

Award No. 12
Case No. 12
NMB Case No. PLB-07602-000012

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION—IBT**

v.

BNSF RAILWAY COMPANY

**Carrier File No. 10-12-0618
Organization File No. C-12-D040-21**

Claimant — Michael A. Luther

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The discipline [Formal Reprimand] imposed upon Mr. Michael A. Luther by letter dated July 13, 2012, for alleged violation of MOWOR 1.13 Reporting & Complying with Instructions in connection with charges of failure to comply with instructions with regards to overtime notification on scheduled workdays May 30th through June 6th as instructed in writing on April 25th, 2012 while assigned as a machine operator.
2. As a consequence of the violation referred to in Part (1) above, Claimant Michael A. Luther shall now receive the remedy prescribed by the parties in Rule 40(G).

BACKGROUND:

The Claimant, formerly a Group 2/Lowboy Operator, entered service with the Carrier in August 2004. This is one of two Claims that arise from two investigations that

were conducted on the same date, June 15, 2012, into the Claimant's job performance. (The other Claim is addressed in PLB 7602, Award No. 11, NMB Case No. PLB-07602-000011.)

The Claimant had worked as a lowboy operator in Engineering Support in Galesburg, Illinois, for several years under several different supervisors when a new supervisor took over his department in the spring of 2012. As a lowboy operator, Claimant was responsible for delivering heavy equipment to different work sites. On April 25, 2012, Supervisor Engineering Support Michael Buchholz, who was based in LaCrosse, Wisconsin, sent an e-mail to the Claimant and the other lowboy operator who would be working under him, outlining his expectations.

I will be taking over from Mr. Dye starting April the 30th. I have a few expectations that I believe you are already doing but I will list them to make sure we are on the same page.

.....

- Call me before 1400 if you see that you will be on overtime for any reason.

.....

On June 8, 2012, a notice of investigation was sent to Claimant, stating that an investigation would be held "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to comply with instructions with regards to overtime notification on scheduled workdays May 30th through June 6th 2012 as instructed in writing on April 25, 2012, while assigned as a machine operator.

An investigation was held June 15, 2012. According to the testimony of Supervisor Buchholz, Claimant had called in a few times but not consistently, and Buchholz had asked him repeatedly during their daily morning calls why he had not called in per instructions. On May 30, 2012, Buchholz began to document Claimant's calls regarding overtime. Buchholz stated that he spoke by telephone to Claimant the next morning about his failure to call but he continued not to call in. According to Buchholz, Claimant worked seven hours' overtime on May 30 without calling in; seven hours' overtime on May 31 without calling in; eight hours' overtime on June 1 without calling in; four and one-half hours on June 2 without calling in; three hours on June 5 without calling in; and one hour on June 6 without calling in. This caused problems for Buchholz with his supervisors, after he had reported to them that there would be no overtime and then had to call them back the next day to let them know that he had been wrong. Having employees call in before working overtime gives Buchholz the ability to re-assess priorities for machine deliveries and decide

whether a delivery needs to be done on overtime or can wait for straight time the next day. Claimant's failure to call in meant that Buchholz lost that control. On June 7, 2012, Buchholz e-mailed the Claimant about his failure to call in: "Why have I not been receiving the required 1400 Overtime call when you work overtime?" Mr. Luther responded "I was on time to deliver the load but I had to answer [sic] questions to the permit agent and do my Post trip and do the Daily report."

In his testimony at the investigation, the Claimant acknowledged having received Buchholz's April 25, 2012, memorandum. He testified that he tried to the best of his ability to comply with the overtime call-in instructions and denied that Buchholz had asked him repeatedly over the phone why he was not calling in about overtime. He stated that Buchholz told him not to call when he (Buchholz) knew already that Claimant's assignment would require overtime. In addition, there were times when he was unable to call because he was out of cell phone range or actively driving. On occasion, he himself did not know by 1400 that completing his assignment would require overtime. He also stated that he did not make calls when he was off-duty, but would report to Buchholz during their daily morning call. Mr. Luther testified to what happened on each of the dates in question. On May 30, 2012, he did not call in because Buchholz knew he was on a priority assignment that would require overtime. He acknowledged that he did not call in by 1400 on May 31; the testimony is not entirely clear, but it appears that Claimant swapped assignments with the other lowboy operator on a long-haul job and believed that Buchholz knew on May 30 that the Claimant would be working overtime in order to complete his assignment on May 31. On June 1, Claimant telephoned Buchholz at 1245 after hitting a deer. They did not discuss overtime, but Buchholz instructed Claimant to wait for police to arrive and then finish his assignment, which he did. Because Buchholz knew where he was and what he was doing, the Claimant did not think he needed to call again. On June 2, he did not have time to call Buchholz by 1400. On June 5, he was in an all-day welding class and could not call until class was over, which he did at about 2:30 or 2:45 p.m. He followed Buchholz' instructions about getting the permits for his next day's assignments and by the time he did that and completed other paperwork, he was on overtime. On June 6, at 1400 Claimant thought that he would be back in Galesburg by the end of his shift (around 1500 or 1530) so he did not call Buchholz. However, he subsequently ran into a last-minute permitting problem that delayed him. (This is the incident he referred to in his response to Buchholz's June 7 e-mail.) On rebuttal, Buchholz denied knowing that Claimant would have to work overtime on the dates in question, especially the significant amounts of overtime that he claimed. Buchholz also testified that the Claimant was the only employee he supervised that failed to

follow the overtime call-in instructions. He wrote the Claimant up after several phone conversations failed to have any effect. Because the two men work some 300 miles apart, it was not easy for them to physically sit down together and talk.

