

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 494 – Award No. 494 – Claimant: Tindell

Carrier File No. 14-15-0260

Organization File No. 180-SF13C5-159

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing March 15, 2015, when Claimant, Bobby G. Tindell (1215656), was disciplined with a Level S 30-Day Record Suspension with a 1-year review period for his failure to comply with previous instructions on April 7, 2015 at approximately 7:00 am while working as a Track Supervisor on the Needles Subdivision resulting in his continuing to create an unpleasant work environment to various employees after confronting them about their overtime pay after it was clearly instructed for him to stop. The Carrier alleged violation of Maintenance of Way Operating Rule (MWOR) 1.6 Conduct and MWOR 1.13 Reporting and Complying with Instructions.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be reinstated, if applicable, with seniority, vacation, all rights unimpaired and pay for all wage loss commencing May 15, 2015, 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, Bobby Tindell, has been employed by the Carrier since 1998. On April 15, 2015, the Carrier directed Claimant to attend an investigation for the purpose of

ascertaining the facts and determining his responsibility, if any, in connection with his alleged failure to comply with previous instructions on April 7, 2015 at approximately 0700 hours while working as a track supervisor on the Needles Subdivision, thereby perpetuating an unpleasant work environment to various employees after confronting them about their overtime pay after being instructed to stop. Following the investigation, the Carrier found Claimant guilty of the misconduct alleged and assessed him a Level S 30 day Record Suspension with a 12-month review period.

The facts of this case are largely undisputed. On March 24, 2015, Needles, California Track Supervisor Kyle Sahlstrom sent an e-mail to Carrier Human Resources Manager Carmen Turner. It stated:

Carmen, I spoke with you briefly yesterday about someone looking up my time and pay. His name is Bobby Tindell. For the past year just about every week he comes to me about how much more money I make than he does with the exact dollar amount. Yesterday he told me he's now looking up not only my time, but the time of everyone that he has seniority on so he can put in time claims. I feel he has no right to know how much I make or don't make. I hope there's something that can be done about this. Any questions feel free to call me.

Ms. Turner forwarded the message to Roadmaster Frank Barrera, who forwarded it to Division Engineer Jimmy Capps. On March 25, 2015, Mr. Capps sent the following e-mail to Claimant:

Bobby:

It has been brought to my attention that you are looking at fellow employees' payroll. This is something that we all have access to do, but it is not right for you to look at employees' time but your own. If you continue to do this I will take further actions. Thanks for your time.

Mr. Barrera testified at the hearing that he spoke to Mr. Capps later that morning, and he told him he had spoken to Claimant, and that if any of these incidents continued he needed to escalate the matter. Mr. Barrera stated that he was also instructed to tell the other employees that Mr. Capps had addressed the situation and if it did continue, they should let him know.

Mr. Barrera added that it is not common for employees to be able to check other employees' time in the computer system, and that as of the hearing the Carrier was still investigating how Claimant was able to do so. However, following this incident, Claimant was put on restricted access.

Claimant was on vacation the last week of March, 2015, but on or about April 7, 2015, Mr. Sahlstrom and Track Supervisor Nick Mazanowski contacted Mr. Barrera and informed him that they had been confronted by Claimant and told that they needed to tell

him how much overtime they worked and that if they did not he had other means of finding the information. The employees, he stated, were extremely frustrated and upset, as they thought the matter had been resolved.

Mr. Sahlstrom testified at the investigation that for about a year before this incident, Claimant would regularly come to him to discuss how much he was earning, and finally told him he was printing out Mr. Sahlstrom's time and knew exactly how much he was making. He felt that was none of Claimant's business, so he took the matter to Human Resources. He confirmed that Mr. Barrera subsequently told him to bring it to his attention if Claimant asked him about his time again.

Mr. Sahlstrom stated that on or about April 7, 2015, Claimant came by and told him that he had been instructed to stop looking up his pay, but Mr. Sahlstrom should tell Claimant how much overtime he had so Claimant could put in claims. Mr. Sahlstrom stated that Claimant told him he had other ways of obtaining the information if Mr. Sahlstrom would not provide it.

