

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 190

AWARD NO. 176

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

Carrier's File

1518277

AND

ORGANIZATION

Brotherhood of Maintenance of Way Employees
Division of International Brotherhood of Teamsters

System File

R-0948U-302

STATEMENT OF CLAIM

1. The Carrier violated among other rules violations of the July 1, 2001 Collective Bargaining Agreement, Rule 48, when it assessed Claimant, Sectionman Truck Driver, Bruce D. Lippert a Level 3 discipline consisting of one (1) day of training without pay and development of a Correction Action Plan, for violation of General Code of Operating Rule (GCOR) Rule, 1.13 (Reporting and Complying with Instructions) in connection with the charge he allegedly abandoned a broken rail on Main Track 2 at Mile Post 22.9 on the Omaha Subdivision as well as his alleged failure to contact someone for additional assistance or, to inform someone there were problems encountered the morning of February 4, 2009 pertaining to the repair of a curve rail.
2. As a consequence of the violations set forth in Part 1 above, the Level 3 discipline and any reference to the removal of the discipline be expunged from all Company and Claimant's personal record(s) and that he be compensated at the applicable rate of pay for all work hours lost as a result of the discipline wrongfully assessed.

STATEMENT OF BACKGROUND

On the morning of February 4, 2009, Jill Makstaller, Track Supervisor/Project Coordinator working tour hours of 11:00 pm to 7:00 am, was notified at 4:08 am by the Corridor Manager of a broken rail located at Elkhorn, Iowa, specifically on the

Omaha Subdivision, Main Track 2, at Mile Post 22.9. In addressing the need to repair/fix the broken rail in question, Makstaller, made a series of calls, one of which was to Claimant at 4:17 am. Claimant had been off work for the prior two (2) months and had just returned to duty on February 2, 2009 assigned to headquarters at Council Bluffs, Iowa, located forty-five (45) minutes away from Elkhorn. Claimant agreed to the call out during this conversation with Makstaller but the record evidence reflects two (2) critical disagreements regarding part of their conversation. The first disagreement pertained to the following: according to Makstaller, Claimant asked if he was going to be the person-in-charge (EIC) and she asked if Claimant had a problem with that and he responded he had no problem with that. According to Claimant however, he had no idea he was to be the employee-in-charge explaining that he had never in his 37 years of service with the Carrier ever volunteered to assume the responsibilities of a foreman and had he been so inclined, he would have been a foreman some thirty (30) years ago. The second disagreement pertained to the following: according to Makstaller, she informed Claimant that if he needed additional help to contact her and to that end, she gave Claimant her telephone number. Claimant asserted that, that part of the conversation never occurred. In addition to Claimant, Makstaller also called and spoke with Speed Swing Operator, Jim Richardson at 4:30 am and Laborer, Tony Renteria at 4:34 am. According to the record evidence, Richardson agreed to the call out and Renteria indicated to Makstaller that if he could get a ride to Council Bluffs, he would be there. Makstaller related she called Claimant a second time at around 5:00 am to confirm she had arranged for Richardson and Renteria to assist him in the rail repair. Claimant recounted that he asked Makstaller if she had contacted any welders and she informed him she was making calls to them but had yet to reach any welders.

Claimant related he arrived at Council Bluffs at around 4:50 am, which does not comport with the time of 5:00 am Makstaller stated she contacted Claimant for their second conversation, and that Richardson arrived at Council Bluffs at about 5:20 am. Claimant related that in discovering his truck had been in the shop for the two (2) months he was off work and was not operable, he consulted with Makstaller who told him to take any truck that was available. According to Claimant, Richardson suggested that they take the truck that just happened to have a fairly good rail already loaded on it. Claimant related that he and Richardson then checked the other equipment on the truck to make sure there were joint bars, bolts, a saw and a drill. According to the record evidence, Claimant and Richardson waited for Renteria to show up but he never came. At 6:00 am, Claimant recounted, he and Richardson left Council Bluffs and arrived at Elkhorn 45 minutes later. Fifteen (15) minutes after that, at about 7:00 am, Claimant and Richardson arrived at the broken rail and in assessing how bad the curve rail was worn they both determined that with no other assistance, it was not possible for the two of them and the material they had with them to make the necessary repair. As a result, in consultation with each other, they both decided that the quickest way to make the repairs and complete the tasks involved, was to return to the headquarters at Council Bluffs at around 8:00 am, the same time their fellow employees would be returning to work.

