

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 December 20, 2002, [sic]¹ Mr. E. J. Geer was dismissed from employment of the Burlington Northern Santa Fe for violation of Maintenance of Way Operating Rules 1.6 and 1.15.
2. As a consequence of the Carrier's violation referred to above, Mr. Geer shall be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss commencing January 7, 2003, continuing forward and/or otherwise made whole. [Carrier File No. 14-03-0058. Organization File No. 170-13D2-033.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. Edward J. Geer, entered the Carrier's service on March 1, 1999, as a Maintenance of Way Welder. On December 30, 2002, he was assigned as Lead Welder in Winslow, Arizona. Track Supervisor William Richey observed the Claimant leaving the office where employees go on and off duty at 3:40 p.m. on that date, twenty minutes before his off-duty time. The Claimant was directed, on January 2, 2003, to change the payroll to reflect his early quit on December 30. As Lead Welder, the Claimant is responsible for the timekeeping for his small gang, usually just two employees. His failure to amend the payroll report as directed resulted in a notice of charges and investigation for violation of Maintenance of Way Operating Rules (herein, "MWOR") 1.6 and 1.15, concerning his alleged falsification of his payroll on

¹The date "December 20, 2002," in the Statement of Claim is a typographical error. The letter formally notifying the Claimant of his dismissal is dated February 12, 2003. He was withheld from service pending investigation on January 7, 2003.

December 30, 2002, by leaving work without permission, but claiming eight hours pay for the day.

The investigation was held on January 15, 2003, and the Claimant was notified of his dismissal on February 12, 2003. The Claimant had been taken out of service on January 7, 2003, pending the investigation and the result thereof. The subject Rules 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 1.15

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 the Carrier's disciplinary decision. The Organization argued that the Claimant had a doctor's appointment on December 30 for treatment resulting from a previous on-duty injury. He informed his fellow employee, Welder Andrew Lowry, that he was leaving early, and he actually left the job only ten minutes before his assigned off-duty time. Notwithstanding his notice to Mr. Lowry, who was entering the gang's payroll data, Mr. Lowry showed the Claimant working a full eight hours.

The Organization further states that when the error was brought to the Claimant's attention on January 2, 2003, he directed Mr. Lowry to adjust the payroll entry to deduct ten minutes, but Mr. Lowry failed to do so. The Organization also points out that Mr. Lowry was handling the payroll entries because the Claimant has never had formal training in the timekeeping system. The Organization contends that there were three witnesses present on January 2 who could have provided testimony about the events on that date, but the Carrier did not make them available. The Carrier's failure to have them present denied the Claimant a fair and impartial

investigation. The Organization says the Claimant was not aware that the ten minutes were not deducted until he received his pay check.

The Organization concludes that the discipline assessed in this case is "extreme, unwarranted and unjustified." It believes the Carrier did not sustain its burden of proof, but even if it had, the penalty is excessive in proportion to the charges.

The Carrier states that the record clearly shows that the Claimant left work at least ten minutes early. He was observed leaving by Track Supervisor William Richey. (Mr. Richey testified that he saw the Claimant leaving twenty minutes early). Mr. Richey reported this fact to Roadmaster Charles Gilliam, who in turn, on January 2, instructed the Claimant to amend his payroll report to reflect that he left ten minutes early, and to show his absence as unexcused. The Carrier contends that it then became the Claimant's responsibility to make the payroll changes as he was directed, or to see that it was done by someone else. The Carrier says that the payroll report was not changed, however.

The Carrier argues that the Claimant was instructed to be certain that he did not get paid for time not worked, and it was then his responsibility to make sure that he was not paid. Even though he alleged that Mr. Lowry was instructed to change the payroll entry, it remained his responsibility to follow up to insure it had been done. (In the investigation, Mr. Lowry testified that he overheard the instruction given to the Claimant by Mr. Gilliam, but he did not hear the Claimant tell him to enter the change).

