

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 when on August 30, 2002, Mr. M. A. Barragan was dismissed from service of the BNSF for allegedly violating rules 1.6(4) (Conduct) (Dishonest), 1.13 (Reporting and Complying with Instructions) and 1.15 (Duty - Reporting or Absence) of the Maintenance of Way Operating Rules in effect January 31, 1999 including amendments through April 2, 2000.
- “2. The Carrier violated Rule 13 and Appendix no 11 of Agreement between the parties dated January 1, 1984 as amended.
- “3. As a consequence of the Carrier’s violation referred to above, Mr. Barragan should be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss commencing July 19, 2002, continuing forward and/or otherwise made whole.” [Carrier File No. 14-02-0190. Organization File No. 190-1311-027.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. Mario A. Barragan, was hired by the Carrier on October 12, 1995. He reported to work at 7:00 a.m., July 15, 2002, at Calwa, California, as Foreman of a newly established Maintenance of Way Quality Control Gang. He had been instructed to report on this date to organize this four-man gang and to obtain a truck for their work. As it turned out, no other gang members had been assigned, no truck was available, and there was no work to be performed by this gang until July 22. The Claimant was instructed to remain in the office at Calwa and await orders from District Roadmaster Anthony Silva, the Claimant’s immediate supervisor, who had not been made aware of the Claimant’s assignment, and who had to deal with

the Carrier's Manpower Control office to determine what to do with the Claimant, since there was no work for him at that point.

There followed a series of events which resulted in the Claimant's being withheld from service beginning July 19, 2002, pending an investigation. On July 23, he was sent a notice of charges by Division Engineer R. A. Mason, reading as follows, in part:

"This letter will confirm that you will remain out of service pending results of formal investigation scheduled in the General Manager's Conference Room, 1776 W. March Lane, Suite 400, Stockton, CA, at 1000 hours on July 31, 2002, concerning your alleged failure to follow instructions of Roadmaster A. M. (Tony) Silva on July 15, 2002, when you reported to Calwa, CA, and he instructed you to contact roadmaster John Palacios and report to Riverbank, CA, and you did not contact Mr. Palacios nor report to Riverbank and you input time into the timekeeping system for yourself for the day; so as to determine the facts and place responsibility, if any, involving Rules 1.6 (4) (Conduct) (Dishonest), 1.13 (Reporting and Complying with Instructions) and 1.15 (Duty - Reporting or Absence) of the Maintenance of Way Operating Rules in effect January 31, 1999 (including amendments through April 2, 2000)."

The investigation was held on the appointed date. The Claimant was competently and diligently represented by the Organization's Assistant General Chairman. Testimony and evidence was presented by the Claimant, Mr. Silva, and Roadmaster John Palacios, and a transcript was prepared by a Certified Shorthand Reporter, which is a part of the record in this case. Their composite testimony presents the following summarized depiction of the events which culminated in the charges and investigation.

When it was determined there was no work for the Claimant at Calwa, it was decided that the Claimant should return to the position he had previously occupied, as Machine Operator running a Little Giant crane at Riverbank, California. Mr. Silva called back to the office in Calwa, from 10:00 a.m. until 10:25 a.m., but the Claimant was not waiting there, as he had been instructed. Mr. Silva drove to Calwa, but could not find the Claimant there. Instead, Mr. Silva found him at Carl Jr.'s, a restaurant in the Fresno-Calwa area. The record indicates that Mr. Silva and the Claimant communicated by cellular telephones while Mr. Silva, parked across the street, observed the Claimant in his privately-owned vehicle. The Claimant indicated that he was still in the office at Calwa, apparently not knowing that he was under observation. The Claimant said he told Mr. Silva he was leaving Calwa. Mr. Silva said he directed the Claimant to drive to Riverbank and finish his day's work on the Little Giant crane, meanwhile contacting Roadmaster John Palacios by telephone, in whose territory the Claimant would be working. The Claimant admitted that he was told to report at Riverbank that afternoon. The Claimant did not tell Mr. Silva he would neither go to Riverbank that day, nor contact Mr. Palacios as instructed.

Mr. Silva attempted to follow the Claimant when he left Carl Jr.'s, since he was suspicious because of the Claimant's untruth about his location. but lost him at a freeway entrance. Mr. Silva drove to Riverbank, arriving about 12:30 p.m., but the Claimant did not show up at the Little Giant crane site before Mr. Silva left at 2:45 p.m.

Meanwhile, the Claimant drove to his residence in Hanford, California, to pack his clothes, he said, since he had originally planned to commute between his home and Calwa when he was assigned there. He then remained at home, and said he had no intention of going to Riverbank on that day. He explained that the distance from Calwa to his home and then to Riverbank was approximately 200 miles. Being allowed travel time based on 40 m.p.h., pursuant to Agreement Rule 37(a), he would have earned five hours of travel time, which by then would have put him at or after his quitting time of 3:30 p.m. in Riverbank. He therefore reported eight hours at straight time for that day, rather than breaking it down by separating his time worked and his travel time. He also reported a day's per diem for July 15. He actually traveled to Riverbank before the starting time of his job on July 16, but reported the travel time on July 15, as a part of his basic eight-hour day, he explained.

