PUBLIC LAW BOARD NO. 4244

Award No. 316
Case No. 317

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 22, 2003, Mr. E. J. Rojas was issued a five-day record suspension with a one-year probationary period for violation of Maintenance of Way Operating Rule 1.6 (Conduct) Item 4 (dishonest) and Rule 1.13 (Reporting and Complying With Instructions) in conjunction with Mr. Rojas's alleged failure to comply with written instructions which were on the First-Aid Incident Follow-Up Instruction sheet signed by Mr. Rojas on January 22, 2003, and his alleged including a different description of the incident on his personal injury report that he had supplied in a written statement before the personal injury report was completed.

2. As a consequence of the Carrier's violation referred to above Mr. Rojas shall have his record expunged of the above referenced discipline. [Carrier File No. 14-03-0108. Organization File No. 170-13I3-031.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. Edward J. Rojas, Jr., was hired by the Carrier on February 12, 2001, in its Maintenance of Way Department. On January 22, 2003, he was working as a Welder on a gang with assigned hours from 3:00 p.m. until 11:30 p.m. On this date the gang was working in or near Corcoran, California. At about 11:00 p.m., the Claimant suffered a person injury. Subsequent events stemming from that injury resulted in his being served with a notice of charges by the Carrier's Division Engineer, reading, in part:

> You are hereby notified to attend formal investigation in Roadmaster's Office, 2650 Tulare Street, Fresno, CA, at 1030 hours on March 31, 2003, to determine all facts and circumstances concerning your alleged failure to comply with written

> instructions which were on the First-Aid Incident Follow-Up Instructions sheet which was signed by you on January 22, 2003, and alleged actions regarding your conduct concerning your original statement which described the cause differently than the Employee Personal Injury/Occupational Illness Report that you filled out on March 4, 2003, in conjunction with your alleged personal injury on January 22, 2003; so as to determine the facts and place responsibility, if any, involving possible violation of Rules 1.6 (Conduct) Item 4 (Dishonest) and 1.13 (Reporting and Complying With Instructions) of the Maintenance of Way Operating Rules in effect January 31, 1999 (including amendments through April 2, 2000).

The investigation was held at the appointed date and time, and a transcript of evidence and testimony taken therein appears in the record before this Board. The Claimant was competently represented in the investigation by the Organization's Vice General Chairman.

Assistant Roadmaster Danny Escalante appeared as a witness for the Carrier. He said he was notified of the Claimant's injury on January 22, 2003, and went to the work site to interview the Claimant and to prepare necessary reports. He asked the Claimant to give him a written statement, which is in the record. It is dated January 22, 2003, and reads as follows:

> Myself along with Welder Palacios, Welder Powell, and Welder Serda were finishing up a couple of welds at M.P. 937.5. I stepped into the truck and realized Welder Palacios was not complete with putting all the equipment away. I then got down from the truck and proceeded to walk to the rear of the vehicle to see if there was anymore tools or equipment that had not been put away.
>
> In process of walking to the rear of the vehicle I had stepped on the ground which was covered in grass, and did not see that there was a hole of some sort hidden. Which in result I had hurt my ankle in doing so. I sat on the ground and waited for a minute to see if I could get myself up and then got into work truck, came to yard, told Foreman Geary. He contacted Roadmaster Escalante.

Mr. Escalante testified the Claimant stated the weather was clear, and said nothing about lighting conditions. He testified that he also observed the weather was clear.

The Claimant, according to Mr. Escalante, did not desire medical attention at that time. He testified:

> I came in, as I got there I noticed there was swelling on his ankle. We then proceeded with the paperwork. During this time Mr. Rojas explained to me he didn't want to report it. It was just an ankle sprain, and we would treat it as an ankle sprain. And we had Mr. Rojas work with foreman Gary during the course of the week which was, I believe, three four days, uh, remainder of the week there to

assist him to stay off that ankle as much as possible until it healed. [Transcript page 10].

Mr. Escalante further testified:

Q. So what we're talking about here, Mr. Rojas was injury [*sic*] on January 22nd, 2003, and he did notify the carrier. What were your instructions to Mr. Rojas on January 22nd?

A. My instruction to Mr. Rojas at any time if he chose to seek medical attention he needed to contact an immediate supervisor which was myself at the time, and Mr. Rojas has access to my numbers to where he can call me at any time just in case he needed to seek medical attention whether he was at home or on the job.

Q. Did Mr. Rojas seek medical attention?

A. Yes, he did seek medical attention later on in the course of the month or two.

Q. Did he notify you of this?

A. I was notified of him seeing the doctor after he attended the physician?

Q. And who told you about it?

A. Mr. Rojas called me up, notified me that he had went to seek medical attention, and that he had a couple – what he described was a chipped bone in his ankle, and that he was going to require surgery.

