

**PUBLIC LAW BOARD NO. 5850**

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**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**vs.**

**BNSF RAILWAY COMPANY**  
(Former ATSF Railway Co.)

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Case No. 400 – Award No. 400 (Frias)  
Carrier File No. 14-10-0196  
Organization File No. 150-13D2-108.CLM

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**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing July 22, 2010, when Claimant, G. Frias (6419006), was issued a Level S 30-day Record Suspension with 1 year probation, for falsification of time on July 22, 2010. The Carrier alleged violation of MOWOR 1.6 Conduct.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be compensated for his lost time and expense and otherwise made whole.

**FINDINGS:**

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Greg Frias, has been employed by the Carrier since 1979. On August 12, 2010, the Carrier charged Claimant to attend an investigation "for the purpose of ascertaining the facts and determining (his) responsibility, if any, if connection with (his) alleged falsification of time on Friday, July 22, 2010 at 4:28 p.m. while working as a Welder." The letter stated that the investigation would determine possible violation of Maintenance of Way Operating Rule 1.6 Conduct. Following the investigation, which

was held on September 2, 2010, the Carrier determined that Claimant had committed the violations alleged and assessed him a Level S 30-day record suspension and a one-year review period.

Maintenance of Way Operating Rule 1.6, Conduct, provides, in relevant part:

Employees must not be:

\* \* \*

4. Dishonest

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated.

Sherri Ellis, Roadmaster for Belen and Albuquerque, testified at the investigation that she was Claimant's direct supervisor at the time of the incident. She stated that during her routine time review for the period July 16 through July 31, 2020, she noticed some discrepancies between what was reported for overtime and hours actually worked. Specifically, she stated, Claimant had claimed one hour of overtime, until 1700, for July 22, 2010, but she saw him leave the property at 1628 on that date. She testified that she knew Claimant did not return to the jobsite after that time because at approximately 1650 she went to the location where he and his co-worker had been working that day and they were not there. She added that she remained at the jobsite until approximately 1850 and did not see Claimant again.

Ms. Ellis testified that she must always be aware of when her employees work overtime and she keeps a log of that time. She added that she expects employees to communicate with her in overtime situations, and she monitors the time at which they complete their work. She stated that Claimant and his co-worker were welding on a frog early in the day at issue, and Track Supervisor Gerardo Gonzalez called them to assist with laying out plates for a steel gang which was to begin work the next day. She stated that she last saw Claimant at the jobsite at approximately 1600 when she delivered refreshments to the work group. Ms. Ellis acknowledged that there is video surveillance in the yard, but she did not check to see whether there was video of Claimant's movements that day and did not know if it was possible to do so.

Mr. Gonzalez testified that on the day at issue he had employees working in the 7105 track distributing plates for a gang that would be coming in to re-lay some rail in the yard. He stated during the afternoon the employees took a break, and they were on the east end of the yard and were re-briefing. He stated that at about 2 p.m. he called Claimant and Mr. Baca to come to the east end of the yard to help distribute the plates in 7105. He stated that after that he left the premises at about 2:30 or 3 p.m., from the east end of the yard, and went back to the depot, and he never saw the two employees arrive at

the east end, but was "pretty sure" they had shown up there without his seeing them. He added that he did not return to that jobsite that day. He also stated that it was possible for another Track Supervisor to assign the employees to other tasks but they would have contacted him first.

A written statement from Mr. Gonzalez, dated September 1, 2010, was read into evidence at the investigation, over the Organization's objection. It recited that at about 1630, when he and Ms. Ellis were sitting in the conference room, they observed Claimant's truck pulling out of the parking lot and leaving the property. The statement recounted that Ms. Ellis then went to check on the whereabouts of the co-worker, Mr. Baca. In his live testimony, Mr. Gonzales stated that he had been in the depot holding morning conferences with Ms. Ellis, going over the next day's work, when, at about 1630, he saw Claimant's truck leave the property. Mr. Gonzales testified that later that afternoon he was with Ms. Ellis in a conference room at the depot, talking about the next day's work. He acknowledged that he did not physically see Claimant in the truck. Mr. Gonzalez testified that he was not at the jobsite where Claimant had been working in the afternoon after about 1430.

Track Supervisor Ronald Fenstermacher testified at the investigation that during the afternoon he saw Claimant and Mr. Baca at the east end of the yard, performing setup support for a rail gang that would be coming in to the main yard. He stated that he did not recall assigning them to any other tasks. Mr. Fenstermacher testified that he saw Claimant at the east end of the yard, but he left the area at about 3:30 and clocked out at 4 p.m., so he did not see him after that.

