

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, Mr. E. M. Corchado was issued a Level S 10-day Record Suspension with 2 Year Probation for violation of Maintenance of Way Operating Rules 1.13, 1.14, and 1.15.
2. As a consequence of the Carrier's violation referred to above, Mr. Corchado shall be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss commencing December 20, 2002, continuing forward and/or otherwise made whole. [Carrier File No. 14-03-0008. Organization File No. 190-1311-0213.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. Emilio M. Corchado, entered the Carrier's service on April 15, 1996. He was a regularly assigned Maintenance of Way Foreman in Richmond, California on Friday, October 18, 2002, when the events which resulted in this disciplinary proceeding began. On that date, he engaged in a telephone conversation¹ with Ms. Becky Nicks, an employee in the Carrier's Maintenance of Way Manpower Planning Office, who advised him that he was being displaced ("bumped") by a senior employee, Mr. Sam Fields. Mr. Fields, however, was going to be retained temporarily at his current location to train another employee. Ms. Nicks offered the Claimant two options. He could remain in place on the Foreman position in Richmond, or he could proceed to

¹This telephone conversation and a subsequent conversation on Monday, October 21, 2002, were recorded on tape, and that tape was placed in evidence by the Claimant's representative at an investigation afforded the Claimant on December 2, 2002.

displace ("place his bump") a junior employee elsewhere. The seeds of this dispute are found in their discussion on that Friday:

MR. CORCHADO: Now, if I wanted to take Monday off, I can take Monday off?
MS. NICKS: Sure.
MR. CORCHADO: Since I got bumped?
MS. NICKS: Yeah.
MR. CORCHADO: Without getting in trouble?
MS. NICKS: Yeah. Without get in trouble. You've got seven days to place a bump.

After some discussion about the financial implications of his decision, their conversation continued:

MR. CORCHADO: Let me think about it. But I'm about 90 percent sure. I'll take Monday off. I'll call you Monday morning and tell you –
MS. NICKS: You tell me – I'll tell you what to do. If you decide to take Monday off, you call me. If you want to report to Richmond, report to Richmond. Let me know.
MR. CORCHADO: What was that?
MS. NICKS: If you want to work Monday, just go ahead and report to Richmond, call me and we'll place your bump and we'll do it that way. Okay?
MR. CORCHADO: Okay. If I don't decide to work on Monday, then I'll call you from home.
MS. NICKS: Yeah. And just let me know –
MR. CORCHADO: On Monday, let you know that I'm going to make a bump or go to Richmond.
MS. NICKS: That would be great. Okay?
MR. CORCHADO: Okay. Well, thank you very much.

Each morning, Roadmaster Phil E. Heusler, whose territory includes the Richmond area, presides over a conference telephone call with his subordinate Track Supervisors and other employees concerning the day's work. On Monday, October 21, the Claimant did not report for his job at Richmond, and that fact became known to Mr. Heusler. In the course of his telephone conference with Track Supervisors Kevin Self, Adam Sorensen, and James Ridgway, he instructed Mr. Ridgway to contact the Claimant to find out why he was not protecting his position in Richmond.

Without Mr. Heusler's knowledge at the time, the Claimant was listening to the conference call on his telephone at his home. When he overheard Mr. Heusler's instruction to Mr.

Ridgway, he made his presence known. Mr. Heusler told him not to leave a job unprotected. He directed the Claimant to proceed to Richmond as soon as possible and to call him when he arrived. Mr. Heusler said that the Claimant seemed somewhat confused about the order, and protested that he was going to place a bump and had been told he could stay home. Mr. Heusler said, according to Track Supervisor Self, "I didn't tell you to stay home. I said go to Richmond now and call me when you get there." He asked if the Claimant understood. He received an affirmative answer from the Claimant. The other three parties to the conversation, the Track Supervisors, confirmed the sense of this discussion in their own words, essentially the same facts. They felt Mr. Heusler's directions were clear. Although Mr. Heusler characterized the Claimant's initial reaction as "confused," Mr. Ridgway described it as "hesitant."

Following this directive from Mr. Heusler, the Claimant again called Ms. Nicks, and in this recorded conversation, he acknowledged that he understood the instruction given him by Mr. Heusler. Part of their dialogue was as follows:

MR. CORCHADO: Well, I'm here at home.

MS. NICKS: Okay.

MR. CORCHADO: I took the – I thought I was going to take my day off.

MS. NICKS: I thought you were planning on that maybe Friday when I talked to you.

MR. CORCHADO: Yeah. But I was on a conference call. I just jumped on it just to hear what was going to go on, and then when the conference call was over with, then Phil Heusler's going (Inaudible).

