PUBLIC LAW BOARD NO. 4244

Award No. 347
Case No. 358

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes
and
BNSF Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on January 27, 2005 when it improperly dismissed Claimant, A. Bert, from service for allegedly abandoning his job when he was absent without authority more than five consecutive days in violation of Letter of Understanding dated July 13, 1976.

2. As a consequence of the violation referred to in part (1), the Carrier shall immediately return the Claimant to service with seniority, vacation and all other rights restored, remove any mention of this incident from his personal record, and make him whole for all time lost account of this incident. [Carrier File No. 14-05-0103. Organization File No.240-13A1-052.].

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 in this case, Maintenance of Way Trackman Alonzo Bert, was hired by the Carrier on April 21, 1997. The record indicates that he had been furloughed at some point in time, but was the successful applicant for a Sectionman position on newly established Tie Production Gang TP02. He had been assigned by an award dated December 15, 2004, but the reporting date for this Gang was January 17, 2005.

On January 27, 2005, the Claimant was notified that his seniority and employment with the Carrier were terminated for being absent without authority for more than five consecutive work days, beginning January 17, 2005, pursuant to the provisions of a Letter of Understanding dated July 13, 1976. This Letter of Understanding reads as follows:

> In connection with application of (Rule 13) [the Discipline Rule] of the current Agreement, this will confirm our understanding reached in conference today that, effective October 1, 1976, to terminate the employment of an employe

> who is absent from duty without authority, the Company shall address such employe in writing at his last known address, by Registered or Certified Mail, return receipt requested, with copy to the General Chairman, notifying him that his seniority and employment have been terminated due to his being absent without proper authority and that he may, within 20 days of the date of such notice, if he so desires, request that he be given an investigation under (Rule 13) of the current agreement.
>
> NOTE: Effective January 1, 1984, the above understanding is to be applied only in cases where the employe is absent from duty without authority more than five (5) consecutive work days.

The Organization's General Chairman promptly requested an investigation in accordance with Discipline Rule 13 of the Collective Bargaining Agreement which applies to employees holding seniority on the former Atchison, Topeka & Santa Fe Railway Company (ATSF).[1] The investigation was initially set for March 1, 2005, and finally held on April 6, 2005. The exchanged correspondence between the Parties is part of the record before this Board. It is pertinent to the outcome of this case, and will be discussed below.

The initial notice of investigation was dated February 22, 2005, and it reads as follows, in pertinent part:

> [Y]ou are hereby notified to attend formal investigation in the Roadmaster's Office located at 4006 E. Vine St., Bldg. B, Fresno, CA, at 1400 hours on March 1, 2005, concerning report alleging your being absent without proper authority for more than five (5) consecutive work days beginning January 17, 2005, and forward; so as to determine facts and place responsibility, if any, involving possible violation of Rules 1.13 (Reporting and Complying With Instructions) and 1.15 (Duty-Reporting or Absence) of the Maintenance of Way Operating Rules in effect October 31, 2004; and Letter of Understanding dated July 13, 1976.

The above notice was sent to the Claimant's Post Office Box address in Pinon, Arizona, by Certified Mail, Return Receipt Requested. The Carrier offered in evidence a Return Receipt with a corresponding number, indicating its receipt by the Claimant on February 28, 2005.

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[1]The BNSF Railway, being the product of a series of mergers, is party to several different collective bargaining agreements made between the Organization and predecessor carriers which have application in various parts of the merged system.

The Organization's General Chairman requested a postponement, which was agreed to, and the Carrier notified the Claimant by a letter dated February 28, 2005, postponing the investigation until March 24, 2005. This letter was also sent by Certified Mail, and a receipt bearing the corresponding number indicates it was received by the Claimant on March 7, 2005.

On March 16, 2005, the Organization's General Chairman requested yet another postponement, due to unavailability of a representative. On March 21, 2005, the Carrier notified the Claimant that the investigation was postponed until March 31, 2005. This notice was also sent by Certified Mail, Return Receipt Requested, but the Carrier was unable to produce either a receipt or the United States Postal Service's advice of non-delivery.