The record from the investigation also includes a copy of an e-mail that was sent on May 28, 2012, from George Loveland, the Organization's Local Chairman, to Duncan Brown, the Carrier's Director of Human Resources, requesting a meeting for the Claimant and his supervisors "to discuss and hopefully resolve specific issues that seem to be occurring on the job in regards to following BNSF rules and then being penalized for following the rules in addition to Mr. Luther's treatment compared to other Lowboy Drivers." A list of specific issues followed. On June 5, 2012, Loveland followed up with an e-mail to Mr. Brown and several local supervisors, including Mr. Buchholz, stating that he had not received any response from Brown "so I am forwarding this on to you all." June 7, 2012, is when the Claimant was served with two investigation notices.

By letter dated July 13, 2012, the Carrier concluded that the Claimant was in violation of MOWOR 1.13 "Reporting & Complying with Instructions" and assessed him a Formal Reprimand¹ for failing to comply with Supervisor Buchholz's overtime notification instructions May 30th through June 6th 2012. On that same date, the Claimant was also assessed a Formal 10-Day Record Suspension, in conjunction with damage to a vehicle he had been driving (see Case No. 11).

The Organization filed an appeal, which was denied by the Carrier. The Organization's position is that the discipline should be overturned in its entirety, for both procedural and substantive reasons. Procedurally, the Carrier failed to provide information to the Organization that it requested in advance of the investigation and failed to provide a copy of the Claimant's personnel record, which the Notice of Suspension indicates was considered in determining the penalty assessed. The Notice of Investigation failed to indicate the charges for which the investigation was being held, in violation of Rule 40 of the collective bargaining agreement. The hearing was not conducted in a fair and unbiased manner. Moreover, the charge was untimely filed. Substantively, the transcript establishes that the Claimant was trying to comply with instructions. He was charged and investigated only after he requested a meeting with management on May 28, 2012, to address questions that he had about how to comply with the expectations of his new manager. Such cause and

¹ The Notice of Decision is titled "Standard 10-Day Record Suspension," but the body of the letter states that the discipline assessed is a Formal Reprimand. That is also the discipline noted in Claimant's personnel record.

effect is not coincidental. The Carrier retaliated against the Claimant for asking to meet with his supervisors. Such retaliation is improper and the discipline should be overturned.

The Carrier denies that any procedural violations occurred. The evidence clearly establishes that on May 31, June 2, 5 and 6, 2012, the Claimant failed to follow Supervisor Buchholz's April 25, 2012, instruction to call him before 1400 (2:00 p.m.) if the employee anticipated working overtime. This violated MOWOR 1.13, "Reporting and Complying with Instructions," and a Formal Reprimand, the first level in the PEPA Program, was properly assessed following the investigation. There was no retaliation, as Claimant was aware of both the requirement to call in before working overtime and his supervisor's concerns about it before the Notice of Investigation was issued; indeed, it was issued only because of the supervisor's frustration with Claimant's failure to comply with his repeated requests to call in.

FINDINGS AND OPINION:

The Board, upon the whole record and all the evidence, finds that the carrier and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934. This Public Law Board has jurisdiction over the dispute involved herein.

The Carrier concluded at the end of its investigation that the Claimant had failed to follow Supervisor Buchholz's instruction to call in before 1400 when he anticipated needing to work overtime, specifically on May 30. This constituted a violation of MOWOR 1.13, Reporting and Complying with Instructions, which states:

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.

Claimant acknowledged that he had received Buchholz's April 25, 2012, memorandum and that he understood his responsibility to call in regarding overtime. His explanation of his actions in his testimony at the investigation indicated that he believed that he was, for the most part, in compliance. The Claimant understood Buchholz to have told him that if Buchholz knew that Claimant would have to work overtime in order to complete an assignment (such as delivering a piece of equipment to a distant location), he did not

need to call in. This is why he did not call on May 30 and 31 and June 1; he had long-haul assignments both days. On June 1, he called Buchholz at about 1245, after striking a deer. They did not specifically discuss overtime, but Buchholz instructed Claimant to wait at the scene of the accident for local police to investigate. From that, Claimant assumed that Buchholz knew that he would have to work overtime and that he did not need to call back specifically about overtime an hour later. On June 2, Claimant stated that he simply did not have time to call. On June 5, he was in an all-day welding class and called in after the class, at about 2:45 or 3:00 p.m., at which time Buchholz instructed him what tasks to perform, which required him to work overtime to prepare for his next day's assignment. Claimant assumed that Buchholz knew that he was in class and would not be able to call before 2:00 p.m. Finally, on June 6, Claimant did not call because he did not anticipate needing to work overtime. It was only after 2:00 p.m. that he ran into delays obtaining the permits he needed for his next day's assignment, which put him into overtime.

