

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 November 25, 2002, Mr. D. A. Senesac [was] issued a Level S actual suspension of 60 days for allegedly violating Rule 1.6 and 1.13 of the Maintenance of Way Operating Rules, in conjunction with failure to comply and being insubordinate.
- “2. As a consequence of the Carrier’s violation referred to in part (1) above, Mr. Senesac shall be reinstated with seniority, vacation, all rights unimpaired and paid for all wages lost in accordance with the Agreement.”
[Carrier File No. 14-02-0286. Organization File No. 10-1311-0214.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.

On October 25, 2002, the Claimant, Machine Operator David A. Senesac, was served with a notice of charges and investigation over the signature of Division Engineer Jerry Boman, reading, in part, as follows:

“Arrange to attend investigation . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to Comply with Instructions in violation of Maintenance of Way Rule 1.13 and being Insubordinate, in violation of Maintenance of Way Rule 1.6 at Eola, Illinois at approximately 0720 hours on October 25, 2002, while assigned to Tie Production Gang TP02.

YOU ARE BEING WITHHELD FROM SERVICE PENDING RESULTS OF THIS INVESTIGATION” [Capitalization in original letter]

This investigation was set for and held on November 1, 2002. The Claimant was present and was competently represented by his Organization's Assistant General Chairman.

Other than the Claimant himself, there were four witnesses who presented testimony and evidence. The totality of their testimony and evidence presents the following picture of the events which brought about the charges against the Claimant.

On Thursday, October 24, 2002, while the Claimant was operating a machine in connection with work being performed on the track by his Tie Production gang, there were changes made in the gang's working limits, which resulted in some of the gang's machines working outside their designated track and time limits. The Claimant testified that he was not made aware of this infraction until after he had left work the following day. When the gang cleared the tracks and tied up at the end of their work day on October 24, the Claimant, as was his habit, changed clothes, entered his automobile, and drove to his home, 84 miles away. He commuted daily, while the rest of his crew stayed at Carrier-provided lodging. It was his personal choice to commute daily, rather than staying with the balance of the gang, although he did utilize Carrier-provided lodging when working farther from his residence, at other times and work locations.

When he reported for work at 7:20 to 7:25 a.m. on Friday, October 25, he was instructed by Tie Production Gang Foreman Lloyd Ihde to report to Assistant Roadmaster James Savage's office at the depot in Eola, Illinois, a distance estimated in the record of from one-half to two miles from the Claimant's reporting site. According to his own testimony, which could not be affirmed or denied by that of any other witness, he drove for 30 minutes to one hour¹ searching for the depot, without success. In the meantime, he said he received a telephone call from his wife, who reported that there was no heat in their house and she could smell the odor of gas. (He said he had just lighted their gas furnace on Wednesday). He then called his own Foreman, Mr. Larry Lemaster, and told him he was going home, requesting a personal day. Mr. Lemaster told him he didn't know whether he could give him a personal day, but the Claimant said he considered it an emergency and was going home whether he was paid or not. According to his testimony, the Claimant said he conversed with Mr. Lemaster about 7:30 a.m.

Mr. Savage testified that because of the track and time violation on Thursday afternoon, the entire crew was taken out of service for urinalysis and determination of how the serious safety violation occurred. The Claimant was also taken out of service, being one of the crew, but unlike the other employees in the gang, he was not aware of it, since he had departed for home, as was his customary practice. Nor was he apprised of his being withheld from service on the morning of Friday, October 25, because it was intended that he be required to provide a urine specimen and a

¹"I rode around for a half hour." (Transcript Answer No. 231). "I [tried to find Eola depot] for over an hour." (Answer No. 261). "[P]robably 45 minutes." (Answer No. 422).

statement of what had happened after he reported for work on Friday morning. He was handled differently because, unlike his fellow workers, he had left for home before a statement and urine specimen were taken on Thursday afternoon.

On November 25, 2002, Division Engineer Boman advised the Claimant of the disciplinary decision arising from the investigation:

“This letter will confirm that as a result of investigation held on November 1, 2002, concerning your failure to Comply with Instructions in violation of Maintenance of Way Operating Rule 1.13, and being insubordinate in violation Maintenance of Way Rule 1.6, on October 25, 2002 while assigned on Tie Production Gang TP02, you are issued a Level S Actual Suspension of 60 days.”

The cited Rules read as follows:

Maintenance of Way Operating Rules (MWOR) 1.13

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

MWOR 1.6

- “Employees must not be
1. Careless of the safety of themselves or others
 2. Negligent
 3. Insubordinate
 4. Dishonest
 5. Immoral
 6. Quarrelsome
- or
7. Discourteous.”

The above decision was promptly appealed by the Organization’s General Chairman to the Carrier’s Assistant Director - Labor Relations.

The Organization argues that the Claimant, whose personal record was clear of any previous discipline, had been removed from service the evening of Thursday, October 24. Not being aware of this fact, the Claimant reported for work on Friday morning, October 25, and was instructed by a Foreman to report to the Roadmaster’s office, a place he described as difficult to

find, which he had never visited before. The Organization questions how an employee who is out of service can be charged with failure to follow instructions.

Before he was able to locate the Roadmaster's office, he was called away to return home because of a gas leak in his residence. He immediately left to attend to that emergency situation, the Organization states.

