

PUBLIC LAW BOARD NO. 5850

Award No. 175
Case No. 176

PARTIES TO DISPUTE:

**(Brotherhood of Maintenance of Way Employees
(The Burlington Northern Santa Fe Railroad**

STATEMENT OF CLAIM:

- 1. The Carrier violated the Agreement when on November 31, 2000, the Carrier suspended Mr. S. P. Kearns from service for 45 days in connection with his alleged violation of Maintenance of Way Operating Rule 1.8 and Engineering Instructions, Section 21.1 based on his alleged improperly entering time roll using another employee's Identification Code and Password providing improper per diem payments to employees assigned to Mini-Mech Tie Gang #27236.**
- 2. As a consequence of the Carrier's violation referred to above the discipline shall be removed from Mr. Kearns's personal record and he shall be compensated for all wages lost, in accordance with the Agreement.**

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

On November 30, 2000, the Carrier wrote Claimant as follows:

"Attend investigation in the BNSF conference room, 3770 East 28th Street, Los Angeles, California on, December 11, 2000 at 8:00 am. 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 Rule 1.8 and the Engineering Instructions - Section 21 when you allegedly arranged for lodging and housed your gang in carrier-provided rooms and when you allegedly paid the members of your gang

per diem payments that included a lodging per diem beginning on May 3, 2000 and continuing through September 18, 2000.

Please be advised that you will be withheld from service, pending the results of this investigation."

The investigation was held on December 13, 2000, following which the Carrier, believing it had furnished sufficient evidence of Claimant's culpability for the charges assessed, issued on January 10, 2001, the following disciplinary letter:

"This is to advise you that as a result of the formal investigation afforded you on December 13, 2000, at Barstow, California, concerning your responsibility when you arranged for the lodging of the employees assigned to Mini Mech Tie Gang # 27236 at carrier's expense, and subsequently made payroll entries authorizing a per diem payment for lodging for the members of Mini Mech Tie Gang # 27236 from May 3, 2000 continuing through September 18, 2000. As a result of your violation of Maintenance of Way Rule 1.6 and Engineering Instructions, Section 24.1 effective January 31, 1999, you are issued a 45 day Level 8 suspension, beginning November 30, 2000 and ending January 13, 2001. In addition you will be placed on one year's probation. You may return to work January 15, 2001."

From the transcript, it is apparent that Claimant commenced the timekeeping chore for the gang in May when he was the Assistant Foreman and later when he became the Foreman.

The investigation involved the use of Pay Code 41 which is intended to reimburse specific employees under specific conditions per diem for room and meals.

The investigation delved into the history of Pay Code 41, how it originated, to whom it was applicable to up to the time seniority rosters were consolidated.

From the Board's limited understanding, Pay Code 41 is to be used only for certain employees formerly of one of the carriers that became a part of the Burlington Northern Santa Fe, and only when those employees are working in certain states that used to be Santa Fe controlled. Under no circumstance is Pay Code 41 to be used for an

individual when Carrier also provides lodging as 41 is for lodging and meals.

The investigation also developed that an Assistant Roadmaster reviewed Claimant's payroll entries and found nothing wrong or at least he, a Carrier Supervisor, did not understand how Pay Code 41 was to be used, thus he did not question the use thereof.

It also developed that at one point, Claimant was behind in payroll reporting and phoned the payroll to a time revisor who inputted the verbally reported time including the entry of Pay Code 41 and did so without questioning its use.

From the facts brought forth in the investigation, it is clear that Pay Code 41 was being misused on a system-wide basis. In fact, the Carrier went to the Brotherhood of Maintenance of Way Employees and sought their assistance in curtailing the use thereof as well as some other misused, abused or negligent use of expense codes, mileage claims, lodging and meals claimed, etc.

Evidence was established that the Union cooperated fully and wrote each of their members about the alleged abuse or misuse of expense claims, etc.

When this Board reviewed the history of Pay Code 41 and the manner in which it was listed to all concerned, it became clear how the misuse of Pay Code 41 came to be. A review of the payroll codes and the brief explanation of each which was revised periodically clarified for this Board how easily the pay code could have been used, not purposely nor fraudulently, but mistakenly.

A history of the pay code sheets issued periodically by the Carrier was incomplete. For instance, the pay code sheet revised February 1, 2000 lists Pay Code 41 as "Meals and Lodging (RLD) (MoW)." The pay code sheet revised September 24, 1997

read "\$42.50 - Meals and Lodging Combined (RLD) - Non Taxable." In the April 1, 1995, revision left blank, the pay code is listed but no explanation. Same for the July 1, 1994, revised code sheet. The April 1, 1993, payroll revision lists Pay Code 41 as, "\$29.00 - 250 miles from home station meal and lodging allowance for each calendar day - no bunk cars assigned." The revision effective June 1, 1987, read for Pay Code 41 as, "Per Diem Meals and Lodging assembling for work over 250 miles (Rule 38 Sec. (J)) (Group 5, 6, -8, 11 only.)"

As is evident, the pay code list for Pay Code 41 waffles between a solid explanation (the 1987 list) to nothing (the 1994 & 1995 lists) to an incomplete explanation in the year 2000 list.

The only thing Claimant knew about Pay Code 41 was that it was applicable to employees residing over 250 miles from the point the crew started work, yet he did claim for one of the gang who he knew lived less than 250 miles away Pay Code 41. This was only for several dates in March.

This Board, in reviewing Claimant's work record, finds one commendation for, "cost and time efficient installation of concrete road crossing at Blain St." and no disciplinary entries other than the current being protested.

It is noted the Claimant's representative vigorously protested the investigation contending the Carrier failed to hold the investigation promptly, arguing that the Carrier knew of the misuse as far back as September, 2000, yet did nothing until they set the current investigation.

The Board has examined the entire file and finds no smoking gun refuting the date the Division Engineer stated he gained knowledge of Claimant's misuse of Pay Code 41,

but the Board does find the 45 day suspension of Claimant was excessive in view of the facts cited herein. Claimant's discipline for applying Pay Code 41 to an employee who lived less than 250 miles from the point assembled when he stated that he understood that Pay Code 41 was applicable to all employees residing over 250 miles from their assembling point is pure negligence. However, the dates this occurred were in March wherein he was charged only with misapplying Pay Code 41 May 3 through September 30, 2000.

Considering all the factors adduced at the investigation, the Board cannot accept Carrier's assessment of a 45 day suspension as a proper discipline. Claimant's record has been outstanding. Whatever Claimant did, he did with the tacit blessing of the Assistant Roadmaster who found nothing improper about the time sheets Claimant had prepared and a Time Revisor who should have known.

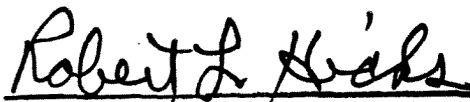
Claimant's discipline is rescinded. He is to be compensated for all time lost as provided for in the Schedule Agreement.


AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the award effective on or before 30 days following the date the award is adopted.


Robert L. Hicks, Chairman & Neutral Member


Rick B. Wehrli, Labor Member


Thomas M. Rohling, Carrier Member

Dated: March 6, 2002