

PUBLIC LAW BOARD NO 5850

**Award No.
Case No. 140**

PARTIES TO DISPUTE:
**(Brotherhood of Maintenance of Way Employees
(The Burlington Northern Santa Fe Railroad**

STATEMENT OF CLAIM:

- 1. The Carrier violated the current Agreement when dismissing Mr. E. D. Martinez from service for his alleged violation of Maintenance of Way Operating Rule 1.6, number 4 and Rule 1.13; and Maintenance of Way Safety Rule S-1.2.5 for allegedly being dishonest on claims of weekend travel allowance and failure to comply with instructions and policies governing weekend travel allowance and corporate lodging on June 11, 12 and 13, 1999.**
- 2. As a consequence of the Carrier's violation referred to above, Mr. Martinez shall be returned to service, the discipline shall be removed from the Claimant's personal record, and he shall be compensated for all wages lost in accordance with the Agreement.**

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

The facts leading to the investigation and Claimant's dismissal are set forth in Case 138. What follows is the Board's findings relative to the Claimant identified in the Statement of Claim.

On June 14, 1999, Claimant submitted for payment a TRAVEL HOME

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ALLOWANCE LOG SHEET indicating he traveled on June 11 from Pueblo, Colorado, to Clovis, California, and on June 13, he traveled from Clovis, California, to Pueblo, Colorado, a round trip of 3420 miles.

The problem with Claimant's travel log was that at or about 3:40 PM on Saturday, June 12, 1999, he had a confrontation with a clerk at the motel. The motel had incorrectly assigned him to a suite and when they asked him to relocate, he refused. The motel clerk called Claimant's Foreman to complain. The Foreman passed the complaint on to the Roadmaster who then called the motel but was told that the matter was straightened out, but they did fill the Roadmaster in on the details.

The Roadmaster, when he received Claimant's request for mileage payment, started to ask questions with the net result being a Special Officer of the Carrier being assigned to investigate the mileage slips.

The Special Officer testified, as follows:

"Exhibit - Y2

At approximately, 08:56 hrs., date I interviewed Edward D. Martinez at the same location of the Lyles Interview. I also advised Martinez that he was free to contact a Union Rep., he was free to leave at any time and was not under criminal investigation at this time. I asked Martinez, why he completed a fraudulent mileage claim. Martinez related that the claim was not fraudulent, he was in California on 06-12/13-99. I asked Martinez what time he left Pueblo, Colo. on 06-11-99. Martinez related 14:30 hrs., I then asked Martinez, what time he arrived in Fresno, C.A. Martinez related approximately 11:00 hrs., on 06-12-99. I then asked Martinez what time he returned to Pueblo, Colo. on 06-13-99. Martinez related that he was in Pueblo, Colo. on 06-13-99 at approximately 17:00

hrs. I then asked Martinez what time he left Fresno, CA to return to Pueblo, Colo. Martinez advised that he did not know what time and could not estimate a time. I asked Martinez how many hours he was in Fresno, CA. Martinez again refused to provide any type of time frame for his travel. Martinez would only relate that he had witnesses that will state that he was in Fresno, CA on 06-12/13-99. I asked Martinez why he did not check out of the room on 6-11-99. Martinez related that the 184 room was used as storage for luggage by the tie gang.

On 06-17-99 at approximately 13:31 hrs. I interviewed Ramada Inn Front Desk Clerk, Irene Carrillo. Carrillo related that on 06-12-99 at approximately 15:30 hrs., she was working as a Front Desk Clerk at the Ramada Inn and was confronted by a man wearing a white t-shirt and stonewash jeans. Carrillo further described this subject as 'Spanish, with a pock-marked face, black hair, thin mustache, in his 40's'. The subject asked to have another key made to room 184. Carrillo advised that she could make another key but the current key would then be rendered useless. Carrillo also asked the subject if he had come down to change rooms. The subject stated 'Hell, NO!', 'I don't care what you say, I'm not moving.' Carrillo gave the subject the key and he left the front desk. Sometime between 15:30 hrs. and 15:45 hrs., on 06-12-99, Carrillo was replacing a broken telephone in room 188 and observed that same man she described entering room 184.

On 06-21-99 at approximately 08:34 hrs., I met with Carrillo while she was working at the Ramada Inn. I had received photographs from Roadmaster Barnes of Martinez, Lyles, and Romero. I labeled these photographs: #1 on Martinez, #2 on Lyles, and #3 on Romero. I then presented photo #1 to Carrillo and she positively identified Martinez as the same man she spoke with on 06-12-99 at the front desk and entering room 184 a short time later."

The Carrier has furnished substantial evidence that Claimant did not travel home on the June 11-13 weekend. He has been positively identified as being in the motel as late as 3:30 PM on June 12, 1999, thus he could not have been at home in

Clovis, California, at 11:00 AM on June 12 as he told the Special Officer.

Despite what Claimant presented in an effort to overcome the charges, in this Board's opinion, substantial evidence has been furnished establishing Claimant's culpability for the charges assessed.

Fraud and theft are charges warranting severe discipline. Claimant was dismissed. This Board finds nothing upon which it can look to as a reason for mitigating the discipline assessed.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.


