

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 179

AWARD NO. 183

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

Carrier's File

1517220

AND

ORGANIZATION

Brotherhood of Maintenance of Way Employees
Division of International Brotherhood of Teamsters

System File

J-0948U-252

STATEMENT OF CLAIM

1. The Carrier's decision to impose a Level 4, ten (10) day suspension without pay, upon Mr, Juan Lopez, Jr. for the alleged violation of Rule 1.15 Duty – Reporting or Absence, in connection with leaving work without proper authority on October 23, 2008 while employed as a foreman on Gang 4840, is based upon unproven charges, unwarranted and in violation of the Agreement.
2. As a consequence of the violation outlined in Part 1 above, we request that the Level 4, ten (10) day suspension without pay, imposed upon Claimant Lopez, Jr. be reversed and expunged from his personal record as well as that he receive compensation for all hours (straight time and overtime) he lost during his unjustly suspension from service from January 5, 2009 through January 16, 2009.

STATEMENT OF BACKGROUND

On the date in question, October 23, 2008, Claimant, with approximately eleven (11) years of service and established seniority in various classifications within the Carrier's Maintenance of Way and Structures Department, was performing his regularly assigned duties as a Track Foreman on Gang 4840 under the direct supervision of Engineering Supervisor David Booth. According to the Organization, prior to October 23, 2008,

Claimant had informed Supervisor Booth that it was very likely he would have need to leave work early to attend a consultation with an attorney relative to handling some personal matters assuming he could successfully schedule such a consultation and that during this conversation he requested Booth's permission to be absent from work during the hours necessary to attend this consultation and that Booth approved his request. The Organization notes however, that Booth did not recall if, during said conversation, Claimant specifically requested time off to attend the consultation.

The Organization noted that in connection with the Claimant's regular assignment, Gang 4840 was regularly assigned to perform track maintenance work with a thermite welding gang headed by Foreman Bob Hinton. According to the Organization, Claimant and Hinton had an informal understanding/agreement between themselves and Supervisor Booth wherein, it was acceptable for Claimant and Hinton to assume responsibilities for the performance of work during a project/work assignment by Gang 4840 and the thermite welding gang, when either Claimant or Hinton needed to be absent from a project/work assignment.

The record evidence reflects that Booth was on vacation on October 23, 2008 and prior to his leaving on vacation, Booth informed Foreman Hinton directly but not Claimant, that while he was gone, Track Supervisor Brian Hansen would be the designated Carrier officer in charge of both Gang 4840 and the thermite welding gang. On October 23, 2008 Claimant was notified he could meet with the attorney for his consultation that afternoon. On October 23, 2008 the thermite welding gang was assigned to perform thermite welding on rail ends of rails that were assigned to be cut/changed out by Gang 4840 at the North Platte Yard at the East Hump. The record evidence reflects that Gang 4840 completed the day's original assignment by the time Claimant had to leave work to attend his consultation with the lawyer but that the thermite welding gang was unable to complete its remaining work of welding three (3) rail ends due to the unavailability of track time. Given the arrangement between Claimant, Hinton, and Booth about leaving work early in order to take care of personal business and the fact that Hinton was aware Booth had granted Claimant permission in advance of October 23, 2008 to attend his lawyer appointment, Hinton took no exception to Claimant leaving work early that day. Consequently, Claimant and the other members of Gang 4840 left the designated work site and proceeded to the headquarters. From headquarters, Claimant proceeded to transport employee Juan H. Lopez, a Thermite Welder and co-worker assigned to Gang 4840 to his residence while on his way to his appointment with the lawyer.

After Claimant left work, Carrier Supervisor Gary Peterson contacted Track Supervisor Hansen requesting Hansen to assign Gang 4840 to perform some track maintenance work on the Kearney Subdivision prior to the employees leaving work that day. In response to Peterson's request, at approximately 2:00 p.m., Hansen called Claimant on his cell phone several times to inform him of the work that needed to be done before the gang left for the day, but to no avail. In the alternative of being unable to speak with

Claimant, Hansen then left Claimant a text message asking Claimant to call him immediately. At approximately, 2:30 p.m. Claimant called Hansen and informed him he and the gang members had already left work and that he had left to take care of personal business. According to the Organization, Claimant offered in this conversation with Hansen to cancel his appointment with the attorney and return to the property to perform the work on the Kearney Subdivision. As Hansen responded it was okay to attend the attorney consultation, neither Claimant nor any other member of Gang 4840 returned to the property to perform the work on the Kearney Subdivision.

As Carrier believed Claimant did not get permission or authority from Supervisor Hansen to leave his work assignment early on October 23, 2008, Carrier issued the following Notice of Hearing dated November 12, 2008 which read in part as follows:

Please report . . . on Monday, November 17, 2008 . . . for investigation and hearing on charges to develop the facts and place responsibility, if any, that while employed as Track Maintenance Foreman on Gang 4840, at North Platte, Nebraska, on October 23, 2008, you allegedly left work without proper authority.