The Carrier argues that an employee cannot pay himself, or permit another to pay him, for time not worked. To do so is theft. The Carrier states:

When the Claimant left early he was responsible to properly report his time and only pay himself for the time he worked. He did not instruct the timeroll maker, Welder Lowry, to dock his pay when he left. Instead, he had to be instructed that he would not be paid for the time he didn't work. The Claimant had already been dishonest when he left without docking his pay. There can be no doubt that his actions were dishonest when he failed to amend the timeroll as instructed.

The Carrier points to the Claimant's record, and states that it was reviewed when the decision was made in this case. Hired in March, 1999, he was assessed a ten-day actual suspension and a 20-day record suspension in August 2000, for giving false statements in an investigation, a serious violation of the Carrier's Rules. The instant case, accepting pay for time not worked, is the second serious violation within a three-year period. Dismissal is warranted and in accordance with the Carrier's discipline policy.

The Carrier further states that the investigation was conducted fairly and impartially. The Claimant and his Representative had the opportunity to call witnesses and present evidence. The Organization's appeal was declined.

A transcript of the testimony and evidence in the investigation is in the record before this Board. The Board has studied the record and considered the arguments presented by the Parties in their exchanged correspondence.

The Board is struck by either a lack of communication between the Claimant and Mr. Lowry or, in the alternative, blatant falsification by the Claimant. Pertaining to his early quit on December 30, 2002, the Claimant testified:

Q. Did you inform Mr. Lowry on December 30th of 2002 that you were in fact leaving?

A. Yes, I did. [Transcript Page 30].

But Mr. Lowry, whose testimony is crucial, said:

Q. . . . Where was Mr. Geer while you were inputting the time on December 30th of 2002?

A. He mentioned something that day earlier about leaving early. But when we had got in we went to the office, I got on the computer. Then I went or he said he was going to go the back or go to the truck or something like that and then I went to the bathroom. And, as I was coming out of the bathroom, Bill [Track Supervisor William Richey] asked me where's Eddie, [the Claimant] and I said I don't know. I think he's outside. . . [Transcript Page 18].

Q. . . . Did Mr. Geer state to you why he was leaving early that day?

A. He told me earlier in the day he had a doctor's appointment. So... [Ellipses in Transcript] but, you know, he didn't say, okay, I'm leaving right now. He was kind of gone when I got out of the bathroom. [Transcript Page 20].

A further failure of communication, or a falsification by the Claimant, occurred on the morning of January 2, 2003, when the Claimant was directed by Roadmaster Gilliam to deduct ten minutes from his payroll on December 30. The Claimant testified:

Q. Did you attempt to modify the time that you were compensated for on December 30th of 2002?

A. Myself, I didn't. But I did state to my welder. My welder would be A. A. Lowry. He's in the computer at the given time of discussion we had had

with Bill Richey and myself, and he was sitting at the computer doing pay, which was not brought up earlier, to deduct the 10 minutes off of my time and to make it unapproved. And, apparently, as far as I knew, it was taken care of as far as I understood. Apparently, it wasn't. That was on January 2, 2003. During that discussion, Bill did state very clearly to make it unapproved. As far as I knew, the time was deducted, or I would have went in there and absolutely I would have changed it myself but, as far as I understood, it was taken care of when I told Lowry to do it. Apparently, he doesn't remember. I sure wished he did, but apparently he does not remember me stating that to him. . . . [Transcript Pages 27-28].

But Mr. Lowry said:

- Q. At any time were you instructed or asked by Mr. Geer or anyone else to modify the time input for 12-30 of 2002?
- A. . . . That morning [January 2, 2003] as soon as I got there I jumped on the computer and paid us for the two holidays. But after I was done and I was checking my e-mail, I heard Bill [Richey] tell Eddie [the Claimant] that he needed to go back and change his time, deduct 10 minutes off of his time, and show it as absence unapproved. And, Eddie said he told me to change it, but I don't remember him or Bill telling me to go ahead and change his time. . . . But I don't recall him telling me I needed to go in and change 10 minutes off his time. [Transcript Pages 18-19]
- Q. Mr. Lowry, you just stated that there could have been a breakdown of communication between you and Mr. Geer about this so-called 10 minutes. Is that what you just said?
- A. That's correct. You know, you know maybe. See, I thought he was going to go in and change his time because Bill told him that morning, you know, you need to go in and change your time. So, you know, I didn't bother with it, and he says he told me that morning to do it, but I don't recall him telling me to do it that morning, to go in there and change his time. [Transcript Page 20].

