

PUBLIC LAW BOARD NO. 6102

Award No. 17

Case No. 18

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employees
and
Burlington Northern Santa Fe Railway
(Former St Louis - San Francisco Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when on December 6, 1999, Mr. J. J. Mitchell was dismissed from service for allegedly providing false information on a Weekend Home Travel Allowance Form seeking reimbursement for miles not traveled for the weekend of October 9 and 10, 1999, allegedly in violation of Maintenance of Way Safety Rule 1.6, Conduct.
2. As a consequence of the Carrier's violation referred to in part (1) above, the discipline shall be removed from the Claimant's personal record, he shall be returned to service with seniority rights unimpaired and he shall be compensated for all wages lost in accordance with the Agreement." [Carrier's File 12-00026. Organization's File B-1524-6.]

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 over the dispute herein.

There is a multi-employer agreement between the Brotherhood of Maintenance of Way Employees and various carriers, including the Burlington Northern Santa Fe Railway, referred to in the record as "the 1996 BMW National Agreement." Article XIV of that Agreement, captioned "Travel Allowance," is central to this dispute, and will be referred to as "Article XIV" in this Award. Article XIV reads as follows:

"ARTICLE XIV - TRAVEL ALLOWANCE

Section 1

(a) At the beginning of the work season employees are required to travel from their homes to the initial reporting location, and at the end of the season they will return home. This location could be hundreds of miles from their residences. During the work season the carriers' service may place them

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hundreds of miles away from home at the end of each work week. Accordingly, the carriers will pay each employee a minimum travel allowance as follows for all miles actually travelled by the most direct highway route for each round trip:

0 to 100 miles	\$ 0.00
101 to 200 miles	\$25.00
201 to 300 miles	\$50.00
301 to 400 miles	\$75.00
401 to 500 miles	\$100.00

Additional \$25.00 payments for each 100 mile increments.

(b) At the start up and break up of a gang, an allowance will be paid after 50 miles, with a payment of \$12.50 for the mileage between 51 and 100 miles.

(c) Carriers may provide bus transportation for employees to their home area on weekends. Employees need not elect this option.

Section 2

For employees required to work over 400 miles from their residences the carrier shall provide, and these employees shall have the option of electing, an air transportation package to enable these employees to return to their families once every three weeks. Ground transportation from the work site to the away from home airport shall be provided by each carrier, and on the return trip the carrier shall provide ground transportation from the away from home airport to the lodging site. In dealing with programmed work, the employees and the carrier may know how long the employees will be required to work beyond the 400 mile range, and the employer can require the employees to give advanced notice of their intention to elect the air transportation option so that the carrier may take advantage of discounted air fares. Employees must make themselves available for work on at least ninety percent of the regularly scheduled work days during the three week period. And, they will not qualify for the travel allowance set forth in Section 1 during the three week period. Irrespective of the customary meal and lodging entitlement that employees have under their local agreements, when employees elect the air transportation option, they shall be entitled to meals and lodging during the two away-from-home weekends in the three-week cycle and they shall not be

entitled to meals and lodging during the third weekend upon which they return home by air transportation.

Section 3

Nothing herein shall be construed to bar the parties from reaching mutual agreement on alternative arrangements.

Section 4

This Article shall become effective ten (10) days after the date of this Agreement except on such carriers where the organization representative may elect to preserve existing rules or practices pertaining to travel allowances by notification to the authorized carrier representative."

The Claimant, Mr. J. J. Mitchell, was, at the time of his dismissal, employed as Foreman on Regional Tie Renewal Gang TP02, working at or in the vicinity of Kirksville, Missouri. According to his personal record, he was employed in 1974 as a trackman, and promoted to Foreman in 1996. His record of discipline prior to the instant case shows a censure in 1991 for failure to comply with instructions in his responsibility for releasing a tie gang at 12 noon and recording their payroll as having worked a full eight hours. In 1998, he received a deferred suspension for not wearing proper safety glasses while on duty.

On the weekend of October 8-10, 1999, the Claimant was under surveillance by the Carrier's police officers, in response to a request by the Carrier's Internal Auditor, who suspected the Claimant had submitted false claims for weekend travel to and from his home. Their surveillance included examination of his personal vehicle's odometer on Thursday night, October 7, and Monday morning, October 11, which indicated his vehicle was driven 566 miles during that time interval.

For the weekend of October 8-10, 1999, the Claimant submitted a "Travel Home Allowance Log Sheet," which contains the following printed wording:

"One round trip per line. An employee claiming Travel Allowance under Article XIV of the 1996 BMW National Agreement certifies that the mileage claimed is a true and accurate report of all miles actually traveled by the most direct highway route for each round trip."

