

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees
and
BNSF Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on November 2, 2004 when it issued the Claimant, E. J. Geer, a 30-day actual suspension and 3-year probation for failing to comply with instruction given by his Roadmaster, in violation of Rules 1.13, and 1.15 of the Maintenance of Way Operating Rules.
2. As a consequence of the violation referred to in part (1), the Carrier shall immediately remove any mention of this incident from Claimant's personal record, and make him whole for all time lost account of this incident.
[Carrier File No. 14-04-0161. Organization File No. 170-13A1-0420.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, employed as a Maintenance of Way Welder. On October 19, 2004, he left his job at 10:00 a.m., allegedly in violation of instructions from Roadmaster Ted Keener to perform full service welding work until 12:00 noon. He was served a notice of investigation on November 2, 2004, charged with possible violation of Maintenance of Way Operating Rules ("MWOR") 1.13 and 1.15. Additionally, he was removed from service on November 8, 2004, pending the investigation which was held on November 16, 2004. The cited Rules 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 1.15

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.

A transcript of testimony and evidence presented in the investigation reveals substantial differences between the testimony of the Claimant and Roadmaster Keener, concerning their conversation on the morning of October 19, 2004. There were no witnesses to their discussion, which took place in the Carrier's office in Winslow, Arizona.

It is undisputed that the Claimant had been on light duty for some unstated period of time, because he had suffered an injury. He reported for duty at 7:30 a.m. on October 19, 2004,, performing office work, commensurate with his light duty status. At about 9:00 a.m., Mr. Keener met the Claimant in the office, advising him that he had received a letter authorizing the Claimant to return to full duty, and he was directed to report to work with other welders in the Winslow yard area. The Claimant advised Mr. Keener that he had a 1:00 p.m. appointment with a heart doctor. At this point, their respective testimony diverges.

Mr. Keener stated that he told the Claimant he could leave work for his appointment at 12:00 noon. The Claimant testified that he told Mr. Keener he would have to leave within half an hour to an hour. Mr. Keener denied hearing that response. The Claimant denied that he was told he could leave at 12:00 noon. The Claimant testified, and offered written evidence, that his appointment was at 1:00 p.m. in Flagstaff, Arizona, some 55 miles from Winslow, and that the doctor's office needed about 45 minutes for preparation of paperwork. He testified that he conveyed that information to Mr. Keener, who denied having heard any such communication. Mr. Keener testified that he assumed the appointment was in Winslow. The Claimant further testified that he thought Mr. Keener meant for him to leave for his appointment that day, and report for full duty with the welding gang the following day. He thought it impractical to join the gang and then immediately leave for his doctor's appointment. Mr. Keener left the Claimant to return to his office in Flagstaff about 9:20 a.m.

In the course of their testimony, both the Claimant and Mr. Keener asserted they thought the other understood what was being said. Although the Claimant did not acknowledge he was told to work until 12:00 noon, Mr. Keener said he nodded his head affirmatively. The Claimant said that when he told Mr. Keener he needed to leave in a half hour to an hour, Mr. Keener said, "Fine, go ahead and take care of that doctor's appointment." He said Mr. Keener did not refuse permission to leave in that short time span. The Claimant also testified that he needed the additional time to take a shower, and have himself driven to Flagstaff to arrive by 12:15 p.m. He said that he could not drive himself, being medically restricted from driving a motor vehicle.

Following the investigation, on December 6, 2004, the Claimant was advised that he was being given an actual suspension of 30 days for violation of MWOR 1.13 and 1.15, and assigned a probation period of three years. His suspension began on November 8, 2004, and ended on December 7, 2004, inclusive. This decision was promptly appealed by the Organization, which argues that the Roadmaster's instructions to work with the welder gang until 12:00 noon were never made clear to the Claimant. The Organization justifies the Claimant's leaving at 10:00 a.m. by reason of the necessity to obtain a ride to his home, to clean up, and to be driven to Flagstaff, to arrive no later than 12:15 p.m. The Organization believes the discipline is unjust and not supported by the evidence, and asks that the Claimant's record be cleared and he be paid for all time lost.

The Carrier rejoins that the Claimant was clearly instructed not to leave work before 12:00 noon, but chose to leave at 10:00 a.m. If he had any doubt about the Roadmaster's clear instructions, he had the responsibility to clear up any misunderstanding before acting. The Carrier further argued that although the record indicates the claimant had a very different view of what happened than did the Roadmaster, the hearing officer is charged with making credibility decisions, and he found the Claimant's version of events was less credible than the Roadmaster's. The Carrier asserts that a 30-day suspension is neither harsh nor capricious.

The Board is persuaded that the Carrier's view of the record is the better position, and the claim will be denied. First, there are clearly issues of credibility. We cannot rule out the possibility that neither the Claimant nor the Roadmaster were listening carefully to what the other was saying, but it is the Claimant's responsibility to have a clear understanding of what the Roadmaster's instructions were, and if his instructions were such that the Claimant could not have timely kept his medical appointment at 1:00 p.m. (actually 12:15 p.m.), then further discussion was in order. Indeed, the fact that the Claimant did not attempt to conceal that he left the job at 10:00 a.m. and self-reported his leaving to the employee who kept the payroll, suggests that he thought he had permission to leave at that time.

It is also possible that either the Claimant or the Roadmaster misrepresented the truth. In that event, absent any corroborative testimony or evidence which would tend to give weight to one person's account versus that of the other, the Board cannot find that the Conducting Officer's assessment of credibility is wrong. That he gave more weight to the testimony of a fellow officer than that of a charged employee might give one pause, but we cannot say the Conducting Officer's judgment was wrong to the degree this Board should reverse his judgment.

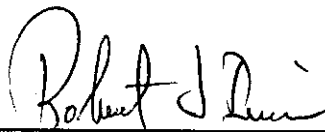
The Claimant's representative raised an objection to the Claimant's removal from service, pending the investigation, arguing that this action by the Carrier constituted prejudgment. While the Board's Neutral Member does not agree that his removal from service means that he was prejudged, this Member is caused to question why the Claimant was permitted to work from October 20 through November 7, some five days after the investigation notice was written, and

then removed from service. But for the fact that his actual suspension was antedated to begin on November 8, 2004, we would order that he be paid for the time held out of service. No rational reason has been offered why an employee considered safe to work for 19 days thereafter becomes a liability.

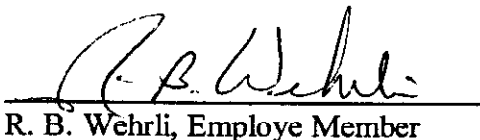
The nature of the offense would normally suggest that a disciplinary penalty of 30 days' actual loss of time is excessive, but examination of the Claimant's personal record indicates that within a four-year period, he has committed three previous rather serious breaches of the Carrier's rules, including failures to comply with instructions and leaving work early without authority, which bear some resemblance to the current disciplinary entry. With this record, the Board cannot justify remission or even reduction of this disciplinary penalty.

AWARD

The claim is denied.



Robert J. Irvin, Neutral Member


R. B. Wehrli, Employee Member
William L. Yeck, Carrier Member

Date May 22 2005