The Organization also argues that the Claimant has already been disciplined for the track and time violation on October 24, having accepted a 30-day record suspension with three years' probation. It suggests that he is now being punished again for the same offense, constituting double jeopardy.

But even if the charges were proven, the Organization further argues, the discipline assessed is out of proportion to the charges made.

The Carrier rejoins that the Claimant's accounts of his actions on the morning of October 25 are simply not realistic and his testimony cannot be believed. He said he reported for work at 7:20 to 7:25 a.m., was told at that time to report to Mr. Savage's office, and then requested a personal leave day about 7:30 a.m., but in doing so, said nothing about an emergency call from his wife.

Furthermore, he testified that he searched for the Eola depot for 45 minutes to one hour, and parked at one location for ten minutes, thinking he had arrived. The time line does not add up, according to the Carrier.

The Carrier questions the Claimant's credibility. If he had a genuine emergency with a gas leak at home, before undertaking a two-hour drive, he did not instruct his wife to leave the house nor to notify an emergency service; he did nothing to protect his home. At one point in his testimony, the Claimant said that if he knew he was in trouble with the Carrier, he would have stayed at work. It is not credible that he would consider staying on the job instead of dealing with the emergency. The Carrier finds his account of an emergency to be unbelievable.

As for the Organization's argument that the Claimant was out of service and was not obligated to respond to instructions, the Carrier states that employees are always responsible to comply with instructions from their supervisors. His failure to do so constitutes insubordination. The Carrier denied the Organization's appeal.

The Board has carefully studied the record in this case and considered the arguments of the Parties. Those issues of significance will be addressed below.

The Organization argues that the Claimant was out of service on the morning of October 25, and therefore cannot be disciplined for failure to follow instructions when he is out of service. The record indicates that he did not know he was out of service at that point, however. He had purposely not been told, pending a meeting with Mr. Savage and the taking of a urine specimen. If he did not know he was out of service, the Organization's argument on this point must fall. In any event, there is no "double jeopardy" attached in this case. The suspension from service, unknown to him to be sure, was for the track and time violation on October 24. The instant case involves his failure to report to Mr. Savage's office as he was directed on October 25. Two different issues.

The Board is also troubled by the time line variances which the Carrier described in its response to the Organization's appeal, and the Board is perplexed by the Claimant's reaction to the emergency described by his wife. Instead of leaving his family exposed to the possibility of a gas explosion during the time it took him to drive home, the logical exigent act is to require that the premises be vacated and the gas company or the fire department notified to locate the gas leak and cause it to be fixed. The Claimant's failure to thus act casts some degree of doubt as to the veracity of his account.

On the other hand, however, the Claimant had advised Assistant Roadmaster Savage, before the investigation, of a furnace problem:

- "369. Q. Were you aware of any problems that Mr. Senesac was having at home?
A. Later on I heard that he had furnace trouble.
370. Q. Later on being?
A. Later on talking to him. He talked to me later in the week or early this week about furnace problems he had at home.
371. Q. He called you this week?
A. Yeah."

The Board concludes that the Claimant's account of a furnace problem is not a total fabrication, as the Carrier suggests. But his election to wait until he completed an 84-mile drive to deal with the problem instead of acting with a greater degree of urgency diminishes its materiality as an emergency demanding immediate action.

The Claimant asserted that he drove around hunting the depot for a period ranging from 30 minutes to one hour. It seems unlikely that he would have continued this fruitless search after his wife called. The Board concludes that this unsuccessful effort to find the depot would have brought about a telephone call or a request for direction from some source. The Claimant's lack of greater diligence in carrying out instructions is inexplicable.

Clearly, the Claimant did not comply with MWOR 1.13, in that he failed to comply with instructions to report to Mr. Savage's office. The Board is not persuaded, however, that he is guilty of insubordination, a charge with greater implications of wilfulness and defiance. *Black's Law Dictionary, Sixth Edition* (1991) defines it:

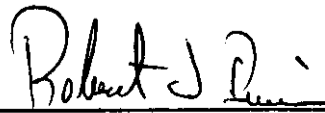
"Insubordination. State of being insubordinate; disobedience to constituted authority. Refusal to obey some order which a superior officer is entitled to give and have obeyed. Term imports a wilful or intentional disregard of the lawful and reasonable instructions of the employer."

Webster's New World Dictionary, Second College Edition (1984), provides this definition of "insubordinate": "[N]ot submitting to authority; disobedient."

The Board does not believe that the Claimant's failure to report as instructed rises to the wilful or defiant level implied in the above definitions. But his failure to act with more diligence to obey an order merits a disciplinary penalty. The Board notes that he is an employee with more than 18 years' service and, except for the record suspension for the track and time violation on October 24, his record was clear of any disciplinary entries since 1990. This record warrants reduction of the actual suspension from sixty (60) days to thirty (30) days.

AWARD

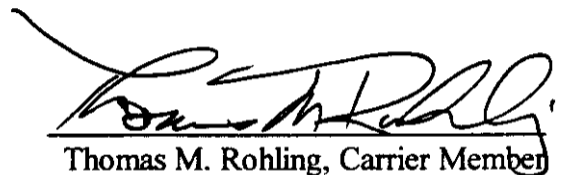
The claim is sustained in accordance with the Opinion. The Carrier shall compensate the Claimant for time lost in excess of thirty (30) days within sixty (60) days from the date of this Award.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member

June 13, 2013

Date