

PUBLIC LAW BOARD NO. 4244

Award No. 328
Case No. 335

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 April 1, 2004, when it withheld the Claimant, Mr. E. G. Burgess, from service and subsequently issued him a 42-day actual suspension for allegedly failing to provide proof of ownership of a trailer while drawing Camper Allowance, in violation of Maintenance of Way Operating Rule 1.6, (Conduct).
2. The Agreement was further violated when the Carrier ordered that the Claimant must reimburse Carrier for all Camper Allowance paid between May 20, 2003, and March 19, 2004.
3. As a consequence of the violations referred to in parts (1) and (2), the Carrier shall make the Claimant whole for all wages lost, repay any wrongfully recollected Camper Allowance, and remove any mention of this incident from the Claimant's personal record. [Carrier File No. 14-04-0122. Organization File No. 40-13D2-043.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. E. G. Burgess, was employed by the Carrier in 1977. He was working as a Machine Operator, headquartered at Argentine, Kansas, on April 1, 2004, when he was withheld from service and thereafter given a notice of charges, alleging violation of Maintenance of Way Operating Rule (MWOR) 1.6. The notice of investigation reads, in part,

The purpose of this investigation is to ascertain the facts and determine your responsibility, if any, in connection with your alleged dishonesty in claiming unauthorized compensation while assigned as a machine operator on various mobile gangs between May 20, 2003 and March 19, 2004, by submitting and

receiving compensation for pay code 45 (Camper allowance) without providing proper documentation that meets the requirements for receiving pay code 45; and your alleged insubordination when you refused to cooperate with the BNSF Resource Protection team on March 31, 2004, at approximately 0800 hours to provide proof of ownership that meets the requirement of pay code 45.

MWOR 1.6 reads as follows:

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.

The investigation was held on April 15, 2004. The Claimant was ably represented by the Organization's Assistant General Chairman. A transcript of testimony and evidence entered in the investigation appears in the record before this Board.

Rule 38 - (i) of the Parties' Collective Bargaining Agreement contains the provisions for the "Camper allowance" referred to in the notice of charges. This Rule reads, in pertinent part:

An employee employed in a type of service, the nature of which regularly requires him to perform service away from home station, residence or headquarter's point, as the case may be, who in lieu of an outfit car, hotel or motel, provides his own accommodations such as a camper or trailer (containing bona fide arrangement for sleeping and preparation of meals), or such an employee who may hereafter purchase or replace such equipment, shall be paid a per diem allowance of \$25.00 for each day service is performed on a position listed below:

- (A) All Machine Operators.

The record in this case indicates that the allowance in Rule 38 - (i) had been increased to \$32.00 per day when this dispute arose.

Shortly after April 15, 2003, the Claimant received a letter from the Carrier's Maintenance of Way Timekeeping Manager, requesting certain information required to maintain authorization to be paid the Camper Allowance. That letter read, in part:

Our system shows that you have a camper that was approved by your exempt supervisor. We are updating our records and need to confirm that you still have a company approved camper. The following steps must be completed, to maintain your camper authorization:

- ⇒ Print your name on the enclosed camper allowance form and enter your employee number. Provide the form to your exempt supervisor.
- ⇒ Provide your exempt supervisor a current copy of your camper's registration and title.
- ⇒ Your exempt supervisor will need to inspect your camper to make sure that it meets the prescribed guidelines. The camper allowance form must be signed and dated by your exempt supervisor, to show that the inspection was made.

The record in this case includes a copy of the Camper Allowance form that was executed by the Claimant and his exempt supervisor, Mr. Jeffrey L. Wilken, dated May 20, 2003. Mr. Wilken also appeared as a witness in the investigation. He testified that he had inspected the single-axle trailer¹ at the Claimant's place of residence, and it met the Carrier's requirement that it have a stove, refrigerator, and toilet facilities. He did not obtain a copy of the registration or title because trailers of this weight class were not required to have either registration or title by the state of Kansas. Mr. Wilken was unable to recall whether the Claimant presented him with a copy of a bill of sale. On this point, the Claimant testified:

I discussed it with Mr. Wilkin [sic]. In Kansas I was not required to have a title and registration for the camper. And he said I believe that the inspection will be, we will send it in and, and see what happens is how he worded it. And because otherwise I, if I was, if I would have needed it I would have obtained it. But, he believes, and current law said we did not have to have title and registration in Kansas, that, that his inspecting it would be sufficient. [Answer No. 190]

Mr. Tom M. Moore, a Special Agent employed by the Carrier, testified that on February 5, 2004, the Claimant's former girl friend had called the Carrier's timekeeping department, reporting that the Claimant had been receiving the Camper Allowance, but did not own a camper. Mr. Moore said he talked with this person, identified only as "Renee." He testified that she said that she and the Claimant had broken up and had some conversation about honesty with each

¹The terms "camper" and "trailer" are used interchangeably in the record, and are so used in this Award.

other. He quoted her as saying, "[W]hy then if being honest is so important why was he getting money for this camper that he didn't even own." [Answer No. 173.]