Marvin J. Baca testified at the investigation that he was working as a welder, with Claimant, at the time of the incident. He stated that Mr. Gonzalez instructed them to perform frog repairs at Beavers, New Mexico in the morning, and when they finished Mr. Gonzalez called, at approximately 1450 or 1500, and instructed them to head to the east end of Belen Yard to distribute tie plates. He stated that they arrived at that location at about 1525. He added that Ms. Ellis was there when they arrived. He stated that following preliminary tasks and a job briefing from Mr. Fenstermacher, he and Claimant worked with employee Billy Sanchez to clean out a crossing in preparation for the steel gang. He stated that they actually began working at about 1540, and the task took 45 to 50 minutes to complete, so the employees finished at about 1630. Then, Mr. Frias stated, they had a job briefing to determine whether they needed to help the rest of the section distribute plates, but determined that they were not needed, so they returned equipment to its proper places and left the area about 1640. He stated that they arrived at the depot at about 1645. Then, he explained, they cleaned up and performed post-trip inspection, so it was about 1705 when they finished and left the depot. He stated that he did not see Mr. Gonzalez or Ms. Ellis when he returned to the depot. Mr. Baca testified that it was not feasible that Claimant could have left the depot at 1628.

Mr. Baca explained that the employees only discuss overtime with a supervisor if the supervisor instructs them to perform that work. Otherwise, he stated, they simply do their work and go home when finished. Mr. Baca acknowledged that he put in for eight

hours of overtime on the day at issue, but maintained that the time was correct, as he actually worked a few minutes more than that.

Claimant testified that he left the Carrier's premises at approximately 1705, not 1628, on the day at issue. He also stated that another employee at the Belen Yard has a vehicle identical to his. He also stated that he left the jobsite about 4:40, and arrived at the depot at about 4:50, leaving for the day at about 1705. He maintained that at 1628 they were still cleaning up for the day and putting their tools away. He stated that if Ms. Ellis had been traveling back to the jobsite they could not have missed one another because there is only one road upon which to travel. He stated that Mr. Baca had physically entered their time into the system, but he trusted him to do so accurately. Claimant also stated that the employees do not notify management when they finish for the day.

A statement from Bill W. Sanchez, who was apparently ill and did not appear at the investigation, was entered into the hearing record. In it, Mr. Sanchez states that he was tasked to work on a crossing on the east end of Track 5, and Claimant and Mr. Frias were sent to assist him, arriving at about 3:30 p.m. He recounted that they had a job briefing and then continued the work for about 45 minutes, leaving the site at about 4:30 p.m. He stated that he continued working, loading tie plates on another loader, until about 7 p.m.

The Carrier's Policy for Employee Performance Accountability (PEPA), provides that an employee involved in a serious incident, as enumerated in the policy's Appendix B, will receive a 30-day record suspension and may be offered training to correct the underlying behavior. Appendix B lists as serious violations numerous safety infractions as well as "other serious violations" of Carrier rules.

The PEPA provides that a second serious incident within a 36-month review period will subject the employee to dismissal, except that the serious-incident review period will be reduced to 12 months for employees who have completed at least five years' service and who have been injury and discipline-free for that period. The policy also states that the circumstances surrounding a serious incident may reduce an employee's personal culpability, and the matter may be handled according to the general guidelines, and if there is any doubt supervisors are to err on the side of leniency.

The PEPA also provides that certain aggravated offenses, listed in Appendix C, may subject an employee to dismissal for a single offense. Those violations include: 1) Theft or other act with intent to defraud the carrier of monies or property not due. Claimant's personal record shows only a demerit, in 1990.

The Carrier asserts that this case is not complicated. Simply put, the Carrier states, Claimant put in for overtime he had not worked. The Carrier notes that the regular hours of Claimant, a welder, and his co-worker Marvin Baca were 0730 to 1600 and, although Claimant claimed to have worked until 5:06 p.m., two eyewitnesses saw him leaving the property at 1628, 4:28 p.m. In particular, the Carrier points out, Roadmaster

Ellis testified that she saw Claimant leave the property at 1628, and noted the time in a log she maintains because all overtime must be approved by the Division Engineer. Ms. Ellis' testimony, the Carrier notes, was corroborated by that of Track Supervisor Gerardo Gonzalez. Thus, the Carrier argues, while Claimant claimed one hour of overtime in the Carrier's timekeeping system, the credible evidence demonstrates that he left Carrier property only 28 minutes after his usual quitting time.

The Carrier states that it well established that in cases such as this one, where there is conflicting testimony, the Hearing Officer must make credibility resolutions and resolve that conflict. The Hearing Officer credited the testimony of the Carrier witnesses, the Carrier stresses, and that determination should not be disturbed by this Board. Thus, the Carrier urges, it has proven Claimant's guilt by substantial evidence.

