

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees
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 September 4, 2001, when it issued the Claimant, Mr. G. P. Mitchell a Formal Reprimand, for allegedly violating Maintenance of Way Operating Rule 1.15 **Duty-Reporting or Absence.**
2. As a result of the violation referred to in part (1), the Carrier shall remove the discipline mark from the Claimant's personnel record and make him whole for any time lost." [Carrier File No. 14-01-0216. Organization File No. 10-13N1-0115.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. G. P. Mitchell, was first hired by the Carrier on October 9, 1995, in its Maintenance of Way Department. In July, 2001, he was working as a Machine Operator on a system gang in or around Galesburg, Illinois. On July 10, 2001, he did not report for work and did not notify any supervisory staff, either the Roadmaster or the Foreman, of his absence.

Consequently, on July 18, 2001, he was directed to attend an investigation on July 24, 2001, on the following charge:

"[F]or the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to protect your assignment as machine operator on Tuesday, July 10, 2001."

The investigation was twice postponed by agreement of the Parties, and finally held on August 14, 2001.

The following evidence was established by the combined testimony of Roadmaster Angel Alvarez and the Claimant. The Claimant did not appear for work on July 10, 2001, nor did he notify either the Roadmaster or the Foreman. Mr. Alvarez stated that he requires employees

under his supervision to contact him, personally, before the starting time of their assignments, to obtain permission to be absent. He stated that he carries a cellular telephone, turned on at all times. He added that it is insufficient for an employee to lay off work to the Foreman or anyone else; he must grant permission, personally.

Mr. Alvarez further stated that this procedure is not set forth in written instructions, but asserted that he had verbally instructed all employees under his supervision. He said that he has furnished employees with a business card with his telephone number imprinted, but modified his statement on cross examination:

"And you said, do you issue written instructions on your excusing yourself from work policy on your territory?"

"Do I issue written instructions? No, I don't. All verbal instructions and they've been instructed." [Q&A No. 23]

"So do you issue copies of phone numbers so people can call, to your employees under your jurisdiction?"

"That's correct. I've done that several times over the conference calls." [Q&A No. 24]

"You have not given them any written instructions, business cards, or anything that they can keep to have your phone number?"

"I've had several business cards made out with different titles (inaudible) and they do have my information." [Q&A No. 25]

"And you furnish them to each employee?"

"Yes, I do." [Q&A No. 26]

"Each time a new employee comes onto your territory you furnish him with this?"

"With my business card?" [Q&A No. 27]

"Yes."

"No." [Q&A No. 28]

The Claimant described his working duties in the record. Employed as a Machine Operator on a System Gang, he works all over the Carrier's system, and is not assigned full-time to any particular location. He had been working in the vicinity of Galesburg since March, 2001, he said, but he reported to the location of his track machine, a backhoe, each day he worked, and not to a fixed location, such as a section house or shop.

The Claimant stated that he did not call Mr. Alvarez because he did not have his telephone number. Instead, he attempted to call the Foreman on a number he had in his possession, but received a recorded message the number had been changed or was no longer in service. His testimony was not the epitome of clarity:

"Did you call your foreman and excuse yourself from work?"

"I tried but the number I had, it's, it said the number, when I called it it says no longer, this number has been changed and I tried to find the Stronghurst section number and I couldn't find it." [Q&A No. 35]

"So you didn't call anybody to excuse yourself from work, is that correct?"

"Correct." [Q&A No. 36]

~~He entered into the record a list of telephone numbers prepared by the Carrier and posted in the Stronghurst section house, and the numbers thereon for Mr. Alvarez and the section house were incorrect, according to the record and his statement.~~

Mr. Alvarez testified that the list was an old one. The Claimant testified that it was the only list posted.

Following the investigation, the Claimant was issued a Formal Reprimand for violation of Maintenance of Way Operating Rule (MWOR) 1.15:

"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."

~~That decision was appealed by the Organization to the Carrier's highest designated officer, and has been progressed to this Board, not having been settled on the property. The Board will sustain the Organization's claim for the reasons discussed below.~~

We agree with the Organization's position that the Carrier did not produce evidence to support the charge. True enough, the Claimant did not obtain permission from Mr. Alvarez to be absent on July 10, 2001. But even Mr. Alvarez could not say with certainty that the Claimant had been given his cellular telephone number, or that he had been instructed to call Mr. Alvarez personally. The Claimant's attempt to contact the Foreman, albeit without success, indicates that he made a minimal effort to comply with the reporting requirement of Maintenance of Way Operating Rules 1.15.

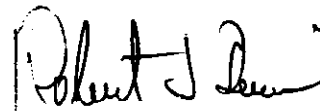
The Claimant was not regularly assigned to work under the supervision of Mr. Alvarez. He testified that he worked systemwide: "California, Washington, Wisconsin." As a transient worker in Mr. Alvarez's territory, he could not be expected to be as conversant with the requirements peculiar to that locale, as one holding a regular assignment there. With the limited information as his disposal, the Board believes he made a reasonable effort by trying to reach the Foreman.

The Carrier, in its response to the Organization's appeal, referred to another disciplinary proceeding in which the Claimant is a principal. The Board believes the speculative nature of the references thereto cannot be considered. The transcript of evidence in this case, we notice, carefully avoids discussion of the Claimant's reason for not reporting on July 10, 2001, and we believe the Carrier's discussion of matters outside the record in that case is inappropriate.

The Claimant's personal record is clear of any disciplinary entries prior to the instant case, and we are precluded from considering any discipline assessed after this proceeding.

AWARD

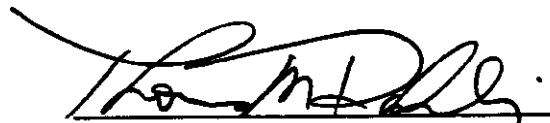
Claim sustained.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member

December 16, 2002
Date