

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employees  
and  
Burlington Northern and Santa Fe Railway  
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- “1. The Carrier violated the Agreement when on January 4, 2002, Mr. G. Ortiz was suspended from service for 10 days for allegedly violating Maintenance of Way Operating Rule 1.15 in conjunction with allegedly leaving work early without proper permission.
- “2. As a consequence of the Carrier’s violation referred to in part (1) above, Mr. Ortiz’ record be cleared and he be made whole for any lost wages and unnecessary expense incurred by the Carrier’s actions.” [Carrier File No. 14-02-0029. Organization File No. 180-13A1-0120.CLM].

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 of the dispute herein.

The Claimant, Mr. Gil Ortiz, was a career employee of the Carrier, having been first hired in 1977. On Friday, November 9, 2001, he was employed as a Trackman on a Maintenance of Way extra gang working out of Barstow, California. His position on this gang was being abolished at the close of the work day on that date. He left before the end of the day, however, and that act resulted in the disciplinary decision which is the subject of this dispute.

On November 20, 2001, the Claimant was served a notice of charges and investigation, reading in part as follows:

“ . . . The purpose of this investigation is to ascertain the facts and determine your responsibility, if any, in connection with your alleged violation of Maintenance of Way Operating Rules 1.13 and 1.15, . . . when on Friday, November 9, 2001 you allegedly left your job without proper authority. . . .”

The investigation was originally set for November 30, 2001, but was postponed to and held on December 11, 2001, by agreement of the Parties.

Roadmaster Michael McNabb and Foreman Steven Larson were called as witnesses and presented testimony and evidence in the investigation. The Claimant also testified in his own behalf. The sum of their testimony and evidence indicates that Foreman Larson arranged for the Claimant and certain other fellow employees to contact the Carrier's Manpower Planning Office on the morning of November 9 to exercise their seniority to obtain other jobs when their positions were abolished at the close of the day.

Roadmaster McNabb offered in evidence a transcript of the discussion between the Claimant and an unnamed person in the Manpower Planning Office. Mr. McNabb stated that he listened to a recording of the conversation, and then caused an audio recording and a written transcript to be prepared covering their conversation. He attested to the accuracy of these records.

The transcript shows that the Claimant advised the other party the identity of the gang to which he wished to exercise his seniority. The other party was thereby able to ascertain whether there was a junior employee in that gang who could be displaced by the Claimant. At the close of their conversation, the Claimant started to introduce another employee (Joe) who was, in turn, seeking to exercise his seniority, but their last words were these:

**G. Ortiz:** Okay. Here, Joe. Oh, okay, report there Monday?

**Manpower:** Yes.

**G. Ortiz:** They start at 7 o'clock?

**Manpower:** 7 o'clock.

**G. Ortiz:** Okay. So I find out where they meet at, uh. Okay. Well, here's the other one."

Foreman Larson testified that the Claimant told him that he had been directed by the Manpower Planning Office to report to the other gang, to which he was displacing, on the same day, Friday, November 9. He testified in these words:

"71. Q. Okay, if you would, please tell us what you know about this incident?

- A. What happened was that day the gang was abolished on the 9<sup>th</sup> and I got a hold of manpower for all the, for all the guys that were abolished that day so I can get a hold of 'em. I got a hold of manpower for them so they can make their bumps to another gang, another position somewhere else. And when Mr. Ortiz was done, I was out in the yard somewhere and he came up to me and said that manpower had told him that he had to go assigned to his new place of work.
72. Q. Okay, so he told you that he needed to report to his new job on that day, Friday, the 9<sup>th</sup>?
- A. That is correct.
73. Q. Okay and what did, what did you do at that time?
- A. I said okay, go ahead and go."

The Claimant gave this account of his dialogue with Foreman Larson:

- "116. Q. Mr. Ortiz, you said you complied with Rule 1.13. Could you explain to me how you complied with this rule?
- A. That was in the morning and time. The (Inaudible) everything was, put in my bump. I asked him [Mr. Larson] if it was all right if I left to go put my bump in San Bernardino since I live in San Bernardino instead of working the whole day and, and he said, 'See you later. Go ahead and go.'"
- "142. Q. Or when your job was abolished up in Barstow, you placed a bump and manpower planning stated to you that you could report on November 9<sup>th</sup> in San Bernardino. Is that what you're saying?
- A. I state, I didn't say that they told me to go report on that day. I said that they said, I asked them if it was all right. Robledo had called 'em after this, since I lived in San Bernardino, Robledo said you could go and bump right now in San Bernardino since you live in San Bernardino instead of working the whole day here. So that's when I told Larson, I asked Larson 'Is it all right if I go to San Bernardino and just bump on Pat Lowe's gang, get paid out there today?' and he said 'Go ahead and go.'"

On January 4, 2002, Roadmaster Adam Richardson, who was the Conducting Officer at the investigation, wrote the Claimant his disciplinary decision. His letter, in part, reads:

“This letter will confirm that as a result of the formal investigation on December 11, 2001, concerning your absence without proper authority, you are issued a Level S Actual Suspension of 10 days for violation of Maintenance of Way Operating Rule 1.15, . . . If you commit another serious rule violation during the tenure of this probation, you will be subject to dismissal.”

