

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

and

Case No. 19

**Claim of J. Klah, Jr.**

10-Day Record Suspension -  
Failure to Follow

Instructions

**BROTHERHOOD OF MAINTENANCE OF WAY**  
**EMPLOYEES DIVISION - IBT**

**STATEMENT OF CLAIM:** Claim on behalf of Machine Operator J. Klah, Jr., requesting removal of a 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 May 17, 1999. 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, Claimant replied that they had been driving around looking for ways to get into the work area and that they went 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 and testified that he had been looking for his Personal Protective Equipment ("PPE") required for his work, i.e., his hard hat. He denied that he attended the job safety briefing. Mr. Roskilly

testified, by contrast, 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 standard 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, asserting 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.

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.

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 employees 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 and his group were 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 Claimant did not know his way around the territory well and 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 the Ballast 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 took away 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.

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 know that he was being charged with failure to report and comply with instructions and to defend against the charge.

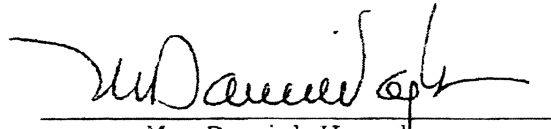
There is no contractual requirement that the Carrier cite a specific rule in the NOI, and it may be that citation to a specific rule is not practical until the evidence has been presented. Thus, concludes the Board, the Carrier's failure to specifically cite Rule 1.13 in the NOI did not take away Claimant's right to a fair hearing or prevent the Organization from properly preparing his defense.

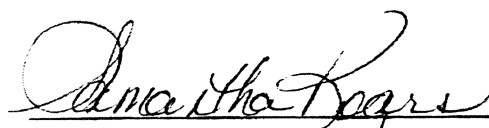
As to the merits, it is undisputed that the testimony offered at the Investigation was in conflict. Mr. Roskilly testified that, when he asked the occupants of the vehicle where they had been and why they were not at the cut-in, Claimant replied that they had been driving around looking for ways to get 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, buy contrast, that Claimant was at the safety briefing and that he had his PPE at the time. In cases of conflicting testimony, 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 disbelieved 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 9<sup>th</sup> day of May, 2014.

  
M. David Vaughn,  
Neutral Member

  
Carrier Member  
Ms. Samantha Rogers

  
Employee Member  
Mr. David Tanner

PUBLIC LAW BOARD No. 7589

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE**

and

Case No. 20

**Claim of L. Ben**

Dismissal - Violence in  
Workplace, Misconduct,  
Hostility and Willful  
Disregard to Immediate  
Supervisor

**BROTHERHOOD OF MAINTENANCE OF WAY**

**EMPLOYEES DIVISION - IBT**

**STATEMENT OF CLAIM:** Claim on behalf of Machine Operator L. Ben requesting reinstatement, restoration of seniority, vacation and all other rights unimpaired and payment 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 March 30, 1995. On May 22, 2012, the Operations Testing Team failed Claimant on an operations test for a lock-out/tag-out violation. Supervisor Structures Patrick Senf, Claimant's supervisor, testified that, because of the seriousness of the alleged operations test failure, he transported Claimant to Kingman, Arizona, for a drug and alcohol test.

The Supervisor further testified that, following the drug and alcohol test and as they returned to the motel, he told Claimant that he hoped the next time they met it would be under better circumstances. Mr. Senf testified that, in response, Claimant stated "next time we meet I'm going to bring a gun and I'm going to shoot somebody." The Supervisor testified that Claimant also recounted to him a story from a friend in the construction industry who was feeling harassed by an OSHA representative and that Claimant stated that his friend eventually shot the OSHA representative. Mr. Senf testified that Claimant further stated that "eventually somebody on the railroad is going to get shot out here if people keep feeling harassed." After dropping off Claimant at the motel, Mr. Senf reported the incident to Human Resources and Resource Protection.