With respect to the penalty, the Carrier asserts that Claimant was dishonest, and such an offense is stand-alone dismissible under the Carrier's PEPA. Thus, the Carrier concludes, there is no reason for this Board to overturn the lesser penalty it assessed against Claimant.

The Organization raises procedural and substantive challenges to the discipline assessed against Claimant. First, the Organization notes that the investigation notice refers to Claimant's alleged violation as occurring on Friday, July 22, 2010, but July 22 was in fact a Thursday. This confusion should cause the discipline to be overturned, the Organization urges, as Claimant and his representative were not able to prepare a proper defense. The Organization further argues that the Hearing Officer erred when he allowed the introduction of an obviously coached and rehearsed written statement from Carrier Officer Gerardo Gonzalez, who was present at the investigation to testify. The statement, the Organization notes, was dated 41 days after the events at issue, and shows that Ms. Ellis' testimony was questionable as she apparently determined that she needed this corroboration. Thus, the Organization urges, Claimant was denied his right to a fair and impartial hearing.

On the merits, the Organization first points out that Claimant's time slip for July 22, 2010 was entered by the lead welder on Claimant's work group, and Claimant had no way of knowing what time was entered for him that day. Therefore, the Organization asserts, Claimant cannot be held accountable for any asserted violation. Further, the Organization argues, although Ms. Ellis testified that she saw Claimant leave the facility at 1628 on July 22, she could not remember the time when she was questioned about it again. As for Mr. Gonzalez, the Organization points out that he was obviously confused as he testified he saw Claimant leave the property when he and Ms. Ellis were sitting in the depot holding morning conferences, but in his written statement he recites that he saw Claimant leave in the afternoon. The Organization further notes that Mr. Gonzalez testified that he did not actually see Claimant leave, just a vehicle.

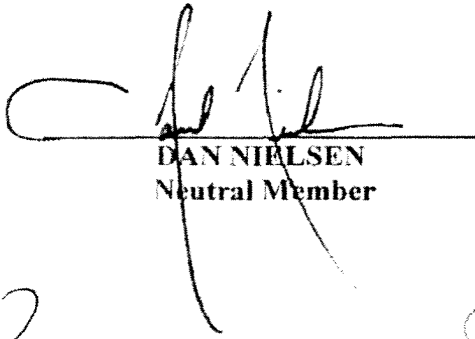
The Carrier's case against Claimant, the Organization urges, is based upon questionable statements, not concrete evidence sufficient to establish his guilt. The Organization notes that Claimant is a 31-year employee with an impeccable record, and,

even if the Carrier was able to prove its charges, the discipline is excessive in proportion to the alleged offense. The Organization requests that the claim be sustained.

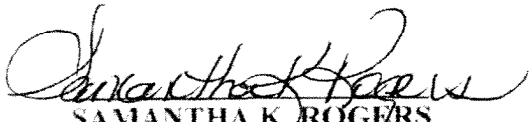
We have carefully reviewed the record in its entirety. First, we find no evidence of any procedural irregularity which denied Claimant his right to a fair and impartial investigation. On the merits, the instant case presents a classic case of competing factual versions of an event. Claimant and Mr. Baca were working together at all times. Two Carrier officers state that they saw Claimant leave the property approximately one-half hour after his usual quitting time, and one Carrier officer also testified firmly that she saw Mr. Baca leave at about the same time. The two employees put in for one hour of overtime pay, and both contended that they worked more than one extra hour and did not leave the property at the time alleged by the Carrier. The record also includes a written hearsay statement from another employee, who did not testify at the investigation, bolstering Claimant's account. Thus, the facts of this case turn upon the credibility resolutions of the Carrier, who credited the accounts of the Carrier witnesses. It is well established that credibility resolutions are not the province of this Board absent evidence that the Hearing Officer's determinations are unreasonable or lacking in record support. There is no such showing here. There is room for disagreement, but the Carrier offered live testimony from two supervisors to the effect that the Claimant and his co-worker left earlier than they claimed. This provides a reasonable basis in the record for the Hearing Officer's determination. Thus, based upon the accounts of its witnesses, the Carrier has proven Claimant's guilt by substantial evidence. The discipline was assessed in accordance with the PEPA, and we cannot say that it represents an unfair or arbitrary exercise of the Carrier's discretion to determine penalties.

**AWARD**

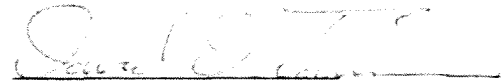
**Claim denied.**



**DAN NIELSEN**  
Neutral Member



**SAMANTHA K. ROGERS**  
Carrier Member



**DAVID TANNER**  
Organization Member

Dated this 20 day of Feb, 2012.