PUBLIC LAW BOARD NO. 4244

Award No. 299
Case No. 305

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 when on October 31, 2002, Mr. T. D. Barrett was issued a Level S 42-day Actual Suspension for violation of Maintenance of Way Rules 1.6 and 1.13 and violation of Engineering Instruction No. 2.8.1.

2. As a consequence of the Carrier's violation referred to above, Mr. Barrett shall be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss commencing September 23, 2002, continuing forward and/or otherwise made whole. [Carrier File No. 14-02-0261. Organization File No. 180-13D2-028.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. Tadd D. Barrett, is a career employee of the Carrier. having been hired in 1974. He was assigned as Track Supervisor at Needles, California, on September 1 and 2, 2002. Track Supervisors are monthly rated employees, and excepted from the application of certain Collective Bargaining Agreement Rules. Their designated assigned hours and rest days may vary from day to day or week to week. At the time this dispute arose, however, the Claimant was assigned to work from 8:00 a.m. until 4:30 p.m., including a meal period.

On September 23, 2002, he was removed from service and issued a notice of investigation on the following charges:

> [O]n September 1, 2002 and September 2, 2002 you allegedly failed to conduct heat patrol as instructed. Additionally you allegedly falsified time records when you allegedly paid yourself for 2 hours of overtime on September 1, 2002 and 9 hours of overtime on September 2, 2002

In connection with the above allegations, he was charged with violation of Maintenance of Way Operating Rules (herein, "MWOR") 1.6 and 1.13, and Engineering Instruction No. 2.8.1.

The investigation was originally set for October 1, 2002, but postponed to and held on October 8, 2002, at the request of the Organization's General Chairman.

The Claimant testified on his own behalf, and his wife also appeared as a witness and offered testimony concerning starter trouble the Claimant was experiencing with his assigned Carrier vehicle. Assistant Roadmaster Gary Bounous, Roadmaster Jimmy Capps, and Track Supervisor Michael Walters appeared as Carrier witnesses, providing testimony and evidence. A transcript of the investigation appears in the record before this Board.

The testimony and evidence addressed the work performed by the Claimant on September 1 and 2, 2002, with particular attention to the requirements of Engineering Instruction No. 2.8.1, and a letter issued by the Carrier's Division Engineer. This Engineering Instruction and the letter were not introduced as exhibits, but those who testified were conversant with them and made reference to them from time to time. From the transcript of their testimony, the Board concludes that the letter reads something like this:

> When the ambient temperature exceeds 100 degrees Fahrenheit, all main track must be inspected daily. [Transcript Page 103]

Engineering Instruction 2.8.1, captioned "Hot Weather," reads:

> The Division Engineer (or AVP Line Maintenance) determines the ambient temperature at which employees will increase their routine track inspections and communicates this requirement to M/W employees before the warm season.
>
> When the ambient temperature reaches or exceeds this threshold temperature, inspect the following track every day between noon and 8:00 pm, or as instructed by the Roadmaster.
>
> - Track where speed limits exceed 40 MPH
> - Track where unit trains operate at speeds over 25 MPH
> - Other tracks as instructed by the Roadmaster
>
> 1. Watch for:
>
> - "Kinky" or "snakey" rail, or running rail
> - Churning ties and ballast

2. Pay particular attention to:

   - Recently disturbed track
   - Track at the bottom of sags
   - Locations where heavy braking occurs
   - Fixed objects such as turnouts, bridges, and crossings

3. Look for the following substandard conditions:

   - Nonstandard ballast section. Pay particular attention to turnouts, crossings, and bridges.
   - Nonstandard anchor pattern. Check the solid pattern at railroad crossings, at turnouts where CWR butts up to bolted rail, etc.
   - Tight rail conditions. Look for alignment deviations, gauge variations, rail rising out of the plates, and joints that are tight during cooler weather.
   - Weak track conditions, such as a cluster of defective ties that will not hold alignment gauge and/or surface.
   - Poor surface conditions, which can result from the previous substandard conditions.

If in doubt, cut the rail and relieve the stress.

The Claimant testified that he did not patrol all the main track in his designated territory on September 1 and 2 because, according to his temperature readings, it did not exceed 100°F. on either day.

An internet weather history for the airport at Needles was placed in evidence by Roadmaster Capps, which indicates the maximum temperature recorded during the day. This exhibit shows 109.9°F. on September 1, and 111°F. on September 2. The Claimant's Representative offered into evidence a different weather history, also obtained from an internet site, showing the maximum temperatures on the same two days in the general vicinity of the Claimant's work area:

Twenty Nine Palms, CA	Sept. 1, 2002 — 100.9°F.	Sept. 2, 2002.— 100.4°F.
Needles Airport, CA	Sept. 1, 2002 — 109.9°F.	Sept. 2, 2002 — 111.0°F.
Barstow-Daggett, CA	Sept. 1, 2002 — 102.0°F.	Sept. 2, 2002 — 106.0°F.
Las Vegas/McCarran, NV	Sept. 1, 2002 — 104.0°F.	Sept. 2, 2002 — 104.0°F.