On March 28, 2005, the Organization's General Chairman again requested a postponement of the investigation due to unavailability of a representative. The Conducting Officer at the investigation mistakenly stated in the record that the General Chairman postponed the investigation until April 6, 2005. There is no exhibit showing a letter from the Carrier to the Claimant setting the investigation for April 6, 2005, but the Board believes that such exists, simply because the Conducting Officer, the Organization's Local Chairman, and a Certified Shorthand Reporter all appeared for an investigation. The Claimant was not present, however. The Carrier offered no Certified Mail Receipt to indicate whether the Claimant received notice of the investigation on that date, nor any proof of mailing.

At the beginning of the investigation on April 6, 2005, the Conducting Officer asked the Organization's Local Chairman, the Claimant's representative, if there was any reason why the Claimant was not present. The following exchange then took place:

> MR. FRANCO [Local Chairman]: I don't know. I haven't talked to him and don't know his whereabouts. I would like to know if he was formally notified? Do you have a receipt for his notification of this meeting here?
>
> MR. PALACIOS [Conducting Officer]: Yes, I do, and it will be entered into the transcript as we proceed. I do have certified mail receipts from Mr. Bert. [Transcript page 6]

As discussed above, however, neither the notice of the April 6 hearing nor certified mail receipt for the same were made a part of the record.

The Conducting Officer offered the Local Chairman a recess of "five or ten minutes" to attempt to contact the Claimant, but that suggestion was declined.

Near the end of the investigation, the Local Chairman requested a postponement until the Claimant could be contacted. The Conducting Officer responded, "That will be taken into consideration, but at this time, I cannot make that decision." (Transcript page 16.) Almost

immediately thereafter, the Local Chairman again requested a postponement, and the Conducting Officer responded that the Claimant had been notified within the time limits of the Agreement. (Transcript page 17.)

The following exchanges took place at the close of the investigation:

> MR. FRANCO: I would like to request a copy of the receipt where he signed to attend this investigation, and then I need the copies of the ones I gave you, too?
>
> MR. PALACIOS: You can have copies of all these.
>
> (Off the record.)
>
> MR. PALACIOS: Alex, do you have anything else for the record?
>
> MR. FRANCO: Yes, I would like to know if you can provide evidence that Mr. Alonzo Bert received and acknowledged the letter of investigation notice for April 6, 2005?
>
> MR. PALACIOS: No. The carrier cannot supply the certified mail receipt for that postponement, which is the third postponement on that. And in the letter of understanding, it is noted that the letter shall be sent to the employee's last known address, which it was, by certified or registered mail. Why Mr. Bert did not answer to that or did not sign for that, I cannot tell you.
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> MR. FRANCO: Okay. And then, Mr. Bert did sign and acknowledge the other letters before this, and because you have no proof that he received that letter in time to be at this investigation today, we are objecting to the fact that he might not have received the letter to be here today – in time for him to be here today. [Transcript pages 18-19]

During the course of the investigation, the Local Chairman entered into the record the document awarding the Claimant a position on Tie Production Gang TP02, and also entered Discipline Rule 40 from the Collective Bargaining Agreement which applies to employees represented by the Organization on the former Burlington Northern Railroad Company (BN), which is commonly referred to as the "Northern Lines Agreement." He also offered in evidence an agreement which provides for the establishment of Regional and Systemwide Production Gangs (RS Gangs), which may consist of employees from either or both the former BN and/or ATSF, and such RS Gangs working anywhere on the merged Carrier will be subject to the Northern Lines Agreement. The Northern Lines Agreement does not provide for summary termination of employment of an employee who is absent from duty without authority, as does the Letter of Understanding dated July 13, 1976, but provides, instead, that no employee will be disciplined or dismissed until after an investigation. As will be seen below, this evidence was intended to provide a foundation for the Organization's further defense of the Claimant.

