

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 456 – Award No. 456 – Alvarez
Carrier File No. 14-13-0338
Organization File No. 10-SF13C5-1310

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing July 19, 2013, when Claimant, Angel E. Alvarez (6475123), was dismissed, for his misconduct in failing to operate a BNSF vehicle in a safe manner, when he chased a private citizen back to his place of residence where a physical altercation ensued, resulting in his hospitalization; and his indifference to duty and dishonesty for paying himself while not performing service on June 28, 2013 at approximately 4:41 pm at Ford Madison, Iowa. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 1.6 Conduct and the Company Vehicle Policy.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from Claimant's record this dismissal and he be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss, including overtime and vacation, commencing July 19, 2013, continuing forward and or 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, A.E. Alvarez, had been employed by the Carrier since 1981. On July 19, 2013, the Carrier notified Claimant to attend an investigation to ascertain the facts

and determine his responsibility, if any, in connection with his alleged misconduct in failing to operate a BNSF vehicle in a safe manner, when he allegedly attempted to ram a private citizen's vehicle, attempted to run him off the road, and chased him back to his residence where a physical altercation ensued, resulting in his hospitalization; and his alleged indifference to duty and dishonesty of paying himself while not performing service, on June 28, 2013, at Fort Madison, Iowa. The Carrier claimed its first knowledge occurred on July 16, 2013. Following the investigation, the Carrier found that Claimant had committed the misconduct alleged, in violation of Carrier Maintenance of Way Operating Rule 1.6 Conduct and its Company Vehicle Policy and dismissed him from employment.

MOWOR 1.6 Conduct provides:

Employees must not be:

1. Careless of the safety of themselves or others
2. Negligent
3. Insubordinate
4. Dishonest
5. Immoral
6. Quarrelsome
- or
7. Discourteous

Any act of hostility, misconduct, willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated.

The Carrier Vehicle Policy and Procedure Manual provides, in relevant part:

7. Make sure vehicle is secured at all times to minimize theft of company vehicles or property.
8. Operate the motor vehicle in a careful and safe manner.

On the date of the incident, June 28, 2013, Claimant was working as a Track Surfacing Gang Foreman. Eric Gillespie, Carrier Manager of Roadway Planning, Galesburg, Illinois, testified at the investigation that on July 16, 2013, he received a voicemail message from Carrier Special Agent Paige DeAngelo in Kansas City. The message stated that Joseph Pender, a non-employee, wished to speak to Claimant's supervisor concerning an incident. Mr. Gillespie explained that he then began an investigation by turning the matter over to Carrier Special Agent Keith Hagemeyer in Galesburg.

Mr. Gillespie testified that Claimant had not notified him of the incident prior to this time. He stated that the only information he received from Claimant, during a conversation on or about July 1, 2013, was that he had personal issues and needed to appear in court for personal proceedings. He maintained that Claimant mentioned nothing about the involvement of a Carrier vehicle or that anything had occurred on Carrier time. Mr. Gillespie added that the Carrier never took a statement from Claimant.

Mr. Gillespie testified that Mr. Hagemeyer learned from the local police department that Claimant had been involved in some sort of altercation on June 28, 2103, and that his vehicle had been involved in some sort of chase. He stated that he also learned that Claimant had to go to the hospital and was eventually arrested and charged with disorderly conduct and criminal trespass. The report of Fort Madison, Iowa police officer David Doyle, which included a lengthy narrative, was entered into the investigation record. It showed that the Police Department was notified of the incident at 1638, and the police arrived at the scene of the alleged altercation at 1644. The police officer's narrative also states that Claimant was bleeding profusely from the top of his head when he arrived and that Claimant was later transported by ambulance to a hospital. The record also includes a police record showing that Claimant was later charged with disorderly conduct and criminal trespass. Two other persons were charged as well. Joshua P. was charged for willful injury and Joseph P. with disorderly conduct.

GPS records showing the location of Claimant's vehicle at various times were also entered into the record and described by Mr. Gillespie. That record indicates that Claimant's vehicle was located at the scene of the altercation from 1630 to 1650, at a library from 1650 to 1707, and then moved to Claimant's home at 1716.