The Conducting Officer, it seems, found Mr. Lowry more credible than the Claimant. Of course, one would expect the Claimant's testimony to be more self-serving, because his livelihood is on the line. The Board cannot account for the lack of communication. When the Claimant left work early on December 30, he said "something," and he left while Mr. Lowry was in the bathroom. When Mr. Richey then inquired about the Claimant's absence, Mr. Lowry somehow didn't link his absence to the Claimant's advice earlier in the day that he had an appointment with

a doctor. One would expect some discussion between the Claimant and Mr. Lowry about how the time would be recorded.

There is another curious lack of communication on the morning of January 2, 2003, when Mr. Lowry admittedly overheard the Claimant being directed to amend his payroll entry. Since, according to the Claimant, Mr. Lowry did 80% of the payroll entries, one would expect Mr. Lowry to ask something like, "How much time do you want me to report for you today?" on December 30, or "Do you want me to change the payroll for December 30?" when he heard that directive on the morning of January 2. (Mr. Lowry testified, however, that the Claimant did most of the payroll entries for this two-man gang).

The Organization seems to argue that it was Mr. Lowry's responsibility to make the correct payroll entries. The Organization's General Chairman wrote,

He had informed his co worker that he had to go to a doctor's appointment for medical treatment for this injury. He left work ten (10) minutes early but was compensated by his co worker, who was performing the timekeeping for the gang, for the entire eight (8) hours of duty. When questioned by the Claimant's Supervisor, it was determined that the ten (10) minutes would be removed from his time roll. This was never done by the Claimant's co worker.

This argument has some appeal, but even if the Organization correctly places the responsibility on the shoulders of Mr. Lowry, the Board believes the Claimant is ultimately responsible to know that the time for his gang is correctly reported. Before the time appointed for the payroll to close for that pay period, 12:00 noon on January 2, the Claimant should have checked the payroll entries done by him or Mr. Lowry, to insure the payroll was correct at its closing time.

The Organization points out that there were three witnesses present on the morning of January 2 who could have provided evidence concerning the events of that day, but the Carrier did not make them available. The Claimant testified that he asked for the presence of these three employee-witnesses, but they declined to appear because they would have lost time from work². The Claimant's Representative stated that he was not aware of the existence of these witnesses until five minutes before the investigation began, but he would have expected them to be there at the Carrier's direction, because they supposedly had knowledge of the events on the morning of January 2. He did not request their presence at that time, however.

²The Parties' Agreement provides that employees acting as witnesses who are called by the Carrier shall be paid by the Carrier for lost time and necessary expenses incurred, but employees acting as witnesses who are called by a charged employee will not be paid by the Carrier.

These employees did sign a statement prepared by the Claimant, addressed to the Organization's General Chairman, on January 8, 2003, with spaces for the witnesses to attest the verity of the statement. It read:

In regards to the alleged rules violations of 1.6 and 1.15 of the Maintenance of Way operating Rules, effective January 31, 1999, as supplemented or amended, concerning my alleged falsification of payroll on December 30, 2002, when I left work early, I clearly stated to my Track Supervisor and to Mr. A. A. Lowry to deduct the ten (10) minutes of time unapproved off of my pay on the morning of January 02 - 2003. During the morning conference a number of witnesses overheard the conversation I had with Mr. W. L. Richey and Mr. A. A. Lowry asking that they deducted time from my pay when I left early. To my knowledge I thought they had handled this matter.

Below please find the signatures of the witnesses that overheard the conversation I had with Mr. W. L. Richey and Mr. A. A. Lowry stating that I asked to be deducted the time from my pay.

At the bottom of this letter, under the caption, appear three signatures, those of Art Gonzales, David Aryes, and Phillip Kaye.