One of the problems that is clear from the record in this case and its companion case is that there may be communication problems between the Claimant and his supervisors and managers. Claimant is not a native English speaker, and his testimony at the investigation was sometimes hard to follow; in fact, during the two investigations, the Hearing Officer noted at one point that he was having difficulty understanding what Claimant was saying and changed his position in an effort to obtain a better audio recording of the proceedings. It appears to the Board likely that some of the issues between Claimant and his supervisors have to do with these communication problems, which may be exacerbated by the fact that Claimant and his immediate supervisor are physically located some 300 miles apart (Claimant in Galesburg, IL, and Buchholz in LaCrosse, WI), so it is difficult for them to sit down and discuss matters face to face. In the end, both sides need to work on better understanding each other.

Both sides' perspectives are understandable as well as reasonable. As a cost control measure, management needs to know when individuals anticipate needing to work overtime. At the same time, employees would like to avoid having to provide duplicative or unneeded notice that interrupts performance of their duties. In this case, Buchholz had only been Claimant's supervisor for a month when he began to track Luther's overtime call-ins; it appears that the two men had not yet established a solid working relationship. While Buchholz testified that he repeatedly asked Claimant why he wasn't calling in, the Claimant does not appear to have understood that there was a serious problem. And that fact in itself is a serious problem. One of the foundation principles of just cause is that an employee is

entitled to notice of substandard performance: what the rules are, what the consequences of failing to abide by the rules are, and when he or she is not meeting the employer's standards, especially when matter have gotten to the point where the employee is at risk of being disciplined for failing to meet the employer's standards.

Supervisor Buchholz testified that he did not speak more directly to the Claimant about his failure to meet the call-in standard because he wanted to give Claimant an opportunity to improve his performance. At some point, however, it was incumbent on Buchholz to inform the Claimant that he was at risk of being formally disciplined—which he did not do. Claimant was not oblivious to the fact that Buchholz was not entirely happy with his performance. He had his own concerns and had requested that his union representative set up a meeting, which Loveland requested by e-mail dated May 28, 2014. Buchholz began formally tracking Claimant's call-ins only two days later, on May 30, 2014. The Organization's suspicion that the tracking occurred in response to the request, as a form of retaliation, is understandable. Such suspicion could have been avoided had Buchholz put Claimant on notice that he was at risk of being disciplined—but he did not. Absent that notice, the charge against the Claimant appeared as an ambush.

The Organization questioned why the Claimant was not counseled by Buchholz about his concerns regarding what he saw as Claimant's failure to abide by the overtime call-in policy. There is a difference between asking an employee to call in and counseling him that he is not in compliance with the policy. Such a conversation would have given the Claimant an opportunity to explain his understanding of the policy—for instance, that he thought that if Buchholz knew that he was on a long-distance delivery he would have to work overtime and there was no need for a call—and Buchholz a chance to explain where Claimant's understanding was incorrect and what he wanted instead. Progressive discipline is based on such incremental efforts to resolve problems with employee performance, and the Carrier's PEPA Policy is based on that principle of progressive discipline. Under the principles of progressive discipline, it is not appropriate to discipline an employee without giving him notice that he is at risk of formal discipline. Claimant was not given that notice in this case; without that clear notice, he was denied a fair opportunity to improve his job performance to meet his new supervisor's standard. Under such circumstances, it was inappropriate for the Carrier to issue formal discipline to him, and it shall be reversed.

The Board recognizes management's right to set standards for employee performance and to require employees to meet those standards. The outcome in this case

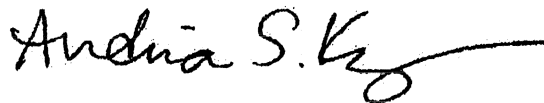
arises from management's failure to communicate clearly with the employee about its concerns and engage in interactive counseling that would have clarified the source of the problem and given the Claimant a better understanding of management's expectations.

AWARD

Claim sustained.

ORDER

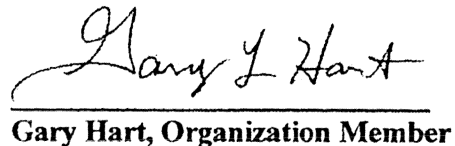
This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Formal Reprimand is reversed and shall be removed from his record. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.



Andria S. Knapp, Neutral Member



Zahn Reuther, Carrier Member



Gary Hart, Organization Member

May 30, 2014
Date