He kept asking for me and asking for me out at Richmond. And just my guys jumped on. So I figured why am I going to have Jim [Ridgway] go through all that bullshit.

MS. NICKS: Yeah. True.

MR. CORCHADO: Ridgway. So when I'm on the call I said, "I just want to let you know I got bumped by Sam Fields on Friday."

"Well, you know Sam Fields ain't there, is he?"

I said, "Well, no he's not."

He said, "Well, then you high tail your ass to Richmond."

I said, "Well, sir, I talked to Becky on Monday – Friday, and I'm just taking the day off 'cause I got to call her up and see where to go."

"He ain't gonna be there. Do you know where he's going to be?"

I go, "No, I don't."

He goes, "Well, you have to be in Richmond until his body is physically there."

I'm like, okay.

MS. NICKS: Okay. So are you going to go or not?

MR. CORCHADO: Do I have to?

MS. NICKS: You don't have to. You've got seven days to place a bump. Legally the instructions on my wall says you don't have to fill that job unless somebody's off (Inaudible). And I don't have any (Inaudible) for foreman. So that's up to you.

After further extended discussion of potential displacements the Claimant might have available, the conversation concluded with the Claimant's advice that would take the rest of the day off on Monday and report at Richmond on Tuesday to finish the week out. He asked Ms. Nicks to call Mr. Heusler to apprise him of this decision, after receiving further assurances from her that he would not get into trouble.

The following day, October 22, the Claimant was notified to attend a formal investigation to determine the facts and circumstances concerning his failure to follow the instruction given him on October 21 to proceed to Richmond and call the Roadmaster when he arrived. The notice referred to possible violation of Maintenance of Way Operating Rules (MWOR) 1.13, 1.14, and 1.15, which read as follows:

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 1.14

Employees are under the jurisdiction of the supervisors of the railroad they are operating on. When operating on another railroad, unless otherwise instructed, employees will be governed by:

- Safety rules and hazardous materials instructions of the railroad they are employed by.
- The operating rules and timetable/special instructions of the railroad they are operating on.

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 preceding accounts of the events on October 18 and 21, 2002, including the dialogue in the tape recording of the Claimant's conversations with Ms. Nicks, are drawn from the transcript of the investigation afforded the Claimant, which was held on December 2, 2002. The Claimant was very competently represented by his Organization's Local Lodge Representative. In his cross examination of Mr. Heusler, a salient issue was addressed:

Q. On Friday, October 18th, Mr. Corchado was notified by manpower that he was being displaced by Sam Fields and you didn't hear anything about that until Monday?

A. That's correct. He was also notified on October 18th, he was aware Mr. Fields would not be reporting on that Monday. He did not inform me of that.

Q. Also, once an employee is being displaced, bumped, you know he has seven days to make a bump or make a request of where he wants to go?

A. Yes.

Q. And do you know that he doesn't have to show up to work during that seven days?

A. He shouldn't have gotten on the call then.

Q. Also, once Mr. Corchado was notified by manpower that he was being displaced, he no longer worked for you, he wasn't in your jurisdiction?

A. Yes, he was under my jurisdiction. I'm a company officer, he was attending my conference call and if I give him instructions that conflict with other instructions or other directives that he has received, then it's his obligation to inform me that he has conflicting information and we should get to the bottom of it, rather than saying that he understands and is going to comply with my instructions and do exactly the opposite

The Claimant acknowledged several times during his testimony that he clearly heard and understood the orders given him by Mr. Heusler. Near the end of his testimony, he presented these responses:

Q. When you were notified by Mr. Heulser [*sic*] the morning of the 21st to report to Richmond, California, we touched a little bit on this, but at any time did you tell him about your conversation with manpower and explain your point of view and why you didn't feel it necessary to report to Richmond, California?

A. I tried.

Q. Okay.

A. I tried to tell him that I had spoken to manpower. But it didn't really – he was – he wanted me in Richmond and that was it. But I did try to tell him. I spoke with manpower and got bumped and I'm taking today off. And to him it was no. You start traveling to Richmond and call me when you get there.

Following the close of the investigation, on December 20, 2002, the Claimant was notified that as the result, he was being issued a Level S ten-day record suspension for violation of the three rules with which he was charged, for failure to follow the instructions given him by Roadmaster Heusler, and assigned a two-year probationary period, during which time, if he committed another serious rule violation, he would be subject to dismissal.

This disciplinary decision was promptly appealed by the Organizations's General Chairman. It was the Organization's position that when the Claimant was notified of his displacement by the Manpower Planner at the close of the day's work on Friday, October 18, the Claimant no longer held his former position as Foreman at Richmond, California. At that point, pursuant to Agreement Rule 3(c), he had seven days in which to make a displacement. The Organization contends that the Claimant was no longer under the jurisdiction of "Local Carrier Management (Roadmaster Heusler)," but rather subject to the Carrier's Manpower Planner. It was thus arranged that the Claimant would take the day off work without pay on Monday, October 21, and contact the Planner (Ms. Nicks) on that day to advise his displacement plans.