On cross examination of Roadmaster Gilliam, the Claimant's Representative asked whether Mr. Gilliam had interviewed any of these three persons. Mr. Gilliam said he had discussed the matter with only one of them, Mr. Gonzales, who, he said, signed the letter "after an hour of Mr. Geer pleading with him and telling him, you remember, you remember, you remember." He characterized Mr. Gonzales as having signed the letter "under duress." He said he had offered to arrange for Mr. Gonzales's presence at the investigation, but he declined the offer.

As it turned out, the letter was not given to the Claimant's Representative until minutes before the investigation started, nor was it placed in the hands of any Carrier officer at any time before the investigation was under way. In his closing statement, referring to the letter, the Claimant's Representative stated, "Whether Mr. Lowry was instructed, we've got three witnesses that say he was. Now why it didn't get taken out, I don't know."

The Board believes the letter quoted above, prepared by the Claimant, entered as an exhibit in the record, is of doubtful evidentiary value. Because the employees who signed the letter were not present at the investigation when it was introduced into evidence, they could not be questioned; therefore, it could be regarded as hearsay evidence, but in investigations in this industry, it is not at all unusual for statements such as this to be accepted as evidence, hearsay though they may be. Mr. Gilliam's testimony about his conversation with Mr. Gonzales, hearsay also, nevertheless casts a cloud of doubt over the verity of the Claimant's prepared statement.

The Board does not agree with the Organization's plea that the Claimant was denied a fair and impartial hearing because these three witnesses were not present. According to the record, the Claimant never made it known to the Carrier that these employees should be called.

Both the Claimant and Mr. Lowry were authorized to enter payroll data for this gang. No other personnel could do so. The investigation transcript contains testimony intended to suggest that Mr. Richey could have changed the entry for December 30, but he did not have access to this gang's payroll account.

The Carrier states that this case, at first blush, appears to be merely an oversight – the Claimant forgot to correct his timeroll. However, he was instructed to reduce his pay and he failed to comply. The Carrier asserts that he was dishonest when he left work early without correctly reporting his time worked, and he compounded this act of dishonesty when he failed to amend the timeroll as instructed.

In the Board's opinion, this case has more characteristics of indifference, lack of communication, and perhaps, ill-will, than the dishonesty attributed by the Carrier. First, without question, the Claimant was negligent when he decided to leave early for a doctor's appointment without the permission of his supervisor. Therein, he violated MWOR 1.15. "Employees must not leave their assignment . . . without proper authority."

Second, his violation of MWOR Rule 1.15 was exacerbated by Mr. Lowry's failure, either thoughtlessly or malevolently, to apprise Track Supervisor Richey that the Claimant had told him he was leaving early for the appointment. "Bill asked me where's Eddie, and I said I don't know, I think he's outside. He says, I just seen him driving off in his truck." (Lowry's account). "I asked Andy [Lowry] then where Geer was going. He told me he didn't know." (Richey's account). Leaving for an appointment with a doctor for treatment of an on-duty injury which occurred some three weeks earlier suggests a reasonable cause for his leaving, although he should have obtained permission. But leaving without giving any reason on the afternoon before two holidays connotes the theft of time suggested by the Carrier.

Third, the Claimant should have voluntarily instructed Mr. Lowry, on December 30, to dock his pay, since Mr. Lowry was making the payroll entries, or he should have entered the time himself. This he did not do. Perhaps he thought it didn't matter because he testified that he occasionally did not charge the Carrier for 10 or 15 minutes overtime. "I wasn't even going to charge them overtime that day. It was like 10 or 15 minutes, but he had told me that I had to put in overtime on the 7th for some reason and, you know, I usually don't. 10, 15 minutes, I usually don't charge the Company that." (Transcript Page 30). The Board believes that time worked should be accurately reported, whether overtime, tardiness, or an early quit, unless authorized to report differently by proper authority. In any event, whether the timekeeping entailed overtime or an early quit, as the Lead Welder the Claimant was responsible for the accuracy of the time

report. If he does not make the entries himself, he must examine them before the close of the reporting period to ensure their accuracy.