The Board notices that although the last sentence quoted above refers to a probationary period, nothing else in the letter made any reference to a probationary period, and its length or duration is not defined. The Board concludes that this sentence was erroneously entered and has no effect. Maintenance of Way Operating Rule 1.15 reads as follows:

“Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They 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 Organization promptly appealed Mr. Richardson’s decision to the Carrier’s Assistant Director - Labor Relations. The Organization argues that the transcript of testimony taken in the investigation contains immaterial statements and irrelevant evidence which denied the Claimant his due process rights. During the course of the investigation the Claimant’s representative objected to questions about compliance with the charged rule violations. Again, such questions were characterized by the Organization as a violation of his due process rights.

The Organization objects to the notice of discipline being issued by the same officer who conducted the investigation, characterizing this as a due process violation, also.

The Organization also argues that throughout the transcript, in testimony by both the Claimant and Foreman Larson, it was established that the Claimant was given permission by Mr. Larson to absent himself.

The Organization further argues that the charges were unproven and the discipline administered was unwarranted and unjustified. Even if the Carrier had carried its burden of proof, (but the Organization denies that burden was borne), the discipline is excessive.

The Carrier rejoins that the discipline was neither harsh, capricious, nor excessive. The Claimant’s due process rights were not violated. As for the Organization’s charge that immaterial or irrelevant evidence was entered into the record, the Carrier states that is simply not correct. The Claimant was charged with leaving his job without proper authority. The record shows, according to the Carrier, that although the Claimant told Foreman Larson that the Manpower Planning Office had directed him to report to San Bernardino on that same day, November 9, the transcript of his conversation with that Office shows that he was told to report on the following

Monday. The Carrier points out that the Claimant's job was abolished at the end of the shift on Friday, November 9, not at a time of his own choosing.

The Carrier further states that asking an employee questions about how he understands a rule and how he complied, is not a violation of his due process rights.

The Carrier further points out that in a previous case before Public Law Board No. 5850, the Organization objected when an officer other than the officer who conducted the investigation issued the disciplinary decision. The Carrier questions whether the Organization has shifted its thinking, or is simply arguing what is convenient. In any event, the Carrier says, it is evident that the Claimant's due process rights were not breached.

The Carrier states that when Foreman Larson permitted the Claimant to leave work before his shift ended on November 9, Mr. Larson had been misled, perhaps unintentionally, by the Claimant's assertion that he had been directed to leave on that date. In fact, as the transcript of the telephone conversation between the Claimant and the Manpower Planning Office shows, he had been told to report in San Bernardino on Monday (November 12). The Carrier concludes that the assessed discipline is not out of line.

The Board has carefully studied the transcript of evidence and the entire record in this case. The Parties' respective positions have been considered.

The Claimant's representative objected to the introduction of the transcript of the conversation between the Claimant and the Manpower Planning Office. He suggested that tape recordings and transcripts could be altered. The Carrier should, instead, have the participants present to directly testify, so they might be subject to cross examination. The Board is not persuaded that the presence of the person in the Manpower Planning Office who conversed with the Claimant would have altered the outcome of this case. The very purpose of recording these conversations is to create an accurate record of what was said. Words cannot be withdrawn once they are uttered. Roadmaster McNabb stated that he heard the tape played, and caused a copy of it and the transcript to be sent to him. Further, the Claimant has not denied the essential fact that he asked if he was to report to the other job on Monday, and the other party answered affirmatively.

Roadmaster Richardson was the Conducting Officer, and he also issued the letter assessing the disciplinary penalty. While the Organization objects to this procedure, and the Carrier rebuts that the Organization took an opposite position in a case before another Public Law Board, this Board found the procedure acceptable in its Award No. 267, wherein we said:

"The Board does not consider the dual roles filled by Mr. Palacios to be a fatal procedural error. The role of the Conducting Officer as both the trier of facts and

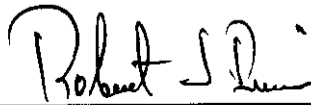
the assessor of discipline is a common practice in this industry, and nothing in Discipline Rule 13 of the Agreement prohibits such procedure.”

The Board concurs in the Carrier’s assessment of Mr. Larson’s role in permitting the Claimant to leave his job on November 9. Clearly, Mr. Larson accepted the Claimant’s misrepresentation of his conversation with the Manpower Planning Office. The testimony of the Claimant and Mr. Larson is not fully congruent, as a comparison of Question and Answer Nos. 71-73 with Nos. 116 and 142, above, indicates. The Conducting Officer found the testimony of Mr. Larson to be more credible, and the Board has been given no grounds to disagree.


The only remaining issue is whether the discipline is excessive for the proven charge, violation of Maintenance of Way Operating Rule 1.15. The Claimant had more than 24 years of service with the Carrier on the date of this event. Although his personal record is not unspotted, his last previous disciplinary entry, a deferred suspension, occurred ten years before. After he left Mr. Larson’s gang on November 9, he could not find the other gang in San Bernardino, and according to the Organization, he lost a day’s pay on that date, which is chargeable to his own act of leaving before the end of the day. The Board believes a ten-day suspension for the first offense in ten years is excessive. The ten-day suspension is reduced to a five-day suspension. As indicated above, the Board believes there is no probationary period, nor should there be.

#### AWARD

The claim is sustained in accordance with the Opinion. The Carrier shall compensate the Claimant for time lost in excess of five (5) days within sixty (60) days from the date of this Award.



Robert J. Irvin, Neutral Member

  
R. B. Wehrli, Employee Member  
Thomas M. Rohling, Carrier Member

June 13, 2003  
Date