

In the Matter of the Arbitration Between:
BURLINGTON NORTHERN SANTA FE

and

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYERS DIVISION - IBT

Case No. 15

Claim of R. N. Tsosie

10-Day Record Suspension
- Failure to Comply
with Instructions

STATEMENT OF CLAIM: Claim on behalf of Machine Operator R. N. Tsosie requesting removal of the Standard 10-Day Record Suspension and one-year review period from his record with seniority, vacation and all other rights unimpaired, and that he be made whole for all time lost.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee, within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein.

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Maintenance of Way craft. The Board makes the following additional findings.

Claimant has worked for the Carrier since July 17, 1992. Assistant Director Maintenance Production Rollie Roskilly testified that, during a 5:00 a.m. job briefing on August 10, 2011, he instructed Claimant, who was still en route, to report to the cut-in of the P811 with Foreman Jim Quinn. He testified that, when he arrived at the cut-in, at approximately 10:00 a.m., he did not see Claimant or the three other members of his work group. He further testified that Foreman Quinn told him that they had been at the morning briefing but that he had not seen them since then.

Mr. Roskilly testified that he found Claimant and his co-workers in a pick-up at a road crossing behind the P811. He further testified that, when he asked them where they had been and why they were not at the cut-in, Mr. Klah, one of Claimant's co-workers, replied that they had been driving around looking for ways to get into the work area and that they had gone to the Section house to get a track chart. Mr. Roskilly testified that he sent them home and instructed them to come back the next workday.

Claimant denied that he was instructed by Mr. Roskilly where to report and that he had been looking for his Personal Protective Equipment ("PPE"), i.e., his hard hat, and did not attend the job

safety briefing. Mr. Roskilly testified that Claimant was at the safety briefing and that he had his PPE at the time.

The Carrier convened an investigation at which the above evidence was adduced. Based on the record, the Carrier found Claimant in violation of MWOR 1.13 (Reporting and Complying with Instructions) and assessed him a 10-day record suspension.

The Organization protested the discipline, which the Carrier denied on appeal. The Claim was progressed on the property on an expedited basis, up to and including the highest designated official, but without resolution. The Organization invoked arbitration, and the dispute was presented to this Board for resolution.

POSITIONS OF THE PARTIES: The Carrier argues that it met its burdens to prove Claimant's violations of the Rules and the appropriateness of the penalty. It asserts that the facts and testimony presented at the investigation make it clear that Claimant failed to follow Mr. Roskilly's instruction to report to Foreman Quinn and was found possibly sleeping in a pickup at a road crossing. It points out that Claimant denied that he was instructed by Mr. Roskilly to work with Mr. Quinn, noting that he testified that he did not speak to Mr. Roskilly that morning. BNSF maintains that, when there is conflicting testimony, as in this case, it is the Conducting Officer who makes determinations concerning credibility. It contends that the Conducting Officer found the testimony of Mr. Roskilly to be credible and Claimant's testimony not to be so. That conclusion established Claimant's violation of the Rules and subjected him to discipline.

The Carrier argues that the Organization's excuses why Claimant should not be held accountable for his violation are not persuasive. It asserts that it proved that Claimant violated the rule with substantial evidence and that the Organization can only request leniency on his behalf. BNSF maintains that the discipline imposed is appropriate and that leniency is not in the Board's discretion.

The Carrier urges that the claim be denied as without merit.

The Organization argues that the Carrier failed to prove the violations and failed to establish the appropriateness of the penalty. It contends that Claimant is a proud Native American from the Navajo Tribe and that English is his second language. It asserts that Mr. Roskilly is in charge of a very large group of people and it is hard to believe that he told all of his employees specifically what he wanted them to do for the day, especially because this was their first day under his supervision. The

Organization maintains that Mr. Roskilly could not have known who the employees were until they had their one-on-one briefing after the main briefing and that the testimony shows that Claimant did not participate at the morning job briefing because he was trying to chase down their PPE required to perform their jobs. It contends that their PPE was left in the gang van and was supposed to be waiting for them but that the Foreman took the van to follow the machines while being transported on the train.