The Claimant recorded his claimed mileage as follows: On October 8, Kirksville, Missouri to Beaufort, North Carolina, 1075 miles. On October 10, Beaufort, North Carolina to Kirksville, Missouri, 1075 miles. Total miles claimed, 2150. Below this recorded trip, there

appears on the log sheet this printed certification: "I certify the mileage stated above is a true and accurate report of actual highway mileage traveled by me." The Claimant printed and signed his name in the spaces provided therefor.

On October 20, 1999, the Carrier's Division Engineer sent the Claimant a notice of formal investigation to be held on October 29, 1999, on the following charge: "[F]or the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to give factual information related to your weekend mileage and reimbursement miles claimed on reimbursement form for weekend home travel for the weekend of October 9 and 10, 1999. . . . You are being withheld from service pending results of this investigation." The investigation was twice postponed, by mutual agreement, and finally held on November 24, 1999.

There is little, if any, dispute as to the Claimant's movements on the subject weekend, from his own account and the facts which were obtained from the police officers' surveillance and further investigation. The combined accounts indicate that he left the Carrier's place of lodging in Kirksville, Missouri, about 3:30 p.m., Friday, October 8, driving his personally-owned vehicle. He stopped in Macon, Missouri to deliver some cookie pans to a baker. He continued to Mountain Grove, Missouri, where he experienced alternator trouble. He borrowed a friend's automobile, leaving his own vehicle to be repaired. He then drove to Clinton, Tennessee, where he visited his parents' grave site. He continued to Cherokee, North Carolina, where he spent the balance of his time at a casino. There was also a side trip to Asheville, North Carolina, either enroute to or from Cherokee. He slept in the vehicle at a rest area, he said.

On October 10, 1999, he drove back to Mountain Grove, where he paid his friend \$100 for the use of the borrowed vehicle. He recovered his own automobile, which had been repaired, and drove back to Kirksville.

The round trip mileage from Kirksville to Cherokee and return, using the circuitous route described by the Claimant, is approximately 1980 miles, according to a computer-generated route provided by the Conducting Officer, not counting the side trip to Asheville.

Following the investigation, on December 6, 1999, the Claimant was advised of his dismissal from the Carrier's service:

"This letter will confirm that as a result of our formal investigation on November 24, 1999, concerning you giving false information on weekend home travel allowance form and reimbursement claimed for weekend October 9 and 10, 1999, you are dismissed from employment for violation of weekend travel home policy and Maintenance of Way Safety Rule 1.6, Conduct."

Maintenance of Way Operating Rule 1.6, captioned "Conduct," 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."

Initially, this Board observes that the Claimant executed a document certifying that his reported travel from Kirksville to Beaufort, and return, was a true and accurate report. The verb "certify" means "To authenticate or vouch for a thing in writing. To attest as being true or as represented." (*Black's Law Dictionary, Sixth Edition*). *Webster's New World Dictionary of the American Language, Second College Edition*, goes into greater detail in its first entry for the word: "1. to declare (a thing) true, accurate, certain, etc. by formal statement, often in writing; verify; attest." Clearly, the Claimant's certification on the Travel Home Allowance Log Sheet, quoted on pages 3-4 herein, was by his own admission incorrect. For that reason alone, he made himself subject to discipline, pursuant to Maintenance of Way Operating Rule 1.6.

The Claimant offers some extenuation, which bears consideration. This Board would be reaching outside its jurisdiction were we to attempt to interpret Article XIV. Nevertheless, the meaning and application of Article XIV are implicated in the Claimant's exculpatory account of the basis for his mileage claim. The following questions and answers from the investigation transcript disclose some arguable interpretive issues about Article XIV's application, at least in the Claimant's mind:

- "13. Q. [By Conducting Officer] What, what is the procedure for an individual that is on, let's say your gang TP02, to account for and collect what's due to them in accordance with this agreement, with respect to weekend home travel allowances?
- A. [By Carrier's Roadmaster Bainter] Individual would be required to check out of the motel for the weekend and go home, not to exceed the milage to his home station.