These allegations, if substantiated, would constitute a violation of Rule 1.15 (Duty – Reporting of Absence) as contained in the General Code of Operating Rules (GCOR), effective April 3, 2005

Rule 1.15 reads in whole as follows:

Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority.

Continued failure by employees to protect their employment will be cause for dismissal.

Following a request by the Organization to postpone the hearing, it was mutually agreed to convene the hearing on December 8, 2008. By letter dated December 23, 2008, Manager Track Programs Gary Peterson, the Conducting Hearing Officer notified Claimant that upon review and consideration of all the testimony set forth in the hearing transcript, he found more than a substantial degree of evidence presented to warrant sustaining the above charges brought against him for his having violated GCOR Rule 1.15. In addition to assessing Claimant the subject ten (10) day suspension, Claimant was apprised that upon his return to work, he had to pass necessary operating rules exam or equivalent and develop a Corrective Action Plan. In response, the Organization filed the subject claim here to be considered and resolved by the Board.

CARRIER'S POSITION

Notwithstanding that Claimant's testimony he arranged for the appointment with his lawyer in advance of October 23, 2008, Carrier maintains Claimant failed to make prior arrangements with either vacationing Supervisor Booth or Acting Supervisor Hansen to leave work early on October 23, 2008. Carrier asserts that no one else besides Supervisors Booth and Hansen had the authority to grant Claimant permission to leave work early unless the purpose for leaving early was due to an emergency which was not the case under the prevailing circumstances. Carrier declares it is very accommodating in honoring requests for the type of early absence from work that was the reason for Claimant's absence provided that the requests are made in advance. In sum, Carrier holds that Claimant did not have the proper authority to leave his work assignment early on October 23, 2008, and there are no mitigating circumstances that justified his actions.

Accordingly, Carrier asserts that it demonstrated by substantial evidence that Claimant left the work site without authority in violation of Rule 1.15, that the discipline assessed was commensurate with the offense committed, and thus urges the Board to deny the claim in its entirety.

ORGANIZATION'S POSITION

In view of the undisputed fact that Claimant did leave work before the end of his tour of duty on October 23, 2008, the Organization identifies the issue to be resolved as whether or not Claimant left the property with proper authority. Since Booth testified he could not recall if Claimant had discussed with him his need to schedule a consultation with his attorney and then requested permission to absent himself from work should he be successful in scheduling such a consultation, the Carrier lacks substantial evidence to prove its position that Claimant absented himself from work without proper authority. On the other hand, Claimant rendered affirmative testimony that, in fact, he did discuss his need with Supervisor Booth to schedule a consultation with his attorney and, that in this discussion, he did request permission from Booth to absent himself from work should he be successful in scheduling such consultation. The Organization argues that inasmuch as Supervisor Booth's testimony is uncertain and speculative regarding Claimant's request and the Claimant's testimony is affirmative and is with certainty, there can be no dispute that the Claimant did request and was granted proper authority/permission to absent himself from work on October 23, 2008 in order to accommodate his need to meet with his attorney. The Organization submits it is abundantly clear that in the case at bar, Carrier has attempted to support its disciplinary decision predicated on nothing more than mere speculation, conjecture and assumption as opposed to the affirmative, factual testimony rendered by Claimant. Additionally, Supervisor's Hansen testimony revealed that once contact was made with Claimant and Claimant explained to Hansen the reason for his having left the property early, Hansen

responded okay, thus indirectly giving Claimant permission to proceed on his way to meet with his attorney. As further support that Hansen assented to Claimant having absented himself from work, Foreman Hinton submitted a written statement wherein he asserted that in a conversation with Hansen, Hansen advised him that Claimant had his permission to leave the property early.

In recognition of the well established principle that Carrier bears the burden of proof in cases involving the imposition of discipline and discharge, the Organization maintains that in the case at bar, the Organization failed to bear this burden. Accordingly, the Organization submits that the discipline assessed Claimant was unwarranted and requests this Board to sustain the claim in its entirety.

FINDINGS

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.


The Board is in concurrence with the Organization's argument that based on a thorough review of the record evidence in its entirety, Carrier failed in its burden to prove by substantial evidence that Claimant left the property on October 23, 2008 without proper authority. Had Supervisor Booth testified he did not give Claimant permission to absent himself from work at a time Claimant was able to schedule a consultation with his attorney, this case and its outcome would have resulted in a different finding by us. Given that Booth could not testify as such, persuades the Board that Claimant was truthful in his claim that he had secured permission from the proper authority to leave the property prior to the ending time of his scheduled shift. Accordingly, we rule to sustain the claim in its entirety.

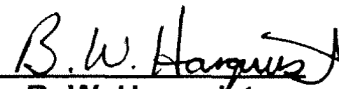
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A W A R D

Claim Sustained


George Edward Larney
Neutral Member & Chairman


B. W. Hanquist
Carrier Member


T. W. Kreke
Employee Member

Chicago, Illinois

Date: Nov 19, 2010