While he was waiting for the Claimant in Riverbank, Mr. Silva called Mr. Palacios, who said the Claimant had not called him. Mr. Silva told him to drive to the Claimant's residence and see if his vehicle was parked there. Mr. Palacios said he saw the Claimant's vehicle at his residence about 1:30 p.m., and again at 3:45 p.m. Mr. Silva drove back to Hanford, and said he observed the Claimant's personal vehicle parked at his home at 5:50 p.m., 8:00 p.m., and 9:00 p.m. The Claimant reported for work at Riverbank on the following day, Tuesday, July 16, 2002, and was given his work instructions by Mr. Palacios.

After the payroll period ended, Mr. Silva and Mr. Palacios interviewed the Claimant in their office in Fresno on July 19, 2002. The Claimant, according to them, said he arrived in Riverbank about 2:00 to 2:30 p.m. on July 15, and spent the night in Carrier-provided lodging in Oakdale, California. The Claimant admitted in the record that he had made these statements to them. Mr. Silva testified that the Claimant had reported for himself a day's per diem on July 15, but would only be entitled to per diem if he stayed away from home. But the Carrier's lodging report does not record the Claimant's staying in the Oakdale lodging facility on that date. (Exhibit 8) The mileage reported by the Claimant on July 15, 252 miles, does not add up to correspond to his reported travel, Mr. Silva stated; furthermore, he has to actually travel to be able to claim the miles. The Claimant was notified in this meeting that he would be withheld from service pending an investigation.

On August 30, 2002, the Claimant was sent a letter by the Carrier's Division Engineer, apprising him of the results of the investigation, reading in part as follows:

“This letter will confirm that as a result of formal investigation on July 31, 2002, concerning your failure to follow instructions of Roadmaster A. M. (Tony) Silva on July 15, 2002, when you reported to Calwa, CA, and he instructed you to contact roadmaster John Palacios and report to Riverbank, CA, you did not contact Mr. Palacios nor report to Riverbank and you input time into the timekeeping system for yourself for the day; you are dismissed from employment for violation of Rules 1.6 (4) (Conduct) (Dishonest), 1.13 (Reporting and Complying with Instructions) and 1.15 (Duty - Reporting or Absence) of the Maintenance of Way Operating Rules in effect January 31, 1999 (including amendments through April 2, 2000).”

The Maintenance of Way Operating Rules (MWOR) cited above read as follows:

MWOR 1.6:

“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.”

MWOR 1.13:

“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.”

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.”

The Organization promptly appealed this disciplinary decision to the Carrier’s General Director - Labor Relations, who denied the claim. It therefore comes before this Board for review and a final decision.

The Organization argues that when the Claimant's assignment was unexpectedly changed from Calwa to Riverbank on July 15, he necessarily had to return to his residence to pack his belongings, since it was impractical to commute between his residence and Riverbank, a distance of 181 miles.¹ Since this would have caused the Claimant to arrive in Riverbank after the quitting time of his assignment there, 3:30 p.m., he chose to remain at home, with the purpose of traveling to Riverbank the following morning, outside his assigned hours. He did not claim the travel time on the morning of July 16, when he actually drove to Riverbank, but it was subsumed within the eight-hour day he reported on July 15.

The Organization also argues that the Claimant did not claim travel time from Riverbank to Calwa, an amount estimated at 3½ hours, when he left his previous assignment to report at Calwa on July 15. Nor did he claim travel time and mileage between his residence and Calwa. Furthermore, it says, when the Claimant reported at Riverbank on the morning of July 16 instead of the afternoon of July 15, he thereby spared the Carrier the cost of a night's lodging.

In summary, therefore, the Organization concludes that the Carrier still owes the Claimant 5½ hours' pay and reimbursement for 362 miles. The Organization states the Carrier has not supported the charges against the Claimant, and he should be paid for the shortages outlined above, and reinstated to service with pay for all time lost, with his record cleared.

The Carrier rebuts the Organization's position by pointing out, first, that the Claimant did not remain at Calwa as instructed by Mr. Silva, and when he was located at Carl Jr.'s restaurant, the Claimant untruthfully said he was still at Calwa. The Claimant was instructed to go to his job at Riverbank and report to Mr. Palacios when he arrived. The Claimant went home, instead, and remained at home until the following day. When he was interviewed on July 19, he told Mr. Silva and Mr. Palacios he had arrived Riverbank about 2:00 to 2:30 p.m. on July 15, and stayed in Carrier-provided lodging. Testimony and evidence in the record disproved these assertions.