* * *

41. Q. [By Claimant's Representative] Mr. Bainter, Exhibit 5, from the national agree[ment], what, has your gang presented with a copy of that before today?
- A. No, sir, they have not.
42. Q. Mr. Bainter, your interpretation of this Article XXIV (sic), the way you understood it to apply. What it, you didn't have to go home, just as long as you made a trip and it didn't incur additional mileage to your home. Was this what you understood the agreement, the way you interpreted, that, just as long as you check out of the motel, and made a trip, as long as it wasn't beyond your mileage, if you would go home, that you'd be entitled to it?
- A. That'd be correct.
- * * *
54. Q. Since you been working for the railroad are you familiar with people filing claims or have you ever filed a claim for rule violations?
- A. I am familiar with it, yes sir.
55. Q. So, is it your understanding that whenever you have a difference interpretation of an agreement that the procedure is that you have to file a claim and handle it through the Railway Labor Act, is this correct?
- A. That is correct.
56. Q. Would you be, would you consider this a matter of what Mr. Mitchell's involved here, would be just a matter of interpretation of the agreement?
- A. That's would be an opinionated question but I, I would have to say, yes it may be a misconstruence [sic] of the interpretation.
57. Q. I mean, what you told me a while ago, you was interpreting that you wouldn't have to make, necessarily make the trip home, that you could just, once you've made a trip that you'd be entitled to the per diem, I mean this milage allowance?
- A. Not to exceed, not to exceed the mileage to your home.

* * *

66. Q. [By Conducting Officer] Okay. You said it was, it was your belief or opinion in, that somebody or an individual was entitled to all the mileage that it would have taken to travel to their home, whether they actually traveled it or not, as long as it did not exceed the, the miles that it would take to travel home and back?

A. No. Mileage, mileage to their home not to exceed the, the mileage to their home station.

67. Q. Okay. Well, maybe I misunderstood that, let's try and clarify that a bit. If an individual lives in a certain town. That is, let's say a round trip from the work sight [sic] of a 1,000 miles, is it your belief or do you think the intent of this was to allow that person to go anywhere he wanted and still claim those miles? If he went 50 miles from the work sight [sic] and came back 50 miles and only traveled a 100 miles, is he still entitled to the full 1,000 miles of reimbursement?

A. No.

68. Q. As a, as a roadmaster on that particular tie gang, do your duties require you to be around the people quite a bit?

A. Constantly.

69. Q. Has members of the crew and Mr. Mitchell, in particular, asked you any questions to clarify this rule to make sure that they had a clear understanding?

A. Not to my knowledge.

70. Q. Did you ever tell members of your crew or anyone that all they had to do was check out of the hotel and not collect weekend expenses at the hotel and they would be entitled to or be able to collect all the miles that it would have taken them to drive home and back?

A. No.

* * *

72. Q. [By Claimant's Representative] Prior to Mr. Mitchell being removed from service, if I understood you right a while ago, if

an employee checked out of the motel and if he wanted to go spend the weekend with his aunt or uncle, whatever there and didn't, didn't actually make the trip to his home. For instance, a 1,000 mile trip to his home and he only incurred 500 miles he would be entitled to the 500 miles and not the 1,000, is this correct?

A. No.

73. Q. I thought I understood you, that he wouldn't have to go home. He just wouldn't be able to draw any excess miles if he went somewhere else. If I checked out this weekend and rather than going home I'd go to my aunt's house 500 miles away rather than a 1,000 miles. I understood you to say a while ago that I would be entitled to the 500 but not anything beyond my home.

A. Well, then I must have misunderstood the question.

74. Q. Well, did you answer the question that I would be entitled to the full mileage to home?

A. I have to ask that you ask the question again?

75. Q. Okay. I'm asking if I checked out of the motel, and as long as I made a trip and if it wasn't beyond the mileage to my home, I would be entitled to that trip?

A. No.

76. Q. That's not what you answered to start with in the investigation.

A. Then I apologize, I must have misunderstood the question.

* * *

189. Q. [By Conducting Officer] I guess I would like to ask a couple of questions trying to clarify how you perceive this, this agreement? The travel home policy, could you explain to me how you believe that, that's suppose to work?

A. [By Claimant] The way I was told three years ago by a road-master was, if you check out of the motel you can, and whatever you drive, that's what you claim. It didn't say, he never said you had to go home and anything like that.

190. Q. So...
- A. And me and John, I talked to John, and John had told me that same thing, John Bainter.

* * *

244. Q. [By Conducting Officer] We received testimony here a few minutes ago from Mr. Mitchell. And Mr. Mitchell stated, that you had told him that he could claim travel miles to go anywhere that was not his home. He could go to other places besides his home and still claim miles, as long as those miles do not exceed the miles that he would have incurred traveling home. Is that a true statement or not?
- A. [By Roadmaster Bainter] I don't recall having that conversation, no.

* * *

246. Q. [By Claimant] All right. John, that on day I asked. I said, my understanding is that I can check out the motel and claim miles, is that correct, and you, I said, 'Is that the way you understand that?' And you said, 'Yes', is that correct?
- A. I, I don't recall." [Underscoring added for emphasis].