Q. And at no time between the time that he got injured and the time he found out he went to the doctor did he try to get a hold of you or anything?

A. No, sir. [Transcript pages 11-12].

There is an exhibit in the record, a form entitled "First-Aid Incident Follow-up Instruction," dated January 22, 2003, reading, in part, as follows:

After submitting a First-Aid notification, you, as an employee, have the following responsibilities:

1. Promptly notify your supervisor before visiting a health care professional for subsequent treatment or observation of your injury.

2. Promptly notify your supervisor if you experience any complications resulting from your injury.

3. Promptly notify your supervisor if you are unable to perform your normal duties.

4. Promptly notify your supervisor if you need to absent yourself from your regular assignment as a result of your injury.

5 Promptly notify your supervisor if a health care professional prescribes prescription medication for treatment of your injury.

If you have any questions regarding these instructions, you are instructed to immediately contact your supervisor.

By signing below, you acknowledge receiving these instructions and understanding the content of these instructions and further acknowledge that you have been afforded the opportunity to ask questions regarding these instructions. [Exhibit 6].

The Claimant's signature appears below the above text.

The Claimant testified that he was put on light duty for about two weeks after his injury, after which he resumed his regular welding duties. Continuing to experience discomfort in his ankle, he sought medical attention on March 3, 2003. He thereafter advised Mr. Escalante and they filled out another personal injury report. On this report, under the heading, "Describe fully how injury or occupational illness occurred," he entered, "Getting out of truck onto tall grass, poor lighting did not see hole, stepped into it. Result was twisted ankle." At two other points in the report, he alluded to "poor lighting." Under the caption, "Weather," he checked a box for "fog." He provided the following explanation in his testimony:

Q. And what is the reason that you did not contact Mr. Escalante before you went to see your doctor?

A. I don't recall having to. I mean, I did not have a copy of the accident report I fill out. So I could have forgot. If I would have had a copy of that I'm sure I would have remembered. I would have had no problem with contacting Mr. Escalante prior to going.

Q. But you did sign the report, right?

A. Yes. Mr. Escalante said he was going to give me a copy of that, and that never happened. [Transcript pages 29-30].

Q. On this original one you filled out on the 22nd, Mr. Rojas, here it states understand number five on the weather, it's filled in as number one as clear, and then on the one that you filled out after you visited your doctor on the 4th of March you're saying that it was foggy?

A. Yes, I did not recall that night. On Many nights in that month that we worked they were foggy. So me and Danny Escalante could not remember. I did

not have a copy of any papers for back up prior to filling out that second accident report.

Q. Here you stated that it was foggy in your second report, right?

A. Yes, sir.

Q. And on your original report you did not state that it was poor lighting conditions out there, and on your second report that you filled out you did state there was poor lighting. What were the lighting conditions that night?

A. The lighting conditions are dark. I mean, granted we do have flash-lights that we were issued, but at the time my flash light was in the Weldon [welding?] bucket, that's what we mainly use them for to unline [*sic*] a rail. [Transcript pages 26-27].

On April 22, 2003, Roadmaster John J. Palacios, who was the Conducting Officer, advised the Claimant of the Carrier's disciplinary decision:

> This letter will confirm that as a result of formal investigation held on March 31, 2003, concerning your failure to comply with written instructions which were on the First-Aid Incident Follow-Up Instructions sheet which was signed by you on January 22, 2003, and actions regarding your conduct concerning your original statement which described the cause differently than the Employee Personal Injury/Occupational Illness Report that you filled out on March 4, 2003, in conjunction with your alleged person injury on January 22, 2003; you are issued a five (5) day record suspension for violation of Rules 1.6 (Conduct) Item 4 (Dishonest) and 1.13 (Reporting and Complying With Instructions) of the Maintenance of Way Operating Rules in effect January 31, 1999 (including amendments through April 2, 2000).
>
> Additionally, you have been assigned a probation period of one (1) year. If you commit another serious rule violation during the tenure of this probation period, you will be subject to dismissal.
>
> In assessing discipline consideration was given to your personal record.

Maintenance of Way Operating Rule (MWOR) 6.1, Item 4, requires that employees must not be dishonest. MWOR 1.13 requires employees to comply with instructions from their supervisors.