On May 3, 2005, the Conducting Officer advised the Claimant that as a result of the investigation, he was dismissed from the Carrier's employment for violation of Maintenance of Way Operating Rules (MWOR) 1.13 and 1.15, and the Letter of Understanding dated July 13, 1976. Those Rules read as follows:

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 1.15

> 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 the Conducting Officer's decision to uphold the Claimant's dismissal. The Organization first argues that the ATSF Agreement, of which the Letter of Understanding dated July 13, 1976, is a part, is inapplicable to the Claimant, because he was, at the time he was taken out of service, subject to the Northern Lines Agreement, by reason of his assignment to RS Gang TP02 on December 15, 2004. The Organization relies on Northern Lines Agreement Rule 40.A., which reads:

> An employe in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employes of the Security Department) and except as provided in Section B of this rule.

and Rule 40.J.:

> If investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employe shall be considered as having been dismissed.

The Organization further argues that the investigation was not held within 15 days after January 17, 2005, in violation of Rule 40.A., above.

The Organization also argues that the Claimant was not properly notified of the time and place of the investigation, when the agreed-upon date, April 6, 2005, was finally established.

The Organization argues that when it was determined in the investigation that the Claimant had not been properly charged under the Northern Lines Agreement, and had not been properly notified of the time and date, the Local Chairman asked for a postponement, and his request was denied by the Conducting Officer.

The Carrier's Labor Relations Department responded to the Organization's arguments. It argues that the Northern Lines Agreement does not apply to the Claimant because he had not ever reported to the position to which he was assigned, and he was therefore never paid nor compensated for working as a member of RS Gang TP02. Being under the ATSF Agreement, he was properly terminated when he was absent for more than five consecutive days, pursuant to the Letter of Understanding dated July 13, 1976.

The Carrier further argues that the Claimant was properly notified and he chose not to appear at his investigation at his own risk. It contends that the Organization never articulated a single valid reason why the hearing should be postponed, and the Claimant's rights were not violated when the investigation proceeded.

The Carrier also argues that the issue is the Claimant's absence without authority, in that he never returned from furlough status and never marked up on Gang TP02. The Carrier states that no defense to that charge was offered by the Organization.

The Organization presented further argument before this case was submitted to this Board. With respect to the issue of whether the Northern Lines Agreement or the ATSF Agreement applied to the Claimant, the Organization argues that the Carrier "now wants it both ways." It points out that each year, when RS Gangs are given notice of abolishment, the Carrier insists that employees holding seniority under the ATSF Agreement must displace junior employees prior to abolishment of their jobs, as required by the ATSF Agreement, rather than giving them 10 days following abolishment in which to displace, as provided by the Northern Lines Agreement.

To be consistent, therefore, the Organization argues that when the Claimant was assigned to a position on the RS Gang on December 15, 2004, he was thereafter subject to the Northern Lines Agreement, and the Carrier did not comply with Rule 40 of that Agreement.

The Organization further argues that there is no receipt for the Carrier's letter of March 28, 2005, which advised the Claimant of the investigation on April 6, 2005. It points out that the Local Chairman asked for this documentation, and the Conducting Officer said he did not have the evidence. A postponement was requested and the request was denied. The Organization points out that previous notifications by Certified Mail required a week to get to the reservation where the

Claimant resided, and there was insufficient time given between March 28 and April 6, 2005, to allow receipt of the notice, which prompted the request for a postponement.[2]

In conclusion, the Organization also argues that no evidence was presented at all to show the Claimant was indeed absent January 17, 2005, and thereafter. The entirety of the Carrier's evidence consisted of the investigation notices and receipts for two of them. The Organization concludes, in its words, "no evidence, no witness, and no case." The Carrier made no answer to any of these arguments, and the case was submitted to the Board about three weeks later.

The Board has studied the transcript of evidence and its attached exhibits, and considered the Parties' respective arguments. A difficult question is that of whether the ATSF Agreement or the Northern Lines Agreement has application to this case. Both Parties offer persuasive arguments for their respective positions. Fortunately, this question does not need to be answered to reach a conclusion in this case. Since this decision turns on issues of adequate notice and sufficiency of evidence, it matters not whether the Claimant was subject to the ATSF Agreement or the Northern Lines Agreement when his employment was terminated.