The record also includes a Carrier timekeeping record for the day of the incident; Claimant, as Foreman, entered the time for himself and his gang members at 8:57 the next morning. For Claimant, the record shows that he entered time from 7 to 1530, overtime for one hour from 0600 to 0700, and overtime again for 1630 to 1730, the time period during which the altercation occurred.. There was no time entry for 1530 to 1630. The record shows that Claimant made identical entries for employees G.R. Doss and M.L. Slocum, with time from 0700 to 1530, overtime from 1630 to 1730 and no entry for 1530 to 1630. The Carrier's witnesses did not explain whether Claimant and the other employees were entitled to time from 1530 to 1630.

Claimant testified at the investigation that the incident began when he was driving his Carrier vehicle into Fort Madison, Iowa, returning from his work duties. He explained that his wife had an appointment at the hospital in the west end of town, and when she came out he followed her personal vehicle. He explained that she had pulled ahead of him about a block when he noticed a vehicle driving recklessly beside her, trying to tailgate her vehicle, so he tried to pull towards them to see what was going on. He stated that it was his intent to get the vehicle's information so he could call the police, but Carrier policy prohibits employees from pushing more than one number on their cell phones, so he could not do that, nor could he get the license information as he was attempting to drive cautiously behind the vehicle.

Claimant stated that he followed the vehicle throughout the area to get the information, and the driver continued to drive recklessly, cutting him off at one point and veering in a manner that threatened other drivers. Claimant denied that he chased the vehicle or ever attempted to hit it. Claimant continued to follow the vehicle, eventually stopping at an alleyway behind a residence, where the driver stopped. Claimant's wife had also followed both vehicles to the location.

Claimant maintained that he pulled into the alleyway and was fumbling to get paper and pencil to get the license number to call the police, when the driver, an approximately 56-year-old man, came out and began yelling and cursing at him.

Claimant explained that he came out of his vehicle and approached the man, explaining that he was simply trying to obtain his information so he could call the police, and a discussion ensued about why the man had been driving so recklessly. Claimant maintained that he had the situation almost settled, when the man's son, an approximately 36-year-old man, came out the passenger side door with a wrench and the father became angry. Claimant stated that he asked his wife if she had called the police, at which time the son came around and tried to kick him, and then struck him in the head with the wrench. He added that one of the men had him in a chokehold, and he sort of blacked out. At that point both men ran into the house. Claimant denied that he ever assaulted either individual or intended any bodily harm; his only intent was to contact the police and turn them in. He explained that a woman who came out of the house called the police.

Claimant stated that he was transported by ambulance to the hospital; he was released that evening. He acknowledged that he had been arrested; the charges were still pending at the time of the investigation. The record indicates that the other two participants in the incident were criminally charged as well. Claimant denied that he knew either of the men.

The incident occurred on a Friday. Claimant maintained that he called Mr. Gillespie the following Monday, July 1, 2013 to let him know about the incident in case it came out in the newspapers. He maintained that he wanted Mr. Gillespie to have full knowledge of everything that had occurred.

Claimant acknowledged that when he entered his time the following day he claimed eight hours of straight time, an hour of overtime from 6 to 7 a.m. and an hour of overtime for 1630 to 1730. He explained that the normal quitting time was 1530, so he should have been compensated from 1530 to 1630 because he was traveling back to his work site from Missouri, and he also had not been paid for his lunch period. The entry shows a blank for the 1530 to 1630 time period. He stated that he was on the medication Vicodin at the time, and was somewhat incoherent, so he might have made a mistake, but he knew he had to enter the time by 9 a.m. to comply with the Carrier's timekeeping requirements.

The record also includes GPS location information from the HLCS unit in Claimant's vehicle. It showed that from 1630 to 1650, Claimant's vehicle was at the location where the police report indicated the altercation occurred. He stated that he was not sure how his truck was moved, but it was arranged between his wife and the police officer. The record further includes hospital records showing that Claimant was admitted to the emergency room at 1707.

Claimant's spouse, Chrystie Phillips, testified at the investigation that prior to the incident she had an appointment at the hospital, and asked Claimant to meet her there. Although not entirely clear, it appears that she became involved in a drag racing incident with a vehicle that pulled up next to hers, with two men inside. She explained that the vehicle had been weaving in and out of traffic, almost clipping her vehicle and Claimant's. She eventually arrived at the scene of the altercation, about which she gave an account similar to Claimant's. She maintained that throughout the incident Claimant had just been concerned for everyone's safety. She stated that he never tried to ram the other vehicle or run it off the road, and kept a safe distance, just attempting to keep the vehicle in sight.