Mr. Sahlstrom acknowledged that Claimant did not act in a hostile or threatening manner. However, he stated, Claimant demanded that he tell him if he had any overtime, and he did feel harassed. He stated that Claimant kept asking him for the information, and bragging about what he knew and printing up everyone's pay.

Mr. Mazanowski confirmed at the investigation that Claimant asked him and Mr. Sahlstrom, his partner, to tell him their overtime so that he could put in claims. He stated that Claimant was very persistent and constantly went after them. He added that Claimant really did not ask but told them he wanted them to tell him their overtime and had other means of obtaining the information if they did not.

Track Supervisor Michael Bradley testified at the investigation that he was present on April 7, 2015 when Claimant spoke to Mr. Sahlstrom and Mr. Mazanowski. He overheard Claimant ask them for their overtime information, but he did not act in an aggressive or discourteous manner. He added that it did not sound, to him, like Claimant was demanding the information.

Claimant testified at the investigation that he stopped accessing the employees' time in the computer system after Mr. Capps instructed him to do so. Thereafter, he stated, he went to the employees and asked them to let him know if they got any overtime so he could put a claim in. He acknowledged that he told them he had other ways of getting the information if they did not provide it. Claimant stated that he had filed multiple overtime claims.

Claimant's personal record show a formal reprimand for an operating violation in 2013, and a Level S Record Suspension, with a 12-month review period, for an operating violation in 2010.

The Carrier asserts that Claimant violated MWOR 1.6, Conduct, when he acted in a discourteous and hostile manner by harassing track inspectors Kyle Sahlstrom and Nicholas Mazanowski about their income and overtime hours. Specifically, as employee Sahlstrom testified, it was common for Claimant to approach and question him about his pay. Finally, Mr. Sahlstrom sent an e-mail to Carrier Human Resources official Carmen Turner, on March 24, 2015, informing her that Claimant questioned him almost weekly about his pay, and that Claimant told him he was looking up, on the computer, the time of everyone junior to him so that he could put in time claims. Mr. Sahlstrom informed Ms. Turner that he felt Claimant had no right to do this and hoped something could be done.

The Carrier notes that Roadmaster Barrera was copied on the e-mail, and he forwarded it to Division Engineer Jimmy Capps. The Carrier points out that on March 25, 2015, Mr. Capps sent Claimant an email, informing him that he needed to stop looking at other employees' time records. The Carrier adds that Mr. Capps spoke to Claimant on the phone and told him his behavior was inappropriate and if he continued Mr. Capps would escalate the matter. The Carrier notes that it then took steps to limit Claimant's access to coworkers' information.

However, the Carrier continues, on April 7, 2015, Mr. Sahlstrom and Mr. Mazanowski contacted Mr. Capps and informed him that Claimant had demanded they inform him of their overtime hours and told them that if they did not he had other means of obtaining that information. The Carrier notes that the employees testified at the investigation that Claimant constantly questioned them and they felt harassed. The Carrier also points out that Claimant did not deny engaging in this conduct. The Carrier asserts that Claimant's conduct was unacceptable and deserving of discipline.

The Carrier stresses that it did not discipline Claimant for filing time claims; rather, he violated Carrier Rules by the manner in which he gathered information to do so. The Carrier argues that Claimant harassed and questioned other employees about their earnings, and no employee should be subject to such persistent abuse. Therefore, the relatively low-level discipline—a paper suspension with a one-year review period—was not excessive or arbitrary.

The Organization raises procedural and substantive objections to the discipline assessed against Claimant. In particular, the Organization argues that Claimant complied with Mr. Capps' March 25, 2015 directive to cease using the Carrier computer system to view the time of employees on gangs other than his own. Whether he secured this information by other means, the Organization adds, is beyond the scope of the e-mail instruction and is moot. Moreover, the Organization states, Mr. Capps refused to provide Claimant the information he needed to file claims and it is a long-standing practice for employees to request overtime information from other employees. Claimant was simply attempting to enforce his rights under the collective bargaining agreement.