The Organization promptly appealed this decision to the Carrier's Labor Relations Department. The Organization raises a threshold issue, arguing that the Claimant was denied a fair and impartial hearing because the Conducting Officer based his disciplinary decision on his own testimony, rather than the record of facts. He should have disqualified himself from that

point onward, the Organization contends. The Organization refers to the following statement by the Conducting Officer on the last page of the transcript:

> Before I close, I would like to let the record reflect there are several discrepancies in his original statement. And then the statement that was filled out on the 4th, for the record, concerning the lighting, and the fog, and the fact that Mr. Rojas did sign the First-Aid Follow-Up Instructions. I got nothing further. [Transcript page 33].

The Carrier made no response to this threshold argument, except by a catch-all statement in its answer to the Organization's appeal:

> The Carrier rejects and denies all of the other objections, arguments and claims raised in the Organization's appeals. Carrier's failure to rebut any assertion by the Organization, or to repeat or elaborate upon any positions taken by the Carrier, shall not be any waiver of our right to do so later, nor shall it be construed as any admission by the Carrier.

The Board has read and considered the Conducting Officer's statement, and the Parties' arguments. It is unusual, perhaps unprecedented, for a Conducting Officer to enter into the record what appears to be his impression of the facts brought out in the investigation — a preview, it seems, of his decision. The Board is not persuaded that this statement, standing alone, is sufficient cause to expunge the discipline, but the Conducting Officer is teetering on the knife-edge of reversible error. Only the fact that his conclusions are correct saves the day.

The Organization further argues that the Claimant requested a copy of the January 22 injury report and the follow-up instructions, which put an employee on notice of his responsibilities, but he was not given a copy. The Organization concludes that the discipline is "extreme, unwarranted and unjustified."

The Carrier responds that there is no doubt that the Claimant was instructed to contact his supervisor before seeking medical attention. He signed a document indicating he received and understood such instruction. He, however, sought medical treatment without first contacting his supervisor, thereby failing to comply with instructions, a clear violation of MWOR 1.13.

The Carrier further responds that the Claimant was dishonest, a violation of MWOR 1.6, when he indicated the weather was foggy on the March 4 injury report, when the weather was, in fact, clear.

The Board has carefully considered the record and the Parties' arguments. By his own admission, the Claimant failed to notify his supervisor before visiting a health care professional, as

he had been directed. He signed a form acknowledging his receipt and understanding of these instructions. He testified that he had forgotten the instructions and had not been given a copy. This was a matter of no little importance, something one is unlikely to forget. On the other hand, the Board notices that the First Aid Incident Follow-up Instructions had five (5) important responsibilities for employees. The Carrier issues rule books, bulletins, and timetables for the guidance of employees, not relying on their memories in connection with matters of importance. They are expected, in some cases, to have such instructions for ready reference. MWOR 1.3.1, for example, directs that employees must have a current copy of the MWOR they can refer to while on duty. The Board believes the Claimant should have been supplied a copy of the Follow-up Instructions, but — nonetheless — he should have remembered this significant admonition.

The issue of weather conditions in two reports prepared some six weeks apart in time — again, involving memory — is of such little significance that it warrants application of the rule of *de minimis non curat lex,* under which small or trifling matters are of little or no account. At worst, the conflicting account of the weather represents an erroneous recollection.

The matter of "poor lighting" was briefly touched on in the investigation. The Carrier argues that the Claimant's reference to "poor lighting" in the March 4 report constitutes a different cause than that reported on January 22. Since the Board was not supplied with the January 22 injury report for comparison, the degree of difference cannot be judged. Assistant Roadmaster Escalante provided this description of the conditions:

> Q. And of this incident report section 1, item number 6 visibility, and that is dark, right?
> A. Yes, sir.
> Q. This is at night time?
> A. Yes, sir.
> Q. So the lightings not the best in the world?
> A. No, sir. [Transcript page 16].

One might, without quibbling too much, equate "lightings not the best in the world" with "poor lighting." Again, the differences in the reports, if any, warrants application of the rule of *de minimis non curat lex.*

The Board concludes that the Carrier has not borne its burden of proof that the Claimant was dishonest in the preparation of the two injury reports. He may have been negligent, or careless, or forgetful, but he was charged with dishonesty, and that serious infraction, involving moral turpitude, has not been conclusively proven.

The Claimant violated MWOR 1.13 when he failed to comply with his responsibility to notify his supervisor before visiting a health care professional, as he was directed.

The five-day record suspension and one-year probation period are relatively light penalties, even had the Carrier borne its burden of proof in all respects. But, because it has not conclusively shown a violation of MWOR 1.6, Item 4 — Dishonesty — the five-day record suspension is reduced to a Formal Reprimand. The one-year probation period will stand.

AWARD

The claim is sustained in accordance with the Opinion.

Robert J. Irvin, Neutral Member

R. B. Wehrli, Employe Member

William L. Yeck, Carrier Member

Dec 12, 2005
Date