Although there were no official temperature readings for the specific area assigned to the Claimant, between Danby and Ludlow, California, in the Mojave Desert, there is testimony in the record suggesting conclusions that might be drawn from these known temperatures:

Assistant Roadmaster Bounous said, "It's usually a little warmer out around the Cadiz and Amboy area." (Transcript Page 19). Cadiz and Amboy are locations on the railroad between Danby and Ludlow.

Roadmaster Capps said, "It's always three to four degrees hotter in Saltus." (Transcript Page 46). "It's three to five degrees hotter there between Cadiz, Saltus, Amboy because it's in a big hole. It's in a valley and it's hotter." (Transcript Page 49).

Track Supervisor Walters, who was patrolling the track and performing a heat inspection on the adjacent territory, was asked what the ambient temperature was on September 1 and 2. He said, "It was probably somewhere in the area of 115, plus or minus a couple degrees." (Transcript Page 58).

Only the Claimant presented countervailing testimony. He said, "Needles is much hotter than it is out there." (Transcript Page 99).

The Claimant testified that although he did not patrol his territory because the temperature did not rise above 100°F., he did inspect track on foot and checked the gauge on curves where concrete ties were installed, on Sunday, September 1. He said that he did generally the same work on Monday, September 2, a holiday, and also inspected several other points on both days that he said he was worried about in hot weather.

Roadmaster Capps testified that since Monday, September 2, was a holiday, the Claimant should not have been on duty at all, unless he was complying with Engineering Instruction 2.8.1, patrolling the track because the temperature was above 100° . The Claimant said he actually worked eleven hours on that date, 6:45 a.m. until 5:45 p.m., but he reported nine hours at the overtime rate, and at the same time asserted that he did not patrol the track because it was not hot enough, but he inspected certain locations that concerned him when it was very hot.

The Claimant had two temperature recording devices in his possession. He listed the following temperature readings on these two dates in his "Daily Record of Events":

September 1	0800	81°	September 2	1015	88°
	1230	96°		1130	93-94°
	1500	98°		1445	98°

On October 31, 2002, a letter was sent the Claimant by UPS Overnight Delivery, by the Division Engineer, advising the Claimant that as the result of the investigation, he was issued a Level S suspension of 42 days, from September 23 until November 3, 2002. He was also disqualified as a Track Supervisor, for violation of MWOR 1.6 and 1.13, and Engineering Instruction No. 2.8.1. He was directed to return to work on November 4, 2002, and the letter further noted that, in assessing discipline, consideration was given to his personal record. The MWOR's 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.

The Organization promptly appealed the Carrier's disciplinary decision. The Organization raised a procedural issue which must first be addressed. It states that the Claimant was removed from service on September 23, 2002, pending the investigation, held on October 8, 2002. The notice of the disciplinary decision was not received by either the Organization nor the Claimant until November 19, 2002. On November 11, however, the Claimant was returned to service, and then told only that he should make a displacement on a Foreman's position.

The Organization argues that Agreement Rule 13(a) requires that the investigation and issuance of discipline shall be held and issued promptly, and that Agreement Rule 13(b) states that employees being withheld from service shall have their investigation and results of the investigation within 30 days from the date removed from service.

The Carrier rejoins that the investigation was held only 15 days after the Claimant's removal from service, and the notice of discipline was issued on October 31, 2002, which is 23 days after the investigation closed. Because there was no response from the Claimant, he was

contacted on November 11 and asked what he intended to do. The Carrier states that there is no fatal flaw which would cause the discipline to be set aside.

The Discipline Rule in the Agreement between the Parties reads as follows, in pertinent part:

> 13 - (a) - Investigations. . . . [N]o employee who has been in service more than sixty (60) calendar days will be disciplined without first being given an investigation, which will be promptly held, . . . Decisions on investigations will be rendered as promptly as possible.
>
> 13 - (b) - Holding Employees Out of Service Pending Investigation. 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.

The dates of the alleged violations were September 1 and 2, 2002. The Claimant was not taken out of service until September 23, the same date the notice of charges was mailed, and the investigation was set for October 1, just eight days later. It was postponed at the Organization's request, and held on October 8, fifteen days after the Claimant was withheld. This met the requirement in Agreement Rule 13(b), which requires that the investigation be held within 30 calendar days after the date of suspension.