The Organization acknowledges that when Mr. Heusler told the Claimant he needed a Foreman in Richmond on Monday, he should have informed Mr. Heusler he no longer held that job and did not have to follow his instructions. Instead, he called Ms. Nicks and was again told he did not have to report at Richmond. She told him that she would notify Mr. Heusler and so inform him. The Organization states that it was then the Claimant's understanding that he did not have to go to Richmond until the following day. The Organization concludes:

Most of the problem revolves around the Carrier's internal debate as to who is the controlling party of manpower for the Carrier. Employees and the Carrier's Manpower Planners have been informed over and over again that employees can only be held by Assistant Vice President of Line Maintenance and not Local Management. Until this internal debate among the Carrier's Officers is resolved and answered, Employees will continue to suffer, as is the case here.

The Carrier rejoins that although the Claimant may have felt that he was displaced effective Monday morning, October 21, he received clear, concise instructions from his Supervisor to report for work, and he failed to do so. Even if, as the Organization argues, the Claimant did not work for Mr. Heusler, that does not mean that he does not have to do as instructed. The Carrier states that this goes to the very core of the manager-employee relationship. Employees have always been required to do as instructed. If he felt that this was a violation of the Labor Agreement, he could then progress a claim or grievance. The Carrier argues that the discipline assessed was warranted and in line with its Policy for Employee Performance Accountability.

The Board has carefully studied the lengthy transcript of testimony and evidence taken at the investigation, and considered the arguments presented by the Parties. While the volume of the

record suggests this case is of great complexity, analysis of the evidence simplifies the issues. The Board could examine the interesting question of whether a displacement is effectuated when an employee is physically replaced by the senior employee, or whether constructive notice of the intended displacement determines the date, hour, and minute of displacement. It is not necessary to delve into that puzzle. The Board is, first, struck by the fact that the Claimant could believe that he need not show up at work on Monday without notice to the Roadmaster that he would be absent, regardless of the exact moment of his displacement, and that the Foreman's job would not be filled.

Second, the Board is struck by his cavalier decision to disregard a direct order given him by an officer of the Carrier, particularly after he acknowledged receipt and understanding of that order. If he believed the order was improper and/or without authority, at the very least, he could have protested the validity of the order. Nevertheless, without regard to the appropriateness of the order, he was obliged to comply with it. This Board discussed a similar issue in its Award No. 267, wherein we said:

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.

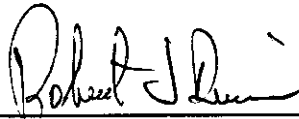
But, the Board is not at all persuaded by the Organization's argument that the Claimant was no longer under the jurisdiction of the Roadmaster. As an employee of the Carrier's Maintenance of Way Department, not having bothered to apprise Mr. Heusler that he had not been physically displaced at Richmond, and as a participant in the conference call, he was, indeed, subject to Mr. Heusler's supervision. When he was given an order by Mr. Heusler, he elected not to challenge the order, but to indicate compliance; whereupon, he turned to Ms. Nicks and asked her to tell Mr. Heusler he wasn't going to comply with his order!

The Board is not indifferent to the potential quandaries posed by what the Organization characterizes as an "internal debate" regarding the respective authority of the Manpower Planning Office and local supervision. But this is not a case in which the Claimant was directed by the Manpower Planner to do one thing and directed by the Roadmaster to do something different. Ms. Nicks gave the Claimant the discretion to take seven days off or to report at Richmond, as he chose. The Roadmaster gave him a direct order. That familiar aphorism which this Board defined in Award No. 267, above, "Obey now, grieve later," should have directed the Claimant's steps at that point.

The Board determines that the discipline in this case is not an abuse of the Carrier's discretion, and is appropriate under the circumstances. The Claimant might have been charged with insubordination for his refusal to carry out the order given him, in light of his acknowledgment that he understood, and then his failure to act upon the order without further word. It may be that the greater charge of insubordination was not imposed because the Claimant was whipsawed by the poor advice given him by the Manpower Planner. It is surprising that she did not encourage him to keep his immediate superiors advised of his intentions in the interest of keeping all positions covered. The claim remains denied.

AWARD

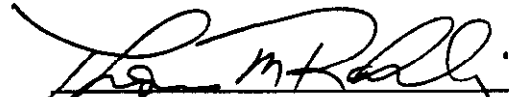
The claim is denied.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member

July 14, 2013

Date