As for Claimant's interactions with Mr. Sahlstrom and Mr. Mazanowski, the Organization asserts that an employee's annoyance with another's persistence does not violate any Carrier Rules, especially 1.6, which only prohibits behavior which is negligent,

insubordinate, dishonest, immoral, quarrelsome or discourteous. In particular, the Organization points to the testimony of Track Supervisor Michael Bradley, an uninvolved witness, that he overheard the conversation and did not see Claimant act in an aggressive, discourteous, disrespectful or demanding manner. This investigation, the Organization urges, was motivated by Claimant's attempts to file claims for overtime to which he was entitled.

The Organization concludes that Claimant committed no violation, certainly not the Level S, serious discipline which has been assessed here. Even if it had, the penalty assessed is excessive and unjustified.

The Board has carefully reviewed the record in its entirety. First, we find no procedural error which denied Claimant his right to a fair and impartial investigation. On the merits, the facts are reasonably clear. Claimant had been accessing other employees' time and earnings in the computer system, in order to glean information for overtime claims, and regularly, on an almost weekly basis, informing Mr. Sahlstrom and Mr. Mazanowski that he was doing so, telling them the exact amounts they were earning. Mr. Sahlstrom believed that Claimant's conduct was inappropriate to the point of harassment and informed Human Resources. Claimant was then instructed to stop using the computer to obtain the information, and his computer access was restricted.

The Organization is correct that Claimant abided by the instruction given to him to stop accessing other employees' time and pay records. The basis for the discipline here is not a failure to obey that directive. It is the manner in which he subsequently interacted with co-workers about the time and overtime issue. Prior to having his computer access restricted, Claimant would go to co-workers and tell them what he knew of their time and pay. That is not investigating an overtime claim. He already had the necessary information, and he had the ability to pursue his claims without bothering these individuals. It is fair to view his approaches in those prior instances as a form of harassment. Those instances, however, are not what he was disciplined for.

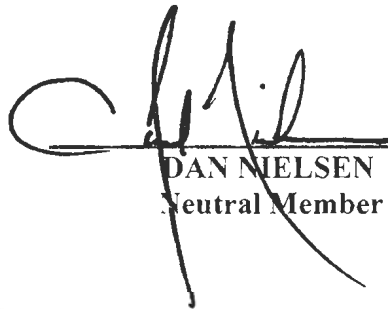
After his access was cut off, Claimant approached his co-workers to seek information about their overtime and pay, with the caution that he had other means of getting the information if they would not tell him. He had not been ordered to refrain from speaking to his co-workers about these issues, and there is nothing in the record to show that this is an inappropriate line of inquiry. Absent any legitimate directive to the contrary, he had the right to ask, and they had the right to refuse to tell him. Notwithstanding that, he is subject to the same rule as all other employees, to refrain from hostile and discourteous conduct in his interactions, and to refrain from harassment. Given the lack of any specific directive beyond not using the computer, the question, then, is whether the manner in which he interacted with his coworkers in pursuit of this information would be something that any reasonable person would understand to be hostile, discourteous or harassing.

While we agree with the Carrier that Claimant was not disciplined for filing overtime claims, but rather for the manner in which he dealt with other employees, we find

the record insufficient to show that his inquiries after the cutoff of computer access were beyond the scope of a normal, if unwelcome, inquiry. Certainly both Messrs. Mazanowski and Sahlstrom were irritated by his constant focus on this. Just as certainly, he knew this. Given that, and given their right to refuse to tell him what he wanted to know, his conduct could be viewed as harassing if he persisted after they told him "no", or if his approach in asking, or his reaction to being refused, was hostile or discourteous. It appears that there was only a single incident of him asking between the order to stop accessing the computer and the initiation of these proceedings, and the details of that are simply not sufficient to say that he was unreasonably persistent, hostile or discourteous. We therefore conclude that the Carrier has not carried its burden of proof, and sustain the claim.

AWARD

Claim sustained. The Carrier is directed to comply within 30 days.



DAN NIELSEN
Neutral Member



MICHELLE McBRIDE
Carrier Member



DAVID SCOVILLE
Organization Member

Dated this 21 day of August, 2017.