The Carrier also points out that the Claimant did not apprise Mr. Silva of his intention to go home, nor that he decided not to drive to Riverbank on July 15, nor that he would not call Mr. Palacios. The Carrier further asserts that the Claimant's/Organization's defense with respect to saving the Carrier's money by doing what he did instead of doing what he was instructed to do does not mitigate the central issue: The Claimant failed to follow instructions and then attempted to mislead his supervisors about that fact. The Carrier says dismissal is appropriate in this case.

¹The Carrier states the distance is 138.1 miles, according to Yahoo.com/Maps, an internet site. The Board's Neutral Member accessed internet site MapQuest, which shows the distance to be 139.33 miles, via Calwa.

The Board has carefully studied the transcript and other documentary evidence in the record. The testimony and the Organization's arguments with respect to travel time allowances, distances, and times are arcane and difficult to follow in some respects. It may well be true that the Claimant has not been paid for all the allowances he is entitled to, but the issue of what he should have been paid vis-à-vis what he was actually paid is not before this Board. Nevertheless, the Board will address one aspect of this defense. At Transcript page 19, he states that when he was directed to drive from Calwa to Riverbank, and he had to go home to pack his clothes, that would have required a trip of some 200 miles. Therefore, based on his assertion, "For every 40 miles you drive is an hour of straight time," the trip would have required five hours, which would have put him into Riverbank at or after 3:30 p.m., the quitting time of the position he was being sent to work.

The Board observes that this "40 m.p.h." provision is found in Agreement Rule 37(a), which provides for the computation of travel time "outside of regularly assigned hours or on rest days or holidays." (Underscoring added). But the Claimant was directed to go to Riverbank while he was within his regularly assigned hours. Mr. Silva drove to Riverbank from Carl Jr.'s in two hours, not unreasonable for a distance of approximately 107 miles. That was well within the Claimant's assigned hours.

The Board notices that the Claimant was told to wait at Calwa for instructions, but he did not wait there. Mr. Silva testified that he tried for 25 minutes to contact the Claimant at Calwa, then drove to Calwa, and from there to Carl Jr.'s, the location of which is not disclosed in the record. Since Mr. Silva began calling the Claimant at Calwa at 10:00 a.m., he said, (Transcript page 36), the Board concludes that the Claimant could have been given his traveling orders as early as 10:00 a.m., had he been in place as he was instructed.

The Board also notices that the Claimant was directed to go to Riverbank and work with the Little Giant crane. He did not do so, nor did he advise his supervisor that he would not do so. The Board further notices that the Claimant testified that he had no intention of going to Riverbank on July 15. (Transcript page 82).

The Board further notices that the Claimant was directed to contact Mr. Palacios by telephone, and he did not do so. He also claimed a day's per diem for July 15, an allowance which is paid only when an employee is required throughout the work week to live away from home. (Agreement Rule 38(a)).

When his work assignment was changed from Calwa to Riverbank three hours after he reported to work on July 15, it is not unreasonable to suppose that he might find it necessary and expedient to return to his residence to pack for an extended stay away from home, but it was his responsibility to obtain permission to do so. Having been given two simple instructions – Go to

Riverbank – Call Mr. Palacios – he was not authorized to go home and stay there for the rest of the day.

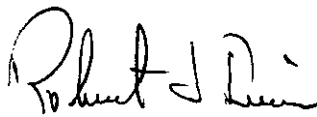
The Board is not persuaded that the trip from Calwa to his home and back to Riverbank would have consumed the rest of his work day, as the Claimant and the Organization argue. Had he left Calwa at 10:00 a.m., when he could have been contacted had he stayed in place as he was directed, driven home (about 32 miles), packed his personal effects, and driven to Riverbank (about 139 miles), he should have arrived about 2:30 p.m., after allowing 30 minutes for the midday meal. But even if, in his mind, he could not have arrived before 3:30 p.m., he did not do the two simple things he was directed to do – Go to Riverbank – Call Mr. Palacios.

The Board has considered the Claimant's personal record. With more than 7½ years of service, the Claimant was assessed a reprimand for a safety violation in June, 2000. But more significantly, in the Board's view, is a five-day record suspension and a one-year probationary period assessed in January, 2002, in which the Claimant, as in this case, engaged in creative timekeeping which did not correspond to the service actually performed. His claim was denied in this Board's Award No. 281.

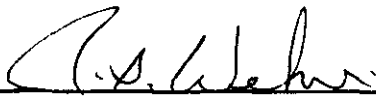
In the present case, the Claimant was dishonest (MWOR 1.6(4)), he did not comply with instructions from his supervisor (MWOR 1.13), and he did not report for duty at the designated place; instead he went home and stayed there while under pay (MWOR 1.15).

AWARD


The claim is denied.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member

May 2, 2013
Date