The notice of discipline was sent by UPS overnight delivery on October 31, 2002, twenty-three days after the close of the investigation. Agreement Rule 13(a) states, "Decisions on investigations will be rendered as promptly as possible." Although "promptly" is an inexact word which has been the subject of more than a few arbitral definitions, the Organization argues here that this Board has already defined "promptly" to mean 30 days. But the Organization argues that the results of the investigation will be issued within 30 days from the date the employee is withheld from service. The Board does not concur with that construction of Agreement Rule 13(b). The applicable phrase reads, "pending result of investigation which will be held within thirty (30) calendar days of date of suspension." Clearly, it is the investigation, not the result, which must be held within 30 days. If the investigation is held within 30 days, the quoted requirement has been met. The result is still pending, and the last sentence in Agreement Rule 13(a) then comes into play. "Decisions on investigation will be rendered as promptly as possible." "Promptly," again, is an inexact term, whose definition may vary from one circumstance to another. A prompt response to a 911 call demands action more immediate than a prompt response to a past-due bill notice received from an attorney. Each must be acted upon, promptly, but the parameters of the "prompt" responses differ. *Blacks's Law Dictionary*, Sixth Edition (1991), expresses these distinctions in its definition of "promptly":

> Adverbial form of the word "prompt," which means ready and quick to act as occasion demands. The meaning of the word depends largely on the facts in each case, for what is "prompt" in one situation may not be considered such under other circumstances or conditions. To do something "promptly" is to do it without delay and with reasonable speed.

In the instant case, the investigation was held within the time limit expressed in Agreement Rule 13(b). The decision was issued 23 days later, not unreasonably late, in the Board's opinion. The Carrier provided a tracking report obtained from UPS, which shows the decision was delivered at 11:23 a.m. on November 1, 2002, the day after it was written. The Organization contends that it was not received until November 19, but even if that is correct, the Carrier is not a guarantor of delivery, when it places a letter in the hands of an established delivery service such as UPS, FedEx, Airborne, or USPS, for example. See Third Division Awards 11505, 28504, 32037, 33320, and 35772. The Board finds no merit in the Organization's procedural issue.

Turning to the merits of this case, the Board notices that it is the Organization's position that the Claimant was simply performing his assigned duties on the two days in question. On September 1, the record confirms that he was doing on-track inspections between the hours of 8:39 a.m. and 10:58 a.m., according to the Carrier's own record of track and time occupancy by the Claimant. The Claimant drove by road to other sites to inspect curves and "problem locations," the Organization states. Although Assistant Roadmaster Bounous testified that he was unable to contact the Claimant at any time on September 2 — he said he called without success about 8:00 a.m. by cellular telephone and on the mobile telephone in the Claimant's truck; between 10:00 a.m. and 11:00 a.m. by the same telephones; and about 2:00 p.m. he asked the dispatcher if the Claimant had contacted him that day, receiving a negative answer — the Organization states he agreed there is poor communication in the area in which the Claimant was driving. Mr. Bounous acknowledged that there are problems with cell phones in that area, and that is why he also attempted to reach the Claimant on the mobile telephone on his assigned vehicle. But the Claimant's assigned vehicle did not start on September 2, the Organization points out. He had his wife drive him to the Carrier's office in Needles and he drove a different Carrier truck. This explains why Mr. Bounous could not contact the Claimant on his mobile phone, because he did not know the Claimant was not using his assigned vehicle.

The Organization states that Mr. Bounous believed the Claimant was working on September 2 and he did not drive out to the work area nor did he telephone the Claimant's home to confirm that he was indeed on duty.

The Organization concludes that the Carrier has provided no testimony or evidence that clearly proves the Claimant did not perform his assigned duties on September 1 and 2, 2002. The Carrier's evidence is solely speculative. The Claimant's wife testified that she took him to get another truck on September 2, and he left for work. The Organization argues that this substitute

vehicle was not fit for running on the track, so the Claimant drove to the problem locations and inspected them on foot.

The Carrier states that the evidence shows that the Claimant did not apprise his superiors that he was having trouble with his vehicle and would be using another. He did not patrol the track as he was required to do when the heat rose above 100° . Although the Claimant testified that the temperature did not reach that level, the evidence indicates otherwise.

The Carrier asks why the Claimant would have reported to work at 6:45 a.m., as he testified, on a holiday (September 2) when heat inspections are not required to be made before 12:00 noon. The Carrier believes that the Claimant did not work at all on September 2, and that he prepared his Daily Record of Events at a later date to cover all the defenses he offered in his testimony. When the ambient temperature exceeded 100° on both dates, September 1 and 2, the Claimant was required to operate his vehicle on the tracks, covering both main tracks in his assigned territory. This he did not do, as the Dispatchers' record of track and time permits did not reflect any on-track movements by the Claimant after 10:58 a.m. on September 1.

The Carrier further argues that if the Claimant used a substitute vehicle, he should have notified the Roadmaster so they would know the substitute vehicle had not been stolen, and so they would know how to communicate with the Claimant if his cellular telephone was not responsive.