However, the police report indicates that Ms. Phillips told the police officer that the P.s took off fast when they came to the same intersection and she decided to race them. The report also states that she told him the car cut her off and, at that point, Claimant, who had been following behind, sped up and tried to tail them. Thereafter, she told the officer, all three vehicles were traveling at high rates of speed.

She stated that when they arrived at the location the man who exited the vehicle apologized and it appeared the incident was over, but then the other man exited the passenger side and attempted to kick Claimant, eventually hitting him in the head with a wrench and putting him in a chokehold.

The Carrier's Policy for Employee Performance Accountability (PEPA) provides that a second serious violation within the applicable review period may result in an employee's dismissal. The PEPA also sets forth a list of stand-alone dismissible violations which may result in immediate dismissal. The list includes, in relevant part:

- 2) Dishonesty about any job-related subject including, but not limited to, falsification or misrepresentation of an injury, abuse of FMLA and/or other leave privileges
- 5) Violence in the workplace or instigation of a serious altercation. This includes possession weapons and the threat of using weapons
- 11) Multiple Serious violations committed during the same tour of duty

Claimant's personal record shows a Level S 30-day record suspension, with a 12-month review period, issued May 16, 2013 for failure to correctly place a temporary speed restriction, and a Level S 15-day actual suspension, with three years' probation, issued October 1, 2001, for failure to comply with instructions regarding handling of expense account payments to vendors, and three demerits more than 10 years earlier.

The Carrier first asserts that, with respect to the Organization's contention that the Carrier failed to conduct the investigation within the required time limits, its first knowledge of the incident occurred when the Carrier's Police Department, on July 16, 2013, notified Claimant's supervisor of the misconduct and he turned the matter over to Special Agent Hagemeyer for further investigation. Given the seriousness of the charges, the Carrier stresses, it needed to await the results of a police investigation before concluding that Claimant had committed Rules violations, and time limits are preserved during such an investigation period. The Carrier stresses that it issued the Investigation Notice within Agreement time limits following the Carrier's first knowledge on July 16, 2013, when Special Agent DeAngelo contacted Carrier supervision after receiving a call from an individual allegedly involved in an altercation with Claimant.

On the merits, the Carrier points out that the Organization does not dispute that Claimant violated MOWOR 1.6 and had an altercation in an alleyway with two private citizens, from which followed an injury to himself, his arrest, leaving his Carrier vehicle in an unprotected location and then returning to work and paying himself overtime for the time of his altercation and subsequent hospitalization.

The record demonstrates, the Carrier states, that at approximately 4:40 on the day of the incident, Claimant, in his Carrier vehicle, was following his wife, who, as she testified, was racing another vehicle with two men inside. There was no demonstrated need, the Carrier argues, for Claimant to follow this vehicle, as he did, all the way to the alleyway of the men's residence.

There, the Carrier continues, Claimant exited his vehicle, and the situation escalated into a threatening confrontation during which one man struck Claimant on the head with a wrench and the other put him in a choke hold. Claimant, the Carrier continues, seized the wrench and police were called. When the police officer arrived, Claimant was bleeding profusely and an ambulance was called. At approximately 5:20 p.m., the Carrier continues, Claimant went to the Police Department, where he arrested and charged with criminal offenses, while his Carrier vehicle was left in the alleyway, contrary to the Organization's contention that the vehicle was at all times in a secure location, and had to be moved by Claimant's wife and the police officer to a public library.

The evidence further shows, the Carrier notes, that on June 29, 2013, Claimant entered his time for the day before and paid himself at the overtime rate for 4:30 to 5:30 p.m., the time during which all of these incidents occurred. This conduct, the Carrier stresses, is clearly dishonest.

While Claimant attempted to portray these events in a different light, the record does not support his version, the Carrier maintains. The credibility conflicts presented were resolved by the Hearing Officer, who found that Claimant's testimony was not credible. It is well established, the Carrier points out, that those determinations should not be disturbed by this Board. Nor, the Carrier states, should this Board be persuaded by

the Organization's excuses and assertions that Claimant should not be held accountable for his actions. Claimant's guilt, the Carrier concludes, has been proven by substantial evidence.

As for the penalty, the Carrier stresses that it was appropriate given the seriousness of Claimant's conduct and his personal record, which includes a previous Level S violation within his 12-month review period. The Carrier also notes that Claimant committed several violations which are designated as stand-alone dismissible violations in its PEPA. The Carrier urges that the claim be denied.