Robert L. Hicks, Chairman & Neutral Member

Please see DISSENT
Rick B. Wehrli, Labor Member

Dated: September 5, 2000


Thomas M. Rohling, Carrier Member

ORGANIZATION MEMBER'S DISSENT

TO

AWARD NO. 140 OF PUBLIC LAW BOARD NO. 5850 (Referee R. L. Hicks)

It has been said more than once that one school of thought among railroad industry arbitration practitioners is that dissents are not worth the paper they are printed on because they rarely consist of anything but a regurgitation of the arguments which were considered by the Board and rejected. Without endorsing this school of thought in general, it is equally recognized that a dissent is required when the award is not based on the on-property handling. Such is the case here.

As shown on page 3 of the Award, the majority declares *"He has been positively identified as being in the motel as late as 3:30 PM on June 12, 1999, thus he could not have been at home in Clovis, California, at 11:00 AM on June 12 as he told the Special Officer."* This, as further contended by the majority, constitutes *"substantial evidence that claimant did not travel home on the June 11-13 weekend."* Simply stated, this Board member cannot agree.

First, because Claimant adamantly rejected the Carrier's charge and the photo used for the "positive identification" was of such poor quality, the Claimant requested a face to face meeting with the hotel clerk who purportedly identified him from the photo. By having such a face to face meeting, Claimant concluded that the matter would be put to rest, positively, i.e., the hotel clerk would realize a mistake had been made. Conversely, if the hotel clerk confirmed her earlier advice, the Carrier would obviously be in a much better position to conclude its charge against the Claimant was supported by substantial and "concise" evidence. In either case, the meeting would have been quite valuable.

A face to face meeting would have also served to lay to rest other significant conflicts in information that developed during the on-property handling such as the following:

- (1) The clerk indicated the individual had black hair compared to Claimant's which was greying, i.e., "salt and pepper."
- (2) The clerk indicated he had a "pock-marked face" when, in fact, Claimant did not.
- (3) The clerk indicated he had a "thin mustache" when Claimant clearly had a thick mustache.
- (4) The clerk indicated claimant had a "thin build" when testimony during the investigation indicated *"he has a protruding waistline."*

Based on these significant concerns, it was crucial that a face to face meeting take place, yet the Carrier rejected the Claimant's request which, if the Carrier's charge was accurate, would have served to "make the Carrier's case." So, why did the Carrier not grant the Claimant's request? The Carrier showed great zeal interviewing people and preparing written statements, but that same type of energy was lost when it came to following through with Claimant's quite logical and appropriate request. Why? One can only speculate as to the Carrier's reasoning. Contrarily, however, speculation is something that is not acceptable in sustaining charges and ordering the dismissal of an employee. The Carrier has the burden of proof, i.e., to produce and submit direct, positive, substantial, material and relevant evidence to sustain its charges and actions. Here, the Carrier clearly failed to satisfy this responsibility.

There were other factors as well which definitely diminished the significance of the Carrier's self-proclaimed "substantial evidence." Please see the following:

- (1) Based on the testimony of Special Agent Stolpa and fellow employee Garcia, combined with the written statement signed by Hotel Clerk Carrillo, Claimant had no room access key to stay in a hotel room because the only key available for the room in question was in the possession of Mr. Garcia. In other words, the Claimant had no place to stay at the hotel in question.
- (2) Based on the record, Special Agent Stolpa prepared **all** written statements for the various individuals. Hence, why would he not enter into the written statement of Mr. Garcia that Claimant stayed in the same room as he did, i.e., Room 184, the entire weekend, if, in fact, that was the case as the Carrier claims? It can only be concluded that Mr. Garcia could/would not attest to that which was not true.
- (3) Finally, the record showed that Claimant was in Santa Fe, New Mexico, 280 miles from Pueblo, Colorado at 8:11 PM on June 11, 1999 as evidenced by his ATM receipt he produced and entered at the investigation. (Exhibit TT) At the investigation, claimant showed his actual ATM card and matched same with the ATM receipt, plus he offered his ATM card to the hearing officer to make a copy "or whatever" to confirm the accuracy of the matter.

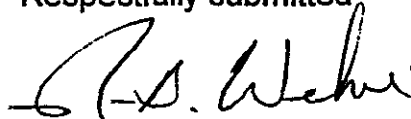
With such information, how could anyone conclude Claimant was at the motel in Pueblo, Colorado and at Santa Fe, New Mexico at the same time? Impossible.

In regard to (3), it was speculated that the Claimant possibly could have given the ATM card to someone else to obtain a withdrawal in Santa Fe to make it look like the Claimant was there when he was, in fact, not. First problem with this argument is, as mentioned before, it's speculation, which cannot serve as "substantial and concise evidence" as is required. Secondly, no one has yet to offer any explanation why Claimant

would create such an alibi when on June 11, 1999, Claimant, and no one else for that matter, had any idea on that date that there was a possible need for such an alibi. That is, no questions were even raised until Monday June 14, 1999. Based on these circumstances, not only is the accusation based on speculation, it is based on speculation that is not even logical. Such speculation, therefore, must be dismissed.

To conclude, based on these facts and circumstances it is this Board Member's opinion the majority of this Board has ignored serious gaps in the Carrier's presentation of evidence and same cannot be accepted as "substantial evidence" as indicated in the Award. I must, therefore, dissent. Further, on this occasion, this Board will have to be satisfied with only two (2) Board Members signatures on this Award because my signature, if affixed thereto, may be construed as an acceptance by the Organization that the decision rendered is appropriate which is simply and emphatically not the case.

Respectfully submitted

A handwritten signature in dark ink, appearing to read "R. B. Wehrli", written in a cursive style.

R. B. Wehrli
Organization Member