The record evidence reflects that a little after 7:00 am, Richardson received a call from Manager Track Maintenance, Chris Rewczuk wherein, Richardson apprised him of the situation, that welders were needed to make the repair of the broken curve rail and that he and Claimant were on their way back to headquarters to re-group and get a foreman, welders, and a compatible rail. According to Claimant, being sent out to repair a rail without having a foreman also assigned as part of a crew, was a procedure that deviated from the usual procedure that was followed in such situations. According to Claimant the usual procedure that was followed in his 37 years of experience was to send some employees to go out and assess the situation to determine what was needed in terms of manpower and appropriate material to make the repairs, then return to the nearest yard or location to secure the manpower and material, return to the job site and then complete the repair work required. Claimant related that in returning to Council Bluffs, it was his and Richardson's intention to secure the welders and the appropriate rail (a 133 rail), return to the site of the broken rail and perform the repair. However, according to Claimant, Manager Track Projects, R. Rohlf's interceded after asking him questions regarding his and Richardson's return to Council Bluffs without having made the repair and without, in his view informing anyone the repair had not been made. According to Claimant, Rohlf's arranged to send welders to the site to make the repair in question and did not send him or Richardson to perform the work. According to the record evidence, the rail repair was completed sometime between 11:00 am and Noon on February 4, 2009.

By notice dated February 13, 2009, Carrier notified Claimant he was to report for an investigation to develop the facts and determine his responsibility, if any, in connection with the following charge:

“ . . . that while employed as SM Truck Driver on Gang 4753, in connection with the broken rail on the Omaha Subdivision, Main Track 2 at Milepost 22.9, that occurred on February 3, 2009, (sic) at 0400 hours, you allegedly failed to contact someone for additional assistance or let someone know there were problems before the broken rail, service was abandoned.

These allegations, if substantiated, would constitute a violation of Rule 1.13: Reporting and Complying with Instructions.”

Rule 1.13 reads in whole as follows:

Employees will report to and comply with instructions from supervisors who have proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.

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Following review of the evidence adduced at the investigation, Carrier notified Claimant by letter dated February 25, 2009, it found Claimant to have violated GCOR Rule 1.13. Thereafter, the Organization filed the subject claim and, as the Parties were unable to reach a mutually satisfactory resolution of the claim on the property, the claim comes now before this Board for a final determination.

CARRIER'S POSITION

As in all discipline cases, Carrier acknowledges the well established three-prong test it has to satisfy in order to prevail in its position that it has met its burden of proof, that the accused employee received a full and fair investigation with due notice of charges, the opportunity to defend against the charges, and the right to representation in making his/her defense; the burden to show by clear and convincing record evidence that the employee was culpable of the charged misconduct or dereliction of duty; and if so shown to be culpable, was the penalty imposed arbitrary, capricious, discriminatory, or unreasonably harsh in facts and circumstances of the particular case.

In the case at bar, Carrier maintains it has satisfied all three (3) tests as set forth above. There being no procedural objections raised by the Organization relative to Claimant having received a full and fair investigation, Carrier avers it has satisfactorily met the first of the three tests. With regard to the second test, Carrier asserts it has shown by the required substantial evidence test that Claimant was given specific instructions to contact someone if he needed help or encountered any problems in repairing the broken rail and he made the decision not to follow these specific instructions by his decision to instead abandon the service he was assigned to perform and instead returned to headquarters at Council Bluffs thereby delaying unnecessarily the required rail repair and, in turn, delaying train traffic beyond the time it should have been delayed.