Mr. Moore, accompanied by another Special Agent, Mr. Ronald W. Tilsworth, interviewed the Claimant on March 31, 2004. The testimony of Mr. Moore, Mr. Tilsworth, and the Claimant differed in some respects, but was generally in accord. The Special Agents asked the Claimant to show them the trailer. The Claimant said it was at a friend's house, but he would obtain it and bring it to his own residence, where it could be viewed. The Special Agents asked him to tell them where it could be found, and they would drive by to see it. The Claimant said he did not want to "involve" his friends. He said it was on their private property and he couldn't allow the Special Agents to go on their property to view his trailer. The Claimant reportedly said he did not trust them. They offered to take him with them. He declined, but offered again to get it and tow it to his residence.

When Renee's name came up in their conversation, and the Claimant learned that he had been reported to the Carrier by her, he became angry and uncooperative, and refused to present the trailer for inspection. (He denies that he refused, and was still willing to retrieve the trailer and bring it to a place where it could be viewed.) At the close of the interview, the Special Agents gave the Claimant their cell phone numbers, and suggested he call them if he changed his mind. They said he never called either of them.

Mr. Tilsworth added that the Claimant was unable to offer any proof of ownership when asked to do so.

The Claimant acknowledges that he is unable to provide a bill of sale. He testified that he purchased the camper in used condition for cash and "some trading." Although he towed the trailer to the investigation, where it was viewed by all the participants, he is still unable to furnish documentary proof of ownership. He testified,

I made several attempts to locate the person that I purchased it, or traded with to get it and, and I haven't been able to. They no longer live where they did when I, when I got it. I haven't been able to find them. I, that would be all that I could prove is that they traded it to me, sold it. [Answer No. 198]

On May 14, 2004, the Carrier's Division Engineer wrote the Claimant, advising him of the Carrier's decision as a result of the investigation on April 15, 2004. It found that he violated MWOR 1.6 when he failed to comply with instructions when asked to provide proof of ownership of the camper. The letter also states,

You are hereby issued a Level S suspension of 42 days, time served. Suspension beginning on April 1, 2004 and ending May 18, 2004. In addition you will be

required to reimburse BNSF for the pay code 45 payments you received, but were not entitled to between May 20, 2003 and March 19, 2004, the amount to be determined by Payroll Accounting. Notification of this amount will be within 15 days. You will also be removed from the pay code 45 (Camper Allowance) list. You will not be eligible for pay code 45 unless you provide legal proof of ownership to a camper that meets the criteria set forth by pay code 45.

Additionally, you have been assigned a probation period of three years, which will expire May 17, 2007.

In assessing discipline, consideration was given to your personal record.

The above disciplinary decision was promptly appealed by the Organization to the Carrier's highest designated officer. It argues that the Carrier had attempted to prove that the Claimant had committed an act of theft by accepting the Camper Allowance pay, but had failed to prove that charge, and the discipline assessed was to cover the time he was withheld from service so as to limit its liability.

The Organization further charges that the Carrier has ignored Discipline Rule 13 - (e), in that it failed to supply the Claimant and the Organization with a copy of the transcript before the appeal was filed. The Organization also argues that the time lost from work totaled more than 42 days, as stated in the notice of discipline, which was not issued promptly after the close of the investigation.

The Organization protests that if the Claimant was not authorized to receive the Camper Allowance during the period between May 20, 2003, and March 19, 2004, he nevertheless qualified for Carrier-provided lodging and a meal allowance of \$23.00 per day. It also argues that the Carrier is in violation of Agreement Rule 45, which limits recovery of overpaid monies to 60 days.

Finally, the Organization argues that the trailer which he brought to the investigation was the same trailer that was inspected by Mr. Wilken on May 20, 2003. If the Camper Allowance form submitted by Mr. Wilken was not acceptable to the Carrier, the Claimant's name should not have been accepted for the Approved Camper List. He was accepted and the Organization believes it unfair that the Carrier should deem the evidence of ownership insufficient ten months later. It asks that the claim on behalf of the Claimant be allowed.

The Carrier responds that it developed substantial evidence in the investigation, including the Claimant's own testimony, that he could not prove that he owned the trailer on which he was drawing Camper Pay. It argues that the Claimant did not act like he was innocent of wrongdoing when interviewed by the Special Agents. It states that he should have taken the officers to see the

camper. He should have been able to supply a statement from his friend verifying ownership. To date, the Carrier argues, despite his assertions of ownership, the Claimant has still not offered evidence of ownership.

The Carrier further rejoins that Agreement Rule 45 addresses overpayment of salary, not expense reimbursement, which is materially different. The Claimant cannot prove that he ever stayed away from home during the period in question, and is not due any reimbursement for an expense which he did not incur. The Carrier rejects any and all other arguments raised in the Organization's appeal, and denies the claim in its entirety.

The Board has read the transcript of evidence and considered the Parties arguments as set forth in the record.