The Organization raises procedural and substantive challenges to the discipline issued against Claimant. First, the Organization contends that the Carrier failed to conduct the investigation within the required 10-day time limits, as the hearing took place 27 days after the incident. While the Carrier claimed first knowledge on July 16, 2013, the Organization contends that Claimant notified Roadmaster Gillespie of the incident on July 1, 2013, only three days after it occurred. The Organization challenges Mr. Gillespie's testimony that he engaged in the conversation but did not learn any details of the incident, as Claimant testified that he indeed provided Mr. Gillespie full information.

The Organization adds that the Carrier's claim of first knowledge on July 16, 2013 relies upon Mr. Gillespie's testimony that on that date Special Agent DeAngelo left him a voicemail and he then turned the matter over to Special Agent Hegemeyer for further investigation. However, the Organization notes, the Carrier did not make either Special Agent available at the hearing, nor did it provide any statements or other documents to support Mr. Gillespie's testimony. Thus, not only was there no support for the Carrier's claim of when first knowledge took place, as the individuals primarily responsible for investigating this incident were not available to be questioned by the Organization.

The Organization also asserts that the Hearing Officer and Carrier Officers, during the investigation, improperly labeled Claimant's conduct with such terms as "road rage," and testified that he had violated Carrier Rules. This conduct, the Organization argues, demonstrates prejudgment of Claimant's guilt before all facts were heard.

On the merits, the Organization points to various aspects of Claimant's conduct to demonstrate that he fulfilled his obligations as a Carrier employee. For example, the Organization states, while Claimant is accused of chasing a private citizen to his residence, Claimant's testimony shows that Carrier policy precluded him from making an emergency phone call so he had to follow the vehicle, which was driving recklessly, to get license information to report to the authorities. The Organization also notes that although Claimant's vehicle was clearly marked as belonging to the Carrier, the Carrier received no reports that any of its vehicles were driving recklessly that day. Further, even though Claimant was in a dazed condition, the Organization notes, he ensured that his Carrier vehicle would be placed in a secure location, at his residence, where it could not be vandalized or stolen.

As for the timekeeping entry on the day in question, the Organization notes that Claimant made odd entries for all of the gang members that day, not just himself. The gang worked 0600 until 1530 without a meal period, the Organization points out, so the employees were entitled to compensation thereafter for a meal period, but Claimant skipped an hour and entered no pay from 1530 to 1630. That, the Organization states, apparently accounts for the incorrect 1630 to 1730 entry. The Organization contends that the logical explanation for Claimant's unusual timekeeping entries for the day in question was that he was taking strong pain medication. The Organization notes that when Claimant was asked at the investigation why he entered time from 1630 to 1730 when he was involved in the incident during that time, he replied that he should have been compensated from 1530 to 1630 because he was traveling back to his work site and had not been paid for a meal period. The Organization also notes Claimant's testimony that Carrier regulations required him to enter the time by 9 a.m. the following day, but he was somewhat incoherent when he did so as a result of taking the strong pain medication.

The Organization concludes that Claimant is a 32-year employee who, looking back at the incident, would certainly have handled matters differently. The Organization stresses that Claimant was following Carrier policy by trying to safely obtain information to report a reckless driver. The Organization also notes that Claimant had authorization to drive the Carrier vehicle to his residence, which was only a few blocks from the location of the incident. While the Organization concedes that Claimant mistakenly entered the wrong hours for his time, the Organization contends that this can be logically explained by the strong prescription pain medication he was taking at the time.

The Organization concludes that the discipline assessed is excessive and requests that the Carrier re-evaluate the situation and reinstate Claimant to its employ. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. First, we find no procedural irregularity which denied Claimant his right to a fair and impartial investigation. The Hearing Officer credited Mr. Gillespie's account of when he first learned any details of the incident rather than Claimant's, and it is well settled that such credibility determinations should not be disturbed by this Board.

On the merits, the Carrier dismissed Claimant for dishonesty concerning his time entry, and for failing to operate his Carrier vehicle in safe manner. The dismissal letter further notes that Claimant ultimately was involved in an altercation which led to his injury, hospitalization and arrest.