Fourth, the issue might not have eventuated in a disciplinary proceeding if the time had been corrected on the morning of January 2, 2003. The indifference by both the Claimant and Mr. Lowry at that point in time is inexplicable. It is clear that each of them expected the other to correct the record, if one believes they both were truthful. Mr. Lowry had just completed entry of their pay for the two holidays and was perusing his e-mail. If the Claimant directed him to amend the payroll entry for December 30, as he said he did, he should have obtained a positive response from Mr. Lowry, such as "Okay" or "Alright" or "I'll do it." This did not occur, nor does the statement which was signed by three absent witnesses indicate that there was any response from Mr. Lowry. Still, if the Claimant had reviewed the payroll entry for the pay period, he would have known whether or not the entry had been made,

Fifth, the Claimant pleaded that he was not trained in payroll reporting, and at one point, said, "I really don't know how to get in there and look to see how my pay is." (Transcript Page 28). If this statement is true, and in view of the fact that, as Lead Welder, he is ultimately responsible for the accuracy of the payroll entries, he should have taken the initiative to acquire the necessary proficiency in the computerized payroll system used by the Carrier. At the very least, he should have required Mr. Lowry or some other person familiar with payroll accounting to make the data available to him.

The Board is persuaded that it does not really matter whether the Claimant told Mr. Lowry to correct his payroll entry. If he told him and Mr. Lowry didn't hear, or chose to ignore the instruction, it was still the Claimant's responsibility to follow up to ensure the correction was made. But Mr. Lowry, when he is entering payroll data, assumes a responsibility of his own. He cannot knowingly enter incorrect data, and then plead that no one told him what to do. First, he was aware that the Claimant had a doctor's appointment on December 30 and planned to leave work early, but he nevertheless knowingly entered eight hours for the Claimant and did not take the initiative to inquire whether he should enter the actual time worked. Second, he admitted that he overheard Track Supervisor Richey direct the Claimant to dock himself for ten minutes, yet he again failed to take the initiative, although he had already accessed the payroll system to input their pay for the two holidays, December 31 and January 1. Again, the Claimant also failed to follow through, if he did tell Mr. Lowry to dock his time, to ensure the job was done.

Clearly, the Claimant put too much trust in his fellow employee. He violated MWOR 1.6, if not because he was dishonest (we cannot know the intentions of his heart), but because he was negligent in ensuring that the payroll entries had been made and made accurately. He violated MWOR 1.15 when he left his assignment before the end of his shift without proper authority.

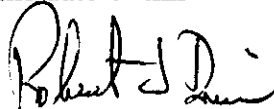
The only remaining issue, in the Board's eyes, is the quantum of discipline. The Carrier relies on its Policy for Employee Performance Accountability (PEPA), which provides, "A second serious incident within a 36-month review period will subject the employee to dismissal." The Claimant was given a suspension in August, 2000, for giving false information in an investigation, which is indeed a serious violation. Gross dishonesty in communicating with Carrier officials is defined as a dismissible offense. Theft, even the first instance, is a dismissible offense, according to the PEPA. While the Board does not know the circumstances surrounding the previous disciplinary assessment, it does have the record in the instant case.

These are indeed serious charges, if proven. Discipline is certainly warranted for leaving his assignment without permission. The circumstances of his failure to correct his time report is less clear. The Claimant demonstrated considerable negligence in his payroll handling, but the role played by his fellow employee, Mr. Lowry, mitigates the gravity of his offense.

The Board believes a lengthy separation from service is warranted, but permanent dismissal cannot be supported under the doubtful circumstances of this case. The Claimant should be restored to service on a last chance basis, with his seniority and other rights unimpaired, but without pay for time lost.

AWARD

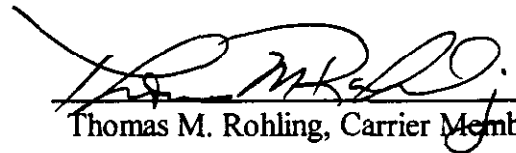
The claim is sustained in accordance with the Opinion. The Claimant shall be returned to service within sixty (60) days from the date of this Award.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member

July 14, 2003
Date