when the same officer, Roadmaster Palacios acted in the capacity of Conducting Officer and then issued the notice of discipline. The Carrier rejoins that the Claimant was afforded all his due process rights in the investigation, i.e., proper notice, representation, and the right to call witnesses. The Board does not consider the dual roles filled by Mr. Palacios to be a fatal procedural error. The role of the Conducting Officer as both the trier of facts and the assessor of discipline is a common practice in this industry, and nothing in Discipline Rule 13 of the Agreement prohibits such procedure. We do not find here the threefold function which resulted in a sustaining Opinion in Award No. 265 of this Board.

The Organization also objected to the Claimant's removal from service pending the investigation, an issue timely raised at the beginning of the investigation. The Board does not find any violation of the Parties' Agreement by the Claimant's removal from service pending the investigation. Rule 13(b) of the Agreement provides:

"It is understood that nothing in this Rule will prevent the supervisory officer from holding men out of service where flagrant violations of Carrier rules or instructions are apparent, pending result of investigation which will be held within thirty (30) calendar days of date of suspension."

Apparent insubordination, of itself, is sufficient cause for removal from service pending investigation, in accordance with the above Rule. The Carrier did not violate the Agreement when it withheld the Claimant from service pending investigation.

The Organization further argues that the Carrier failed to provide substantial evidence to support the assessment of discipline. It points out, correctly, that Roadmaster Heusler did not witness any of the events described to him by Foreman Ramirez, and states that the discipline assessed is based solely upon the testimony of Mr. Ramirez. The Carrier responds that the record developed substantial evidence of the charges, and points out that the Claimant was reinstated to service in September, 1999, on the basis of last chance leniency, following a prior infraction of the rules. The Board believes that the Claimant confirmed, with very little elaboration or disclosure, that he and Mr. Ramirez did "exchange words." Even if the Board disregards all the testimony of Roadmaster Heusler, the accounts of Foreman Ramirez and the Claimant are not altogether inconsistent. The Board believes there is sufficient evidence to support the charge.

The Organization also points out that the testimony of both the Carrier witnesses, the Roadmaster and the Foreman, confirms that the gang was working shorthanded and, consequently, the Claimant was assigned to perform three different jobs during the day, i.e., Van Driver, Machine Operator, and Trackman. The record supports the Organization's contention in this respect, and the Carrier does not assert otherwise. Accepting this testimony as factual, however, does nothing to exonerate the Claimant from the charges that he was disobedient, at best, and insubordinate, at worst.

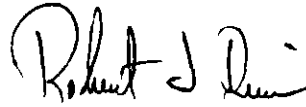
Arbitral decisions, not only in the railroad industry, but throughout the entire spectrum of business and industry, have historically adhered to the principle that an employee who disagrees with a work order or rule normally must obey the order or rule and challenge its legitimacy through the grievance procedure or other channels. The exceptions to this principle are logical and obvious. No employee should be punished for disobeying an order that is illegal, unethical, or immoral, or one that would endanger the employee or others. Those exceptional circumstances are not evident in this case.

The Board has also considered this Claimant's personal record. It presents five previous disciplinary entries, with the penalties progressively more severe. Four of the five involve the offense of being absent without permission. That offense, of itself, is a mild form of insubordination.

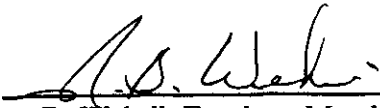
The totality of the record in this case, coupled with the Claimant's past record, precludes the Board from granting any relief, and the claim is therefore denied.

AWARD

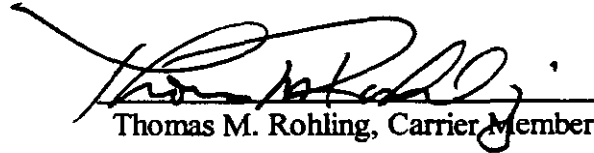
Claim denied.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member

November 5, 2002
Date