The picture that is painted by these responses reflects an understanding by the Claimant that he could travel on the weekend to some point short of his residence, and be paid the mileage allowance therefor, so long as the mileage didn't exceed that to his residence. Significantly, the Roadmaster initially agreed with that understanding, although he recanted when questioned further by the Conducting Officer.

True enough, Article XIV's clear intent is to provide reimbursement for travel between a work site and an employee's place of residence, which may be "hundreds of miles." The Claimant's predicament arises from questions of equity in interpreting Article XIV, questions not indisputably answered in the record. For example, suppose an employee traveled 475 miles from the work site toward his residence 500 miles away, meeting his spouse at that intermediate point for a family reunion. Would he be denied all the 950-mile round trip to the intermediate point because he did not reach his residence?

Or, suppose he met his spouse for the weekend at a resort 500 miles from the work site, but did not stop at his place of residence while enroute. Would he be denied all the 500-mile round trip because he did not reach his residence?

Of course, this Board does not have the answers to those questions, nor are we privileged to supply the answers. Neither the Carrier nor the Organization have provided this Board with any interpretive arbitral decisions or agreed-upon interpretations of Article XIV. But the Claimant's expressed understanding, with which the Carrier's Roadmaster initially concurred, indicates the Claimant understood he was not required to travel to his residence to be entitled to the mileage allowance. However, the Board is not unmindful that even if his understanding were correct, he did claim mileage in excess of that actually traveled.

If the issue is the proper application and interpretation of Article XIV, the General Chairman's appeal letter dated January 6, 2000, raises a valid question:

"From the date the Weekend Travel Allowance went into effect, October 1996, the carrier had a different interpretation of the agreement than the organization. The carrier interpreted the Travel Allowance to only apply to P.E.B. gangs. Our interpretation was that it applied to all mobile gangs. Claims were submitted for the mileage. The carrier refused to pay them and denied the claims. They did not dismiss anyone from service.

"The carrier should have handled Mr. Mitchell's claim in the same manner. Also, if the carrier's interpretation was that Mr. Mitchell was not entitled to his claim, why did they pay the claim when they had the right to deny it?"

This Board recognizes that the Carrier could have and did treat the matter as a criminal act.¹ It could have and did handle it as a disciplinary proceeding. However, as the General Chairman points out, it could have but did not address the issue as a claim, which it could have denied. The interpretive issue could thus have been joined without the trauma and monetary loss arising from the Claimant's dismissal. In this Board's view, a 25-year employee with a record of two minor disciplinary entries merited less severe corrective treatment, notwithstanding his dishonest act in claiming mileage which he did not travel.

The Board's ruminations on this case lead to the following conclusions. Because there is a probability that the Claimant believed that he could claim the weekend travel allowance for travel to and from a destination other than his place of residence, so long as he checked out of Carrier-provided lodging and did not claim away-from-home expenses, and did not exceed the mileage actually traveled or the mileage to and from his residence, his permanent dismissal is excessive. The testimony of the Roadmaster was not unequivocal with respect to

¹Probably the police officers' surveillance, investigation, and interrogation were necessary to develop all the facts in this matter.

such weekend travel. See his responses to Q. & A. 42 and 57, above, compared with his later reversal in Q. & A. 67, 72, 73, and 76. "Well, then I must have misunderstood the question." The Board cannot rule out the possibility, if not a probability, that there was some kind of informal interpretation of the weekend travel agreement which led to this result.

Having concluded that permanent dismissal is not warranted, however, the Claimant should not be rewarded for falsely certifying that he traveled 2150 miles to and from his home, miles not actually driven as he certified. The Board perceives the purpose of Article XIV as reimbursement for the cost of actual travel to and from the employee's place of residence at the end of the work week, because such employees are often required to work at transient work sites distant from their places of residence. Article XIV is, therefore, a reimbursement rule, not to be abused with false mileage claims. The Claimant's dismissal shall be converted to a lengthy suspension. He shall be returned to service with seniority unimpaired, but without compensation for wages lost.

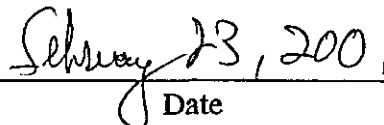
The Board finds there was compliance with the applicable provisions of Schedule Rule 91, the Discipline Rule. Substantial evidence was adduced at the investigation to prove the charges made. Permanent dismissal is excessive, in light of all the matters discussed above.

AWARD

Claim sustained in accordance with the Opinion. The Claimant shall be offered reinstatement to service within forty-five (45) days from the date of this Award.



Robert J. Irvin, Referee


Date