

PUBLIC LAW BOARD NO. 5850

**Award No.
Case No. 235**

PARTIES TO DISPUTE:
(Brotherhood of Maintenance of Way Employees
(The Burlington Northern Santa Fe Railroad (Former
(ATSF Railway Company)

STATEMENT OF CLAIM:

1. The Carrier allegedly violated the Agreement when investigation was held on April 10, 2003, and Mr. G. C. Lopez was dismissed from service for allegedly violating Rule 1.6, Part 4 of the Maintenance of Way Operating Rules in connection with alleged falsification of expense report for weekend travel and miles claimed that were never driven.
2. As a consequence of the Carrier's violation referred to above Mr. Lopez shall be reinstated with seniority, vacation, all rights unimpaired and pay for all wages lost commencing March 5, 2003 continuing forward and/or otherwise made whole.
3. That any mention of the charges relating to this incident shall be removed from Mr. Lopez's personal record.

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.

This Case and Case Nos. 236 & 237 contain such similarities leading to the separate investigations that this Board intends to list the facts leading to all three cases, then review the investigation of each and rule on each investigation. It is only the basic

facts of all three cases that are set forth in this case.

Claimants G. C. Lopez, N. L. Lopez (Case No. 236) and R. P. Avalos (Case No. 237) were assigned to a production gang headquartered as of the claim date in Needles, California. Claimants R. P. Avalos and N. P. Lopez live in Joliet, Illinois, and Claimant G. C. Lopez lives in Channahon, Illinois, a small town some 12 miles from Joliet.

The Carrier and the Organization have an Agreement providing travel benefits for those working miles from home. Each can drive home and will be paid \$25.00 per each hundred miles driven to and from their homes after the first 100 miles. Each employee claiming driving miles must furnish a detailed receipt from each home town to verify they actually drove. The employee does not have to actually drive to claim this benefit, he can ride with someone who does drive. In lieu of driving home each weekend, the Carrier will pay for a roundtrip airline ticket and for transportation to the nearest airport (which in this case was Las Vegas, Nevada) providing the employee flying stays in two consecutive weekends.

The Carrier began checking the miles claimed by the employees and believed some where excessive. They then began an investigation to determine if any claims were false.

They did have a Carrier police officer tail the car containing the three Claimants, and found one flew home, the other two went to Arizona.

On March 5, 2003, the Carrier wrote each Claimant advising they were suspended from service immediately pending the results of an investigation. Claimants G. C. Lopez and R. P. Avalos (Case No. 237) charge letters were identical, reading in part as follows:

"...The purpose of this investigation is to ascertain the facts and determine your responsibility, if any, in connection with your alleged falsification of

expense report concerning weekend travel allowance between Thursday, February 6, 2003, and Sunday, February 9, 2003. This incident occurred while you were assigned as a group 3/4 machine operator on the SC-52 production gang."

Claimant N. L. Lopez's charge letter carried the additional charge of:

"...conspiring with employees R. P. Avalos and G. C. Lopez enabling them to submit false reports, concerning weekend travel allowance...."

Each investigation was scheduled to be held in San Bernardino, California, but was changed to a Chicago, Illinois, location much closer to each Claimant's home.

From this point on, the following relates only to Claimant G. C. Lopez.

At the opening of the investigation, usual preliminary question was asked, did you receive a copy of the investigation notice, and Claimant responded he did not. However, the Carrier attempted to furnish Claimant a copy of the notice personally and asked him to sign a receipt therefore. He refused. To this Board, any attempt on the part of the charged employee to evade the notice of charges, which has to be proved, and in this case was proved, negates any attempt to establish a procedural error in establishing the investigation.

There also was a contention that the notice of charges was vague in that the Carrier never cited any Rules as having been violated, but the Hearing Officer responded, correctly, by stating the contract does not so provide.

Another procedural error was alleged when Claimant's Representative requested copies of all statements, reports by witnesses to the incident including e-mail communications that might be used, but the Carrier declined on the basis that the Agreement did not contain the right to discovery. In lieu, the Carrier advised all such reports, etc., they intend to present will be furnished the Representative during the

Investigation and he would be allowed ample time to review same. The Carrier is not obligated by Agreement to furnish this material, thus its handling of this request was proper.

They further claimed pre-judgment because Claimant was suspended pending the results of the Investigation. The Carrier correctly provides the contract does provide for suspensions.

Because the Carrier suspected some weekend driving allowances were bogus, they set up surveillance of the three Claimants and followed them to the Las Vegas airport where Claimant N. L. Lopez (Case No. 236) boarded a plane for Chicago, Illinois. Claimant and one other then drove away from the airport.

During the interview with Claimant by the Carrier Special Agent, Claimant at first held to the story that each drove or rode in a car to their homes in or near Joliet, Illinois, but when confronted with the facts that he was seen leaving the Las Vegas Airport and driving off, he admitted he did not drive or ride the miles claimed. Note the following excerpted from the Investigation transcript:

- "188. Q. Okay. Well the question really is, is did you travel home on 2/6/2003?
A. No.
189. Q. Did you travel back from your home residence on 2/8 to Needles, California to the gang?
A. Yes, but not from home. We almost made it home, but got stuck in some snow. We were in the process of going home when that, that happened.
190. Q. All right, then how did you obtain a receipt and attach it to this from your home residence?
A. Don't recall."

Claimant, by admitting his culpability for the charges assessed, negated any

procedural miscues Carrier may have committed. Note the following excerpt from Award 2 of Public Law Board No. 1790 chaired by Neutral David Dolnick, who stated:

"Where, as here, the guilt is admitted, there can be no challenge to a fair and impartial hearing. The proceedings admittedly were fair and impartial by reason of the admitted guilt."

The Carrier has furnished sufficient evidence of Claimant's culpability for the charges, and this Board finds Carrier's determination to dismiss Claimant is upheld.

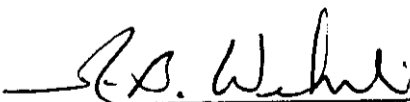
AWARD

Claim denied.

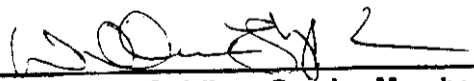
ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.


Robert L. Hicks, Chairman & Neutral Member


Rick B. Wehrli, Labor Member

Dated: Sept. 4, 2003


Thomas M. Rehling, Carrier Member
William Hyeck
as of August 21, 2003