The evidence is insufficient to prove that the Claimant was dishonest, as charged, in claiming unauthorized compensation. The notice of discipline dated May 14, 2004, does not allude to dishonesty. No doubt the discipline would have been more severe had he been proven dishonest. The Claimant was proven guilty of violating MWOR 1.6, however, in that he failed to comply with instructions when asked to provide proof of ownership of the camper. Being suspected of dishonesty, the Carrier was within its rights in withholding him from service pending the investigation.

The 42-day suspension is not unreasonable, in view of the evidence. Although the Claimant's reasons for failing to provide proof of ownership are not implausible — Kansas does not require registration nor title for a light-weight vehicle such as this one — his lack of cooperation in establishing ownership by some other means warrants the finding that he failed to comply with instructions. Indeed, his refusal to follow through even after being told that he might call the Special Agents later, makes his ownership suspect. His stubborn refusal to do more to bring about resolution of the matter of ownership did not serve him well.

The Board observes, however, that while he failed to conclusively establish his ownership of the camper, the Carrier has not disproved it, either. Realizing that proof of a negative presents practical difficulties, the Carrier has not shown that the camper was stolen property, nor acquired by dishonest means. The Board gives no weight to Mr. Moore's testimony concerning his telephone conversation with Renee. Her alleged comments are hearsay evidence. She was not subject to cross examination to test her credibility. She may have been completely truthful, but it's altogether possible her charges are the product of a scorned woman's fury. While hearsay evidence is sometimes accepted for its corroborative value, such is not the case here. The Board notices in passing that the Claimant's personal record was clear of any disciplinary entries prior to the instant matter.

Agreement Rule 13 - (e) requires that a copy of the stenographic report of the investigation be furnished the disciplined employee and his representative, but sets no time limit. The Board is not unaware that the Employees have to observe a time limit in which to file an appeal, and a delayed transcript impedes the preparation of such appeal, but the remedy for this dilemma does not lie within the Board's jurisdiction. There is redress for outright refusal to supply a transcript, but concerns about delayed preparation and delivery must be addressed at the bargaining table.

The number of days lost does appear to total more than 42, as the Organization asserts. This count is in calendar days; the number of work days will, of course, be less. The Organization states that the Claimant was withheld from April 1, 2004, until May 17, 2004, inclusive, a total of 47 days. It states that he was telephoned on May 17, and told to return to work "tomorrow," i.e., May 18. The Carrier has not refuted that assertion. The Board does not know whether the Claimant was working an assignment consisting of five eight-hour days, or four ten-hour days. In any event, he should be paid for any time lost after May 12, 2004, which was the 42nd day of his suspension.

The Board will not address the question argued by the Parties with respect to Agreement Rule 45, because it is a moot issue in light of the Board's further finding below.

It is true, as the Carrier argues, that an employee applying for the Camper Allowance pursuant to Agreement Rule 38 - (i), quoted on page 2, above, must show that the camper meets the guidelines established by the Agreement — having arrangements for sleeping and preparation of meals — and a Carrier-required guideline — proof of ownership by means of a current registration and title. The camper which the Claimant asserts he owns met the Agreement's requirement, but he was unable to establish proof of ownership for two reasons: The state of Kansas does not require a registration nor a title, and the Claimant had no bill of sale. The lack of this documentation does not prove that he does not own the camper, nor can he prove that he does own it.

More importantly, however, when the Claimant and Mr. Wilken executed the Camper Allowance form, Mr. Wilken submitted the form anyway, without proof of ownership, and it was accepted by the Carrier and the Claimant continued on the approved Camper Allowance List. If the Carrier intended to reject the Allowance for lack of ownership proof, it had an obligation to do so at that time. Had it done so, the Claimant may have been able to obtain a bill of sale, or some other form of evidence of ownership. By waiting ten months, the Carrier essentially assented to the Claimant's failure to provide documentary evidence of his ownership. As a matter of equitable estoppel, it cannot rightfully recover pay code 45 Camper Allowance payments made between May 20, 2003, and March 19, 2004. The Claimant relied on the Carrier's acceptance of his Camper Allowance form submitted on May 20, 2003, to receive such payments.

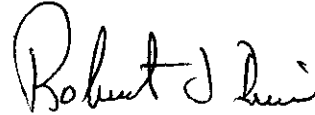
The Carrier properly removed him from the Camper Allowance List after he was required to offer proof of ownership on March 31, 2004, and he refused or failed to do so.

The Organization's claim is sustained only to the extent that the Claimant shall be paid for any time lost after serving the 42-day suspension, i.e., he shall be paid for any time lost after May 22, 2004. Additionally, he shall be repaid any amounts which the Carrier has recovered which represent pay code 45 Camper Allowances paid between May 20, 2003, and March 19, 2004.


The Claimant's record shall not be cleared of the infraction of MWOR 1.6, and the three-year probation period will stand.

AWARD

The claim is sustained in accordance with the Opinion. The Carrier shall comply with this Award within sixty (60) days from the date of this Award..



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



William L. Yeck, Carrier Member

Sept 01, 2004
Date