The Organization further argues that Claimant testified that his last instructions were to work with the Ballast Crew and that the Carrier failed to prove otherwise. It asserts that, since it was the gang's first day at this location, it is understandable that they would not know the area very well and could get lost. It maintains that explains why it took them a while to find a location where the Ballast Crew was going to come by, which is where they stopped and waited for that Crew.

Finally, the Organization argues that the investigation hearing was nothing more than a fishing expedition, noting that the Notice of Investigation ("NOI") did not identify a specific rule violation. It contends that the discipline letter was the first mention of any MWOR rule. The Organization asserts that the Carrier denied Claimant's right to a fair hearing and the ability to properly prepare a defense because it only identified a rules violation after the fact.

The Organization urges that the Claim be sustained, that Claimant's Standard 10-day record suspension and one-year review period be removed from his record with seniority, vacation and all other rights unimpaired, and that he be made whole for all time lost.

DISCUSSION AND ANALYSIS: It was the burden of the Carrier to prove by substantial evidence considered on the record as a whole that Claimant is guilty of violating the Rules with which he was charged and to establish that the penalty of a 10-day record suspension is appropriate. The Board concludes that the Carrier met its burdens.

It is undisputed that Rule 1.13 requires employees to "report to and comply with instructions from supervisors who have the proper jurisdiction" and to "comply with instructions issued by managers of various departments when the instructions apply to their duties." Although the Organization contends that the Investigation was a "fishing expedition", noting that the NOI did not identify a specific rule violation, the Board is persuaded that the NOI - which stated that the event leading to the Investigation was Claimant's "alleged failure to comply with instructions from Rollie Roskilly, ADMP, to report to TC01 Foreman Jim Quinn, August

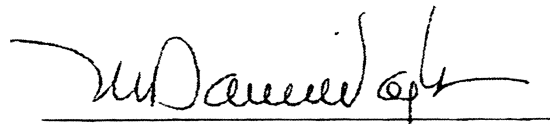
10, 2011, Thayer North Subdivision, Springfield Division" - gave Claimant and the Organization sufficient information to mount his defense. It is not required that the NOI identify a rule allegedly violated; indeed, until the evidence is adduced, it may not be possible or even appropriate to link the conduct with a particular rule. Rule 1.13, which is entitled "Reporting and Complying with Instructions" certainly addressed the conduct at issue. Thus, the Carrier's failure to specifically name Rule 1.13 in the NOI did not take away Claimant's right to a fair hearing or prevent the Organization from properly preparing his defense.

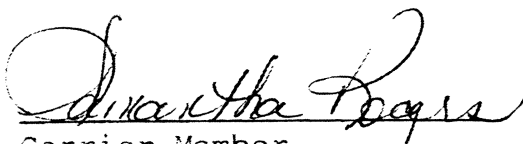
As to the merits of the Claim, it is undisputed that the testimony offered at the Investigation was in conflict. Mr. Roskilly testified that, when he asked the occupants of the vehicle where they had been and why they were not at the cut-in, one of Claimant's co-workers replied that they had been driving around looking for ways to get into the work area. Claimant denied that he was instructed by Mr. Roskilly to report to the cut-in, that he had not attended the job safety briefing and that, in any case, he had been looking for his hard hat. Mr. Roskilly testified that Claimant was at the safety briefing and that he had his PPE at the time. In this case of conflicting testimony uninformed by other evidence, it is the Investigation's Conducting Officer, not this Board, that makes credibility determinations. There is nothing in the record demonstrating that the Conducting Officer lacked a basis not to believe Mr. Roskilly.

Given the nature and circumstances of Claimant's violation, the Board concludes that the penalty of a 10-day record suspension was within the range of reasonableness. The Award so reflects.

AWARD: The Carrier met its burdens to prove Claimant guilty of the charges and to prove his record suspension to have been an appropriate penalty. The claim is denied.

Dated this 9th day of May, 2014.


M. David Vaughn,
Neutral Member


Carrier Member
Ms. Samantha Rogers


Employee Member
Mr. David Tanner