The Carrier further argues that the Claimant claimed overtime that he was not entitled to. It states that under the Agreement, Track Supervisors are due overtime only when performing work that is not considered their normal work. Their normal work is inspecting track, switches, etc., during assigned hours. He is entitled to overtime only when such inspections are done outside their assigned working hours. Patrolling the track would be such an occasion, when the temperature exceeds 100° between 12:00 noon and 8:00 p.m. On both dates, the Claimant asserted that he was inspecting because of the heat, but also argued that the heat did not exceed 100°. The Carrier concludes that the Claimant did not patrol the tracks in his territory between 12:00 noon and 8:00 p.m., although the ambient temperature did exceed 100°. Despite that fact, he claimed overtime for doing heat inspections, by walking the track at certain locations, because the heat, he said, was nearing 100°. The Carrier argues that the Claimant cannot have it both ways, and it concludes, "He can't allege it wasn't hot enough to require heat inspections and then put in for overtime under the theory that 99 degrees is close enough."

The Board has carefully studied the lengthy transcript and the arguments of the Parties, and concludes that the Carrier has the better position, for the following reasons. The Claimant may have been at work on these two dates, as he said, but there is evidence to indicate that he was not there on September 2, 2002. He did not respond to any efforts to contact him all day long, nor did he contact anyone, as far as the record shows.. He offered a reason for that, but if

his cellular telephone was not working in this remote area, and he was not using his assigned truck, it was his responsibility to take the initiative to let his supervisors know where he was and what he was doing. He did not converse with Track Supervisor Walters, who was patrolling the adjacent territory. As far as the record shows, he did not contact any living soul except, he says, the crews of passing trains after he inspected their passage.

The Claimant testified that he drove to various locations on the afternoon of September 1 and all day on September 2, to make inspections by foot. His regularly assigned truck was in operating condition on September 1, the record shows. The Claimant justified his inspections because of heat, but denied there was sufficient heat to require the inspection required by Engineering Instruction No. 2.8.1. The Board notices the following testimony when the Claimant was questioned about his work day on September 2, and offered this testimony:

> Q. So back to September 2nd, 2002. You charged nine hours of overtime for – if I'm understanding you correctly, for some various curve inspections. I think you inspected three curves or so and also put some bolts in on the Y at Ash Hill?
>
> A. Yes.
>
> Q. Is that in line with the policies for overtime or were you out there for heat patrol?
>
> A. I had gone out there to keep track of the heat. I can't keep track of the heat when I'm in Needles. I had to drive out there. Since I was out there, I mean, I was going to go out there and try and get other things done that were due that month.
>
> Q. Okay.
>
> A. Those were my curve inspections. Just trying to keep up on all the other – trying to keep up.
>
> Q. Did you get authority to work the overtime to do the various curve inspections or was the overtime authorized to do heat inspections only?
>
> A. Well, I was out there waiting to see if it got hot enough to have to run track. [Transcript Pages 99-100].

Assistant Roadmaster Bounous testified that the Claimant called him on September 3, asking permission for a day off to consult a dentist. In the course of their conversation, Mr. Bounous asked, "Did you run your track yesterday?" The Claimant answered, "Yes." Mr. Bounous was later asked if the Claimant said how he patrolled his tracks. He testified that the Claimant said he Hi-Railed his track. If Mr. Bounous's testimony is true and correct, the Claimant was not truthful. The Claimant, later in the investigation, testified that he did not Hi-

Rail his territory, but drove by road and inspected track by foot. Of course, it is clear that he could not cover his entire territory by foot in 100+° temperatures, something like 60 miles, with two main tracks, and those separated at one or more points.

The Board is persuaded that the temperatures considerably exceeded 100°F. on both days, based on the temperature readings in the surrounding area and the testimony, particularly, of Track Supervisor Walters, on adjacent trackage in the Mojave Desert. By his own testimony, the Claimant said he did not patrol his territory as required by Engineering Instruction No. 2.8.1. (Although the Instruction says nothing about "Hi-Railing," that is the only practicable way to patrol all of the main tracks on all of the territory). Such travel is the only reason that he should have accrued overtime compensation. Furthermore, he had no plausible reason for going to work at 6:45 a.m. on September 2. The Board is not as certain as the Carrier that the Claimant did not work at all on September 2, but if he did, the work was not authorized and he did not properly inspect his track as required by Engineering Instruction No. 2.8.1. The quantum of discipline does not warrant any reduction or modification. The offenses here might have called for dismissal, and if a train derailment had occurred because of buckled track due to failure to inspect, the outcome could have been disastrous and expensive. The claim is denied.

AWARD

The claim is denied.

Robert J. Irvin, Neutral Member

R. B. Wehrli, Employe Member

Thomas M. Rohling, Carrier Member

July 14, 2023
Date