The Carrier bases its dishonesty allegation on the fact that Claimant paid himself for overtime from 1630 to 1730, the time period during which the incident occurred. However, the Carrier did not dispute Claimant's testimony that he was actually entitled to payment for the previous hour, which he did not claim, because he had not taken a meal period, and simply made a mistake as to which hour was entered. The Carrier also does not address the fact that Claimant made identical entries for the other two employees whose time he entered.

The record evidence does not support the Carrier's determination that Claimant was dishonest; indeed, it appears that he simply made a clerical error by claiming noting one hour instead of another as time to which he was entitled. The fact that he also made the same entries for the other employees supports the Organization's contention that Claimant simply made mistakes when he entered the time the morning after the incident, likely as a result of the effects of his head injury and strong pain medication. The Carrier has not met its burden of proving that Claimant was dishonest by substantial evidence.

As for failing to operate his BNSF vehicle in a safe manner, there is no question that Claimant is guilty of these charges. He was authorized to drive the vehicle to his home, but he certainly was not authorized to use it to engage in the type of behavior demonstrated on this record. His wife's description of the events as a drag racing incident involving her car and another vehicle, where all three vehicles ultimately traveled at high rates of speed, makes it highly unlikely that Claimant, as he contended, simply followed the two vehicles carefully. We are also not impressed, as the Carrier was not, with Claimant's explanations that he was simply trying to follow Carrier policy and obtain the information necessary to call the police, although he also claimed, inconsistently that the Carrier's policy on use of cell phones prevented him from doing so. Claimant's behavior was risky and could have had serious consequences. There was simply no justification for it, and Claimant had several, far better options for dealing with the situation. The Carrier has met its burden of proving Claimant's guilt of operating his Company vehicle in an unsafe manner by substantial evidence.

With respect to the penalty, we first note that we have found Claimant guilty only of the charge had he failed to operate his vehicle in a safe manner, not the charge of dishonesty, which can, under the PEPA, result in dismissal as a stand-alone offense. The altercation itself appears to have been treated as an aggravating circumstance. However, this was off-duty misconduct and took place off Carrier property. The only two eyewitnesses to that event to testify at the investigation were Claimant and his wife, who both stated that Claimant got out of his vehicle and appeared to be involved in a reasonable conversation, resolving the incident, when Joshua P. exited his vehicle and hit Claimant in the head with a wrench. The police report indicates that when the police officer arrived Claimant was bleeding profusely from the head, the only one of the participants in the incident who appeared to be injured, and that Joshua P. told the officer he indeed so hit Claimant, although he also made the self-serving claim that Claimant grabbed the wrench and "went after" both men. The weight of the record suggests that Claimant was not the aggressor in this altercation.

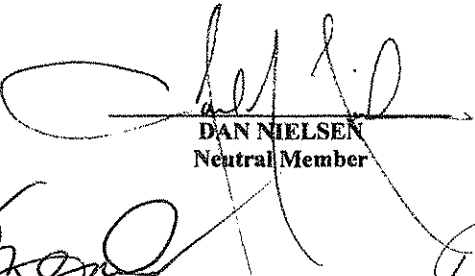
For the foregoing reasons, we find that the Carrier has not met its burden of proving Claimant guilty of dishonesty, a serious allegation against him. The altercation, cited in the dismissal letter as another basis for the Carrier's decision, while certainly not laudable, was off-duty misconduct which occurred off Carrier property. Additionally, the record shows that one of the other participants escalated the confrontation to violence, that Claimant was the only one injured as a result, and that at the time of the hearing


criminal charges were pending but there had been no judicial determination as to whether Claimant was guilty of criminal conduct.


Claimant was a more than 30 year employee with a minimal disciplinary record. We have concluded that his primary misconduct was his very ill-advised decision to, while driving his Carrier vehicle, drive a high rate of speed across city streets, without any proper justification for doing so. Weighed against his overall record and the fact that we have found Claimant not guilty of the most serious allegations the Carrier relied upon in its dismissal letter, we conclude that in these particular circumstances dismissal is too harsh a penalty. We order Claimant reinstated, without backpay and on a last-chance basis with respect to any conduct involving the potential for violence.

AWARD

**Claim sustained in accordance with Findings.
The Carrier is ordered to comply with this Award within 45 days.**


DAN NIELSEN
Neutral Member


JOY MENDEZ
Carrier Member


DAVID SCOVILLE
Organization Member

Dated this 31st day of October, 2014.