

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 7048

BNSF RAILWAY COMPANY

(Former ATSF Railway)

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 7048 Case No. 14
NMB Case No. 106
Carrier File No. 14-08-0018
Organization File No. 190-13A1-0729.CLM
Claimant: Emilio Corchado

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing January 4, 2008 when Claimant, Emilio Corchado (6578322), was assessed a Level S 30-day Record Suspension with a three year probation period for abandoning your position on October 11, 2007 violating Rule 1.6-Conduct and Rule 1.15-Duty Reporting or Absence of the Maintenance of Way Operating Rules; and
2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate the Claimant with all seniority, vacation, all rights unimpaired and pay for all wage loss commencing January 4, 2008, continuing forward and/or otherwise made whole.

This claim was discussed in conference between the parties.

NATURE OF THE CASE

The Claimant is employed as a Truck Driver on a New Construction gang. He is charged with violating Maintenance of Way Operating Rule 1.6-Conduct and Rule 1.15-Duty, Reporting, or Absence on October 11, 2007 by leaving his assigned work area without authorization in contravention of an instruction conveyed to his work group at their morning meeting. The Claimant is a "red rated" employee, whom his Roadmaster must monitor more closely. Red rated employees were defined at the hearing below as "employees with a high number of safety points...either for injury or OPTs Test Failures and they are considered more at risk to unsafe actions or possible injury and they require more attention, more observations tests, operations testing." (Tr. 26)

Because the Roadmaster was scheduled to be away the following week, he was searching for the Claimant on the afternoon of October 11, 2007 in order to check on him and noticed that the Claimant was not where he expected him at the tie up point at the scheduled end of his shift. At the investigatory hearing, the Roadmaster testified that the Claimant returned to the motel that was the tie up point, whereupon the Roadmaster asked him where he had been. According to the Roadmaster, the Claimant admitted having left work at 4:04 p.m., and

acknowledged having gone to retrieve furniture from a friend's garage during daylight hours (Tr. 25). On the basis of this conversation, the Claimant was disciplined for leaving work without authorization in violation of MOW Rules.

The Claimant testified that he was told by his supervisor to leave the job site early because there was no additional work to be accomplished on that shift and was further directed to report back to the motel at about 4:20 p.m. after straightening up his tools, fueling his Company vehicle, and preparing for the next days work, so that he could sign out at the end of the shift at about 4:30 p.m. He was admonished not to leave before 4:00 p.m. The Organization contends that the Claimant's admitted departure at or about 4:04 p.m. was consistent with his supervisor's instructions, and thus the Claimant did not violate any MOW rules.

The parties were unable to resolve their dispute within the grievance procedure, and the matter was submitted to Public Law Board 7048 for adjudication.

FINDINGS AND DECISION

Public Law Board No. 7048 (the Board) finds that the parties herein are Carrier and Employee Organization within the meaning of the Railway Labor Act, as amended. Further, the Board has jurisdiction over the parties and subject matter involved.

Maintenance of Way Operating Rule 1.15 requires that employees "...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..." The Roadmaster's conclusion that the Claimant had violated MOW Rules was predicated on a statement by the Claimant's Foreman that he had not given the Claimant permission to leave early. This testimony is inconsistent with the Foreman's testimony that "I told Mr. Corchado at the end of the day, roughly about 3:45, we leave the yard at 4:00 so we can be at the hotel by 4:30 ending time of our shift. I told Mr. Corchado that I wanted him to clean out his truck, go gas it up, get it prepared for the next day. I told him to take his time and roll into the hotel at 4:20 or so and call it a day (Tr. 7)" This testimony established persuasively that the Claimant's actions were at least arguably undertaken with the permission of his Foreman, who had apparent authority to direct the Claimant's end of shift endeavors, including cleanup activities.

The Foreman testified that he was asked by the Roadmaster if he had given the Claimant permission to go home, and he told the Roadmaster he had not. The evidentiary record does not reflect that the Claimant went home for the day. He admittedly left the work site after 4:00 p.m. and then returned to the hotel after he fueled his vehicle and cleaned up his truck and equipment as directed by his Foreman. The Roadmaster was apparently unaware of the full extent of the Foreman's instructions when he disciplined the Claimant. Consequently, the penalty imposed cannot be justified. By the facts as established through testimony at the investigatory hearing.

Furthermore, there were apparently several other members of the Claimant's work gang whose whereabouts were uncertain at the end of the shift at 4:30 p.m. No discipline was imposed on these co-workers.

There is no allegation that the Claimant defrauded the Carrier for unwarranted pay. He is accused of having left early without authorization. The evidentiary record demonstrated, at the least, that the Claimant was given unclear instructions; that there is no reasonable proof that he failed to follow these directions to clean and fuel his truck; and the Roadmaster was not fully apprised of the directions given to the Claimant before discipline was imposed. The record also

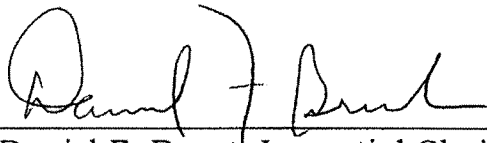
includes, however, credible testimony by the Roadmaster that the Claimant admitted he had performed a personal task after completing his assignment, but before the end of his shift. The Claimant did not refute this testimony. Therefore, some disciplinary penalty is appropriate.

A crucial element in assessing the proper level of discipline is the absence of any evidence of dishonesty by the Claimant, as he readily admitted to the Roadmaster where he had gone and what he had done. Given the Foreman's presumably accurate testimony describing his directions to the Claimant, which was consistent with the testimony of the Claimant and other witnesses, the Claimant did not absent himself from his shift without authorization. He did, however, perform personal work while on the clock.

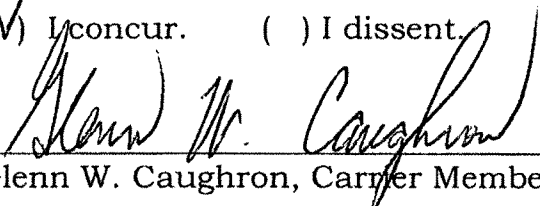
Consequently, based on the evidence submitted, the Carrier violated the Agreement commencing January 4, 2008 when Claimant Emilio Corchado (6578322), was assessed a Level S 30-day Record Suspension with a three year probation period for abandoning his position on October 11, 2007 and allegedly violating Rule 1.6-Conduct and Rule 1.15-Duty Reporting or Absence of the Maintenance of Way Operating Rules. The suspension shall be reduced to a ten day record suspension, and the three year probation period shall be rescinded. The Carrier shall revise the Claimant's personnel record accordingly.

The instant claim is hereby sustained in part and denied in part.

We so find.


Daniel F. Brent, Impartial Chair

Dated: 6-3-09

(☒) I concur. () I dissent.

Glenn W. Caughron, Carrier Member

Dated: 6-18-09

(☒) I concur. () I dissent.

David Tanner, Organization Member

Dated: 6-15-09