

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 7048

BNSF RAILWAY COMPANY

(Former ATSF Railway Co.)

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 7048 Case No. 15

NMB Case No. 106

Carrier File No. 14-08-0023

Organization File No. 170-13D2-074.CLM

Claimant: Jason L. Lacy

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing November 20, 2007 when Claimant, Jason L. Lacy (1408566), was assessed a Level S 51-day Actual Suspension for your dishonest and immoral conduct of paying yourself for call-outs where you performed no work from September 1, 2007 through November 15, 2007 violating Rule 1.6-Conduct of the Maintenance of Way Operating Rules; and
2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate the Claimant with all seniority, vacation, all rights unimpaired and pay for all wage loss commencing November 20, 2007, continuing forward and/or otherwise made whole.

This claim was discussed in conference between the parties.

NATURE OF THE CASE

The Claimant is employed as a Track Supervisor. The instant grievance arose when the Claimant was assigned to Gang TINS 0689 on the Needles Subdivision in California. According to the Carrier, the Claimant engaged in alleged dishonesty and immoral conduct during an interval from September 1, 2007 to November 15, 2007 when he allegedly paid himself for call outs on several occasions when he did not work on behalf of the Railroad that required him to report for duty outside his assigned working hours by repeatedly entering Payroll Code 28, resulting in the automatic payment of four hours straight time wages in addition to his regularly hourly wages. The Carrier contends that these payments were not justified because the Claimant was not required to leave his home and report to an actual work site to supervise emergent circumstances outside the regular hours of his shift. The Carrier cited in support of its contention the absence of records establishing that the Claimant had utilized the Carrier-provided telephone or any other indicia that the Claimant had received calls outside his regular work hours requiring his professional intervention.

The Organization grieved the discipline imposed, a fifty-one day Actual Suspension, contending that the Claimant had not engaged in dishonest and immoral conduct, but rather had properly sought and

received payment for performing work on the Carrier's behalf outside his regularly scheduled work hours. The Claimant contends that he regularly followed a practice of entering Payroll Code 28 when he received calls from employees seeking his assistance in dealing with issues such as obtaining Form B's to secure tracks and other inquiries requiring his attention at all hours of the day and night.

The parties were unable to resolve their dispute within the grievance procedure, and the matter was submitted to Public Law Board 7048 for adjudication.

FINDINGS AND DECISION

The Public Law Board No. 7048 (the Board) finds that the parties herein are Carrier and Employee Organization within the meaning of the Railway Labor Act, as amended. Further, the Board has jurisdiction over the parties and subject matter involved.

The instant case arose when the Roadmaster noticed that the Claimant made entries in the PARS system for seventeen occasions during the first half of November. The increased frequency of requests for call-out pay during this short interval triggered an investigation by the Roadmaster. According to the Roadmaster who supervises the

Claimant, Track Supervisors are not entitled to overtime unless they perform one of seven specified duties. These include responding to situations involving derailment, earthquake, heat burns, heavy rain, high water, or a road crossing accident, and smoke storm or sandstorm. There is an eighth category among the PARS overtime codes, Code 720, that permits payment of overtime to a Track Supervisor, but only with Roadmaster approval.

After conducting his investigation, the Roadmaster concluded that the Claimant had not responded to any of the seven categories of emergency during this interval, had not received phone calls from the Carrier's Dispatcher or on the Carrier-provided cell phone carried by the Claimant, and had not actually reported to a job site outside of working hours for the occasions on which he sought and received overtime payment. The Roadmaster contends that the Claimant had previously been apprised that he would not be entitled to overtime payment under such circumstances.

The Carrier has established that the Claimant could not use Code 720, which would relate to extraordinary circumstances for which he would receive overtime with the approval of the Roadmaster. The Claimant's contention at the investigatory hearing that the reference to Pay Code 28 for "call out" is the equivalent of receiving incoming

telephone calls requiring his participation during hours outside his regularly scheduled work hours was unpersuasive and not buttressed by any contractual provision or binding past practice. Although both parties apparently agreed that employees should be paid when they are required to work outside their regularly scheduled work hours, consistent with the provisions of the collective bargaining agreement between the parties and applicable statutory provisions, the record does not establish that a Track Supervisor who receives one or more telephone calls outside his regular work hours is automatically entitled to a minimum of four hours' pay for such activity, as Track Supervisors earn overtime under Appendix 23 only when they are called back to work. .