As to the last test of the three-prong test, Carrier submits the quantum of discipline assessed was commensurate with the serious nature of the violation especially because Claimant had, at the time, over 36 years of service and should have known he needed to comply with the directive given him to report any problem(s) he encountered related to his assignment to repair the broken rail in question.

The Carrier respectfully requests of the Board that the discipline imposed on Claimant be undisturbed as the Organization failed to cite any valid agreement violations it committed. Carrier submits the discipline imposed was anything but arbitrary and therefore urges the Board not to be deceived by the Organization's attempt to place the blame for Claimant's failure to comply with GCOR Rule 1.13 elsewhere. Accordingly, Carrier requests the Board to deny the subject claim in its entirety.

ORGANIZATION'S POSITION

The Organization submits that contrary to Carrier's position, Carrier in this case failed to meet its burden of proof to show by substantial evidence that Claimant failed to comply with GCOR Rule 1.13. The Organization asserts that the circumstances surrounding the incident that led to assessing Claimant the Level 3 discipline boils down to a he said (Claimant), she said (Makstaller) argument, the Carrier attributing Makstaller's version of the incident as being meritorious while completely discrediting Claimant's account of the incident. The Organization cites a long-line of arbitral authority that bars the assessment of discipline based on the testimony of just one individual without verification by corroborating evidence. The Organization further asserts that even if Makstaller's version could be credited as true and accurate which is not the case, the fact is that Claimant did not fail to comply with instructions to report any problems he and Richardson might encounter in the repair of the rail to a proper management authority since the problem was conveyed by a telephone conversation almost immediately after departing the site of the broken rail to Manager of Track Maintenance, Chris Rewczuk. In this conversation, Rewczuk was apprised of the reason why Claimant and Richardson were unable to effect the repair and the fact that the two were returning to Council Bluffs to secure the proper manpower, read welders, and the proper material, read the appropriate piece of replacement rail. The Organization submits that the decision by Claimant and Richardson to return to Council Bluffs once they both concluded it was impossible for them to effect the necessary repair because they were without the services of a welder and did not have the proper piece of rail in their possession while at the site, was a decision that would guarantee the quickest way to repair the broken rail that would result in the least amount of confusion.

Based on the foregoing argument asserted coupled with the position advanced by Claimant's representatives within on-property correspondence, the Organization urges the Board to sustain the claim in its entirety.

FINDINGS

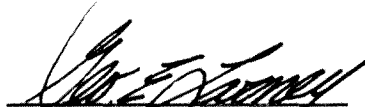
Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

The Board fully concurs in the argument asserted by the Organization without further embellishment by us. We are persuaded by the record evidence that there was no failure on Claimant's part to comply with instructions. He was instructed to repair the broken rail, yet he was disadvantaged in making the repair since he was dispatched to the scene of the broken rail without a welder to perform duties associated with the repair and without having the appropriate rail at his disposal at the scene to replace the broken

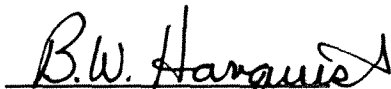
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rail. He was charged here with allegedly not having informed anyone in Management as to his and Richardson's dilemma yet, the uncontested record evidence reveals that Manager of Track Maintenance, Rewczuk was fully apprised of the predicament faced by Claimant and Richardson and that, by his acquiescence when informed they were returning to headquarters at Council Bluffs, he approved of their decision. In the strongest way possible to make the point crystal clear, the record proceedings before the Board is completely void of any substantive evidence that Claimant abandoned the broken rail. We find, therefore, that Claimant did not violate GCOR Rule 1.13 as charged by the Carrier.

Accordingly, we rule to sustain the subject Claim before us in its entirety. The remedy requested by the Organization in Part 2 on page 1 of this decision is hereby ordered by the Board to be implemented as soon as practicably possible.

AWARD**Claim Sustained**

George Edward Larney
Neutral Member & Chairman



B. W. Hanquist
Carrier Member



T. W. Kreke
Employee Member

Chicago, Illinois

Date: Oct. 4, 2010