The Board is not persuaded that the Claimant received notice of the investigation's final convening on April 6, 2005. The Conducting Officer forthrightly admitted that he could not show evidence of its receipt. Indeed, the record does not even contain a copy of the notice, although — as we indicated herein — there is no doubt that such a notice exists. The Board recognizes that the Carrier cannot be a guarantor of delivery, but it bears a burden of showing that a letter was sent to the addressee's home address in sufficient time for him to appear at the investigation.

True enough, a charged employee who fails to appear at an investigation usually does so at his own risk, and this Board has not been patient with those who wilfully ignore their opportunity to present their defense. In this case, however, the Carrier's failure to offer evidence of his notification shifts the burden of risk from the employee to the Carrier.

By reason of his absence, we are without whatever defense the Claimant may have offered. Any number of reasons may have prevented his showing up for the newly established Sectionman's position on Gang TP02. He may have suffered an accident between December 15, 2004, and January 17, 2005. For that matter, how do we know whether he was notified that he was the successful applicant for a position on that Gang, having been furloughed? Was he notified so he could report on that date?

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[2]MapQuest©, an internet program, shows that Pinon, Arizona, is located in the Navajo Indian Reservation in the northeast corner of the state, and is about 750 miles from Fresno, California, the site of the investigation.

Under the totality of these circumstances, the Carrier would be standing on firmer ground had it agreed to a postponement for the purpose of sending the Claimant a notice by Certified or Registered Mail, Return Receipt Requested, with sufficient time to obtain such receipt, or notice of the post office's unsuccessful delivery attempts. His absence, then, would have been at the Claimant's own risk.

This Board is also struck by the Carrier's failure to present substantial evidence that the Claimant was, indeed, absent on January 17, 2005, and thereafter. While it would be incredible that it would charge him with absence and convene an investigation when requested, if the Claimant were not actually absent, the evidence in this record consists of a written notice that he was terminated for absence, and a letter of charge. No witness appeared to testify that the Claimant was absent. No payroll records were offered in evidence, showing that his absence was noted. There is no evidence that he even knew he was awarded a position and expected to show up on January 17, 2005. While it might be assumed (as we do) that he did not report for work, the lack of substantial evidence can be illustrated by comparison with other cases which have come before this Board. At least one individual with personal knowledge of events is called as a witness, and is subject to cross examination by the charged employee and/or his representative. Written documents are submitted in the record. In this case, the only evidence is the letter of dismissal and the letter of charge. These do not constitute evidence, and they cannot be cross examined.

The Board is persuaded that the claim should be sustained for the reasons set forth immediately above. More problematical is the remedy, with particular regard to compensation. The Claimant was on furlough. There is no doubt that he failed to report for work on January 17, 2005. (Although the evidence of such is lacking, the Board is persuaded that the Carrier is not so foolhardy as to trump up completely false charges. Furthermore, the Organization has not countered with any evidence that the Claimant had reported for work on January 17, 2005, or thereafter.)

Without a better record of true events and circumstances, the Board would be remiss if it awarded full compensation. The Claimant should not receive a windfall if his absence was wilful, nor attributable to the Carrier. The reason for the Claimant's absence is not known; perhaps he was unable to work; perhaps he had a better job elsewhere; perhaps he wasn't notified to come to work. In any event, he had been initially notified of his investigation, and whether or not he received notice of the postponements, one would expect an employee, who wants to work and needs to work, to evince greater interest in knowing when the investigation — his only hope of continued employment — would be convened. We will sustain the Organization's claim, but the case is remanded to the Parties to determine what monetary compensation, if any, shall be allowed the Claimant. The Board will retain jurisdiction of this case. In the event the Parties are unable to reach agreement on the monetary aspect of the dispute, it would expect the Parties to present a better record than presently exists in support of their respective positions.

AWARD

The claim is sustained in accordance with the Opinion, and remanded to the Parties to determine the amount of compensation, if any, to be awarded. The Carrier shall notify the Claimant to return to service within thirty (30) days from the date of this Award. If he fails to respond to a proper notice of his reinstatement within thirty (30) days thereafter, the claim will be denied.

Robert J. Irvin, Neutral Member

R. B. Wehrli, Employe Member

William L. Yeck, Carrier Member

Sept 29, 05
Date