The Roadmaster who supervised the Claimant testified that he had unambiguously conveyed to the Claimant that he expected the Track Supervisors under his jurisdiction to conduct their affairs so that their subordinate employees understood what was expected of them and that these expectations should be communicated during regular work hours. The Roadmaster testified that:

"Mr. Lacy's responsibility as a Track Supervisor should make sure that he has given that information out during the regular business hours and if he is not making that clear to the people that are under him during normal business hours and not performing his duties as a Track Supervisor, I don't think the Railroad should pay him for phone calls at

night about something he should have been taking care of during the day.” There is obvious merit to this contention.

The Claimant contends that he received telephone calls from subordinate employees seeking input and permission on his personal cell phone. Some of these calls, for example, were from welders who called on his personal cell phone or used the walkie-talkie feature of the Nextel mobile phone provided to the Claimant by the Carrier. The Carrier would have no record of such communications. The Claimant further contends that the strained relationship with the Roadmaster resulted in the imposition of discipline that was unwarranted. The Claimant acknowledged, however, that he and his Roadmaster should improve their communications.

The Claimant has not demonstrated persuasively as an affirmative defense any valid basis--such as a well-recognized past practice, either under his particular supervisor or throughout the railroad--that would permit him to charge Pay Code 28 for receiving as few as one phone call after working hours. Notwithstanding the Claimant’s testimony that he received multiple calls at all hours of the day and night during the first half of November 2007 and that his input was required to issue Form B’s to protect track intervals, the Claimant’s understanding of his entitlement to substantial overtime payment is not demonstrably well

founded in the Carrier's previous practice or by written policies.

Therefore, the Board must conclude that the Claimant applied for and received payments in the first half of November 2007 to which he was not entitled. At issue in the instant case, therefore, is whether the penalty imposed for the Claimant's actions was appropriate.

The Claimant was suspended for dishonest and immoral conduct. Nothing in the record suggests that the Claimant intended surreptitiously to defraud the Carrier, as the Claimant's entries were open and above board, and could be readily discerned by any supervisor checking the Claimant's PARS entries. However, the circumstances invoked by the Claimant to justify his call outs do not warrant the payment of overtime under the circumstances demonstrated in the record of the investigatory hearing in the instant case.

On the other hand, the Carrier does not contend that Track Supervisors who legitimately work more than eight hours should not be compensated for performing service such duties. Track Supervisors who are dealing with an emergent situation requiring them to interrupt their personal life at odd hours and to return to work to fulfill their Track Supervisor responsibilities in a professional manner are entitled to be compensated for such efforts on behalf of the Carrier. Determining the exact parameters for receiving such compensation falls outside the scope

of the instant case, and this Board will not undertake to define the threshold for receiving payment.

That a Track Supervisor does not have specific assigned hours that are fixed at all times does not place the Track Supervisor on call twenty-four hours per day. However, there is validity to the Roadmaster's contention that a Track Supervisor should anticipate the needs of his crew and provide adequate information before going off duty. If the Track Supervisor is continually pestered with calls, he or she should question the degree to which he has prepared his crews to work during the hours that he is off duty.

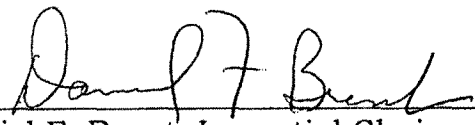
The Claimant justified his actions on his contention that he had been instructed by other Track Supervisors about the manner in which he should be compensated for phone calls he received at home. The Claimant has not corroborated this assertion, nor does the record reflect that other Track Supervisors are routinely paid a minimum of four hours straight time when they field phone calls outside of their regular assigned hours. Consequently, the Board finds the Claimant culpable for having submitted pay codes to receive payment for hours in excess of those he should have been entitled to receive. The record does not, however, justify a conclusion that the Claimant intentionally engaged in dishonest or immoral behavior.

The Carrier correctly asserted that the overtime codes cited by the Claimant, which automatically trigger four hours' pay, were not intended for regular phone calls received outside of business hours. However, if the Claimant is required to monitor emergencies within the scope of his regular employment, and such on-call status is required by the Carrier, then the Claimant may have a valid claim. The record in the instant case is insufficient for the Board to conclude that the Claimant was entitled to all of the overtime payments he received.

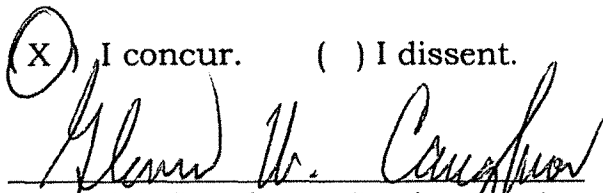
Unless the Organization can demonstrate that there is a widespread practice of paying overtime under the circumstances urged by the Claimant, which demonstration was not incurred in the instant case