

PUBLIC LAW BOARD NO. 5850

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES**

vs.

**BNSF RAILWAY COMPANY
(Former ATSF Railway)**

Case No. 411 - Award No. 411 - Bitsui
Carrier File No. 14-11-0091
Organization File No. 170.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing January 28, 2011, when Claimant, Jolene K. Bitsui (1568815) was issued a Level S 30-Day Record Suspension with a 3 year review period, concerning her misuse of company funds while working as a Welder. The Carrier alleged violation of MOWOR 1.13 Reporting and Complying with Instructions and MOWOR 1.6 Conduct.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and she be compensated for her lost time and expense and otherwise made whole.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Jolene K. Bitsui, has been employed by the Carrier since 2003. On December 16, 2010, the Carrier notified Claimant to attend an investigation "for the purpose of ascertaining the facts and determining (her) responsibility, if

any, in connection with (her) alleged misuse of company funds while working as a Welder on TRWX1547 on the Seligman Subdivision.” The Notice indicated that the investigation would determine possible violation of MOWOR 1.6 Conduct and 1.13 Reporting and Complying to Instructions. Following the investigation, on February 23, 2011, the Carrier found Claimant guilty of the violations alleged in the Notice and assessed her a Level S 30-day record suspension with a three-year review period.

Carrier Maintenance of Way Operating Rules provide, in relevant part:

1.6 Conduct

Employees must not be:

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4. Dishonest

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1.13 Reporting and Complying with Instructions

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.

On or about December 13, 2010, Greg O'Donnell, Lead Audit Clerk in the Carrier's Maintenance of Way Timekeeping Operation, contacted several Carrier officers concerning alleged discrepancies in Claimant's expense claims. On December 14, 2010, he sent the following e-mail to Lynn Ludwig, Carrier Supervisor of Welding in the Southwest Division:

Dates & non-payable trips. 11/12 Gallup-home, 11/15 home-Gallup, 11/22 home-Gallup, 11/24 Gallup-home, 11/29 home-Gallup. These were all paid. We have also removed 2 trips for the first half Dec. that wasn't paid yet. We are STILL collecting from the over \$4000 she owes the company from prior bogus trips. As of right now, **not including** the trips listed here, she still owes the company \$2146.54. We can only take \$200 per paycheck so this nonsense keeps adding up and needs to stop.

Ms. Ludwig forwarded it to the appropriate Roadmasters. On December 16, Tyler Thomas, Carrier Assistant Roadmaster for the Southwest sent the following e-mail to several Carrier officers, "Set up a investigation. This is unlawful use of company funds. We are not a credit card company in which you charge and pay back \$200 installments. We are a business not a charity."

Mr. O'Donnell testified at the investigation that on several occasions since early 2009, Claimant had worked a relief position in which she was entitled to be paid travel time, code 02, and mileage, pay code 69, to get to the relief location, travel time and mileage to get to another relief assignment, or travel time and mileage to a regular assignment. He stated that on many occasions she had also put in for travel time and mileage to her home during the course of a relief assignment, which is not allowed under Carrier rules.

Mr. O'Donnell testified that he had spoken to Claimant concerning the situation at least twice and maybe more, explaining that she could not claim these expenses in this manner, specifically that they were not allowable to go home during the course of a relief assignment. He stated that she told him she understood. Mr. O'Donnell added that in the 60 days prior to the hearing, he explained to her that the matter had been going on for far too long. He added that when employees receive inappropriate payments, the Carrier sets up a recollection method to recoup the payments, for a maximum of \$200 per paycheck.

Mr. O'Donnell testified at the investigation that as of that date she still owed the Carrier \$2,146.54, and she had a declined claim as late as December 13, 2011. Mr. O'Donnell stated that he did not know if there had been continued issues after that point because he had not yet audited the second half of December.

Heather Ashley, Manager of Maintenance of Way Timekeeping Group, testified that she began aware of the situation in April 2010, learning that there was an exorbitant amount of money that needed to be recouped from an employee for improperly claiming time. She stated that the amount due was \$4000 and it continued to be an ongoing problem with the employee, and she requested the assistance of her Field Managers, Adam Sorenson and Dale Johnson, to straighten out the problem. She added that she received an e-mail from Mr. Sorenson on April 29, 2010 stating that he would talk to Claimant about improperly claiming time, and a follow-up e-mail stating that he had done so. Ms. Ashley stated that she learned from Mr. O'Donnell in December 2011 that the problem had resurfaced.

Mr. Tyler testified that Timekeeping officials Greg O'Donnell and Jack Teaford contacted him concerning expense charges involving Claimant. They provided him a spreadsheet, which was entered into evidence at the investigation. It covered a period from January 6, 2009 to November 29, 2010. The document shows pay codes disallowed and taken back for each pay period dating back to January 6, 2009. Mr. Thomas stated that it showed pay codes Claimant was not entitled to, and she was spoken to about the matter on multiple occasions.

Claimant testified at the investigation that from November 12, 2010 she was working a relief position as a truck driver for a 30-day assignment. She stated that she did not relieve on any other positions, just as a truck driver in the same location. She explained that pay code 69 is for mileage, and 02 is travel hours.

Claimant stated that on a relief position an employee is entitled to the two pay codes when she reports to the position and when she actually leaves the position. When asked whether she was entitled to these payments for every trip she makes home, she replied that at the time she believed that was what she was entitled to. She acknowledged that she claimed these two pay codes on November 15, November 19, November 22, November 24, and November 29, 2010. She asserted that she had been honest in claiming these payments. She acknowledged that Mr. O'Donnell had told her in the past that she was not entitled to payments and they would be taken back through payroll deductions. When asked by the Hearing Officer if he had explained why that was the case, Claimant replied that she could not recall. With respect to Mr. O'Donnell's testimony that he had explained why 02 and 69 claims would be recouped, and that Claimant had acknowledged that she understood, Claimant also replied that she could not recall if Mr. O'Donnell had made that statement. She contended that the only thing she was told by supervisors was that the claims would be removed from her paychecks. She also acknowledged that Mr. Sorenson had spoken to her. She acknowledged that she was still making repayments for inappropriate 02 and 69 claims.

Claimant testified that she reviews her paycheck stubs, but she was only aware of about \$700 coming out of her paycheck. She stated that she had noticed disallowments coming out of her check, but had never questioned the deductions with anyone in Timekeeping. She acknowledged that for approximately two years she had been disallowed \$200 per check, but contended she only spoke to Mr. O'Donnell once and never asked why the money was coming out. She contended that she did not know the current amount she owed the Carrier. She stated that Mr. O'Donnell had spoken to her "sometime in December" but she did not identify the year.

Claimant contended that when she entered the codes at issue she believed she was entitled to the payments, and could not recall that any supervisor had ever instructed her that that was not the case. She stated that after she contacted her Union representatives they explained why she was not entitled to Codes 02 and 69, but "did not recall" that any supervisor had ever explained the proper procedure to her.

Claimant also stated that Mr. Sorenson had told her she needed to remove the claims, but she did not recall if he explained why that was the case. She maintained that she did not recall if he gave her any clarification, but she nevertheless removed time to which she had believed she was entitled. She stated that this conversation had taken place "a while back," but she could not recall the date, sometime within the year before the investigation most likely. She stated that she did not change the codes herself, but Timekeeping removed the payments. Claimant acknowledged that the Carrier began to take \$200 out of her paychecks beginning in January 2009, but she never tried to call the

Union for any explanation at that time, and never clarified the matter until she spoke to the Union in December 2010. She claimed that she never tried to clarify why the money was coming out until December 2010.

Claimant testified that she had never been to any classes or received any instruction on how to properly utilize these pay codes. She stated that she could not recall whether the matter was covered in any Carrier rules.

Claimant's discipline record shows a Level S 30-day record suspension, with a 12-month review period, issued January 25, 2010 for failure to obtain proper authority prior to occupying main track.

With respect to the procedural issues raised by the Organization, the Carrier states that the investigation was in fact held in accordance with the time limit provision of the parties' Agreement. While, the Carrier states, the Organization contends that the Carrier is in violation of Rule 13(a) and held the investigation beyond the required 30 days, the Carrier notes that the Rule provides that the investigation "must be promptly held" and Carrier's first knowledge of the events was December 13, 2010. Therefore, the Carrier contends, the investigation was scheduled within 30 days, on December 29, 2010, and this argument has no merit.

Further, the Carrier states, the Organization's argument that the Investigation Notice was not sufficiently precise also fails. The notice, the Carrier states, was quite clear, as it asserted that the relevant events occurred while Claimant worked as a welder on TRWX1547. She only held that assignment from December 14-30, 2010, the Carrier points out, and the Notice therefore provided Claimant and the Organization enough information to prepare their defense. There is also no merit, the Carrier states, to the Organization's contention that the fact that two witnesses testified by telephone was a procedural flaw, and numerous awards have held to the contrary.

On the merits, the Carrier contends, the evidence shows that Claimant had been told on several occasions and by several different supervisors that she was putting travel time and mileage into the timekeeping system when she was not entitled to it. Indeed, the Carrier states, Claimant admitted that these supervisors spoke to her regarding these errors, and, to the extent she also testified that she did not recall receiving any instructions, the resolution of such conflicting testimony is for the Hearing Officer, not this Board. The Carrier urges that there is no doubt that Claimant violated Carrier rules as alleged. With respect to the penalty, the Carrier asserts that it was properly assessed, according to the Carrier's Policy for Employee Performance Accountability (PEPA) and her personal record. For all of these reasons, the Carrier urges that the claim be denied.

The Organization raises procedural and substantive challenges to the discipline assessed against Claimant. First, the Organization states, the Notice of Investigation was deficient as it lacked a date on which the alleged violation took place. Moreover, the Organization states, according to Agreement Rule 45, the Carrier has 60 days from the date of violation to recoup any overpayment to an employee. Evidence presented during

the investigation, the Organization asserts, concerned events outside this timeframe and should not have been allowed into evidence. Further, the Organization argues, the Hearing Officer allowed witnesses to testify by telephone, over the Organization's objection. The Organization contends that Claimant was denied a fair and impartial investigation.

On the merits, the Organization states that the Carrier has failed to meet its burden of proving Claimant's guilt by substantial evidence. The Organization notes that Mr. Thomas testified that he and other supervisors had numerous conversations with Claimant, but was unable to provide any written documentation of these conversations or any evidence that he worked with Claimant to correct any supposed problem. Mr. Thomas also, the Organization notes, acknowledged that he did not know the proper procedure for the Carrier to recoup overpayments to an employee. The Organization concedes that Claimant claimed some expenses to which she was not entitled, but asserts that her actions were inadvertent and she is not guilty of any intentional misconduct. The Organization notes that Claimant is paying back erroneous payments, and the charges could have been avoided had Carrier officers taken the time to help correct her misunderstandings. With respect to the penalty, the Organization states that even if Claimant were guilty of the charges, the discipline is extreme, unwarranted and unjustified. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. Addressing first the procedural arguments, the Organization argues that the Investigation Notice is procedurally defective as it does not specify the date(s) of Claimant's alleged violation. The Carrier counters that it did provide Claimant and the Organization with sufficient notice, as it specified that the misconduct occurred during her assignment as a welder on Gang TRWX 1547, and, the Carrier states, she occupied that assignment from December 14-30, 2010.

We believe the Notice is reasonably specific enough to put Claimant on notice that she should defend her conduct in the period from December 14-30, 2010 which is the only time she worked as a welder on the Seligman subdivision. However, that is not the time period that was addressed in this investigation. The record demonstrates that the investigation was triggered by Mr. O'Donnell's review of Claimant's expense claims and his conclusion that she had made numerous inappropriate claims during **November, 2011**. Mr. Thomas' decision to order an investigation was clearly based on that information. At the investigation, Claimant was questioned only about her claims during that time period, while she was apparently on a truck driver rather than welder relief assignment, and she had no reason or opportunity to defend against any allegations concerning her conduct in December, 2011. Indeed, Mr. O'Donnell stated at the investigation that he had not yet audited late December, and was unaware of whether Claimant had committed any further violations during that period.

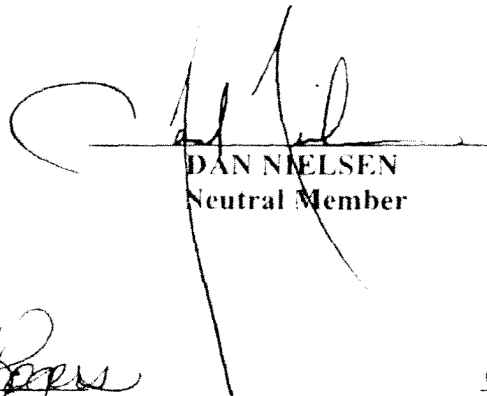
The Carrier's response to the claim clearly states that the Notice addresses Claimant's conduct during a welder assignment in the latter period of December 2011. The letter of suspension advises her that she is being disciplined for her conduct during a

welder assignment in the latter period of December 2011. The investigation concerned her conduct on a truck driver assignment in November 2011. We conclude that the Notice of Investigation in fact failed to sufficiently identify the alleged violations and Claimant was not afforded a sufficient opportunity to defend herself.

On this basis alone, we sustain the claim and order the discipline assessed against Claimant overturned and removed from her personal record. That is not to say that this record does not demonstrate a lengthy period of questionable conduct by Claimant, and what appears to be a great deal of patience and leniency by the Carrier. We also do not suggest that, if Claimant's conduct continues, the Carrier is in any way precluded from addressing it in a formal manner upon proper notice.

AWARD

Claim sustained. The Carrier is ordered to comply with this Award within 45 days.



DAN NIELSEN
Neutral Member



SAMANTHA K. ROGERS
Carrier Member



DAVID TANNER
Organization Member

Dated this 28 day of Sep , 2012.