

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employes
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 April 30, 2003, Mr. William A. Geary was issued a Level-S, 30-day actual suspension with a three year probationary period for violation of Rule 1.6 (Conduct) Item 4 (Dishonest) of the Maintenance of Way Operating Rules; Rules S-1.1 (Safety) and S-12.1.1 (Operation of Motor Vehicles, General Requirements) of the Maintenance of Way Safety Rules; and Rule 15.13 (Motor Vehicle Operation) of the BNSF Engineering Instructions Field Manual in connection with his allegedly operating a Carrier-owned vehicle from February 15, 2003 through April 1, 2003, without holding a valid driver's license.
2. As a consequence of the Carrier's violation referred to above Mr. Geary shall be paid for all time lost, and have his record expunged of the above referenced discipline. [Carrier File No. 14-03-0125. Organization File No. 190-13N1-035.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. William A. Geary, entered the Carrier's service in 1996, and was working as a Welding Foreman in its Maintenance of Way Department when this dispute arose. On April 1, 2003, he was removed from service and sent a notice of charges and investigation, concerning a report that he had allegedly operated a Carrier-owned vehicle from February 15 until April 1, 2003, without a valid driver's license. He was charged with violation of several Carrier rules. The investigation was set for and held on April 14, 2003. A transcript of testimony and evidence taken in the investigation is in the record before this Board. The Claimant was competently represented by the Organization's Vice General Chairman.

The Claimant's representative, at the beginning of the investigation, requested that it be cancelled and the Claimant returned to service, contending that his removal from service before hearing any testimony suggested that he had been prejudged guilty of the charges. The Conducting Officer ruled that the investigation would proceed.

Assistant Roadmaster Danny Escalante, the Claimant's supervisor, testified as the Carrier's sole witness. He stated that it came to his attention, on April 1, 2003, that the Claimant's driver's license had been suspended. He followed up this information with other Carrier supervisors, who obtained a copy of the Claimant's driver record from the California Department of Motor Vehicles (DMV). That record showed that the Claimant had been notified, by certified mail, of suspension of his Commercial Driver's License (CDL), effective February 15, 2003, for driving with an excessive blood alcohol level. Mr. Escalante said he asked the Claimant about the status of his license, and was told, "[B]ack in October he had a DUI, he was in the process of getting it taken care of," with an attorney's assistance. Mr. Escalante further testified that after consulting with his superiors, it was decided to take the Claimant out of service and hold an investigation.

This witness also testified that the Claimant's duties as a Welding Foreman required him to drive Carrier vehicles, and he had, in fact, observed the Claimant driving during the period between February 15 and April 1.

The Claimant testified that he had been notified of his license suspension in October, 2002, but his attorney had acted to have that suspension temporarily stayed, pending the result of a hearing before the DMV. When he received further notice that his license was suspended effective February 15, 2003, he advised his attorney and he was awaiting notification from the attorney whether that suspension would also be stayed. He admitted that his job required him to drive a Carrier vehicle, and he had driven between February 15 and April 1. He said that he did not notify any Carrier supervisors of the matter because he regarded it as a personal problem, not involving the Carrier. He testified:

I was still in confusion as to whether it was going to be suspended after that date [February 15, 2003], or if he had taken care of it, and if the license was valid or not valid. So to this date, I'm still in confusion as to what's going on with that. [Transcript page 21].

Further along in the investigation, these questions and answers are recorded:

Q. On the day you were taken out of service, did you in fact think or feel that you had a work permit to continue to operate vehicles?

A. Yes, I did.

Q. So you were under the assumption you still had a work permit to continue operating company vehicles; is that correct?

A. Yes. [Transcript page 23]

Upon being asked, the Claimant was unable to show any work permit or driver's license.

On April 30, 2003, the Claimant was notified of the Carrier's decision based upon the evidence and testimony obtained in the investigation. For driving Carrier vehicles without a valid driver's license between February 15 and April 1, 2003, he was issued an actual suspension of 30 days, commencing with the date he was taken out of service pending the investigation, April 1, 2003, for violation of several named Carrier rules. He was additionally assigned a probationary period of three years, and restricted to a Trackman's position until he could produce a valid CDL. The cited rules are summarized below.

Maintenance of Way Operating Rule 1.6 requires that employees not be dishonest.

Maintenance of Way Safety Rule (MWSR) S-1.1 requires a job briefing before beginning work and when work or job conditions change.

MWSR S-12.1.1 requires that every Carrier driver must know and obey local, state, and federal laws and regulations for operating vehicles, and must carry a required driver's license. They must notify their supervisor and stop operating vehicles if their license is suspended.

Engineering Instruction 15.13 requires that Carrier vehicles be operated in accordance with local, state, and federal laws and regulations, and all drivers must have a valid driver's license. Drivers must notify their supervisors and stop operating vehicles if their license is suspended, revoked, or restricted.

The Carrier's disciplinary decision was promptly appealed by the Organization to the Carrier's Labor Relations Department. The Organization argues that the Claimant was under the impression his attorney had obtained a stay of his license suspension. The discipline, therefore, is "extreme, unwarranted, and unjustified," and not supported by the record. The Organization asks that the Claimant be reinstated with all rights unimpaired and paid for all wages lost.

The Carrier responds that there is no confusion about the matter of the Claimant's license. He was notified by certified mail that his license was suspended beginning on February 15, 2003. He was dishonest, in that he did not notify the Carrier of his license suspension. Drivers are required to notify the Carrier of any changes in their driving status. The Carrier's rules also require compliance with state and federal laws. The Carrier proved that the Claimant operated Carrier's vehicle after his license was suspended. The Carrier also pointed to the Claimant's past record, and determined that a 30-day suspension was warranted.

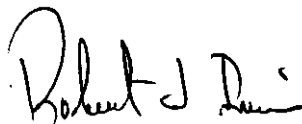
The Board concurs in the Carrier's evaluation of the facts in this case. Upon notification from the state that his license was being suspended on February 15, 2003, it became the Claimant's responsibility to know whether the suspension was stayed, not to be "in confusion," not to "think or feel" he had a permit to drive, not to assume his license was still valid. This was a matter of no little importance. Driving without a valid license is not only a violation of the Carrier's rules, it violates state law. If the Claimant drove a vehicle exceeding 26,000 pounds in weight, or transported hazardous materials, without a valid CDL, he was in violation of Federal regulations. The Federal Motor Carrier Safety Administration requires that when an employee's driver's license is suspended, he/she must notify the employer before the end of the business day following the day the notice of suspension is received. (49 CFR §383.33).

The discipline in this case is not unreasonably excessive, considering the Claimant's personal record and the principle of progressive discipline. He had four previous disciplinary entries beginning in 1997. Clearly, not possessing a valid driver's license, his restriction to a Trackman's position is not illogical.

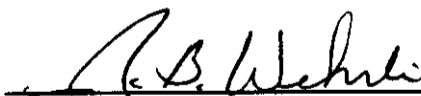
Although the removal of the Claimant from service on April 1, 2003, pending the investigation, is questionable in this case, the 30-day suspension was made retroactive to that date, resulting in no loss of time exceeding that of his suspension. As for the question of prejudgment, the Board observes that the Parties' Agreement permits a charged employee to be withheld from service pending investigation, and is appropriate under some circumstances. An exonerated employee has a remedy when the provision is misused.

AWARD

The claim is denied.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



William L. Yeck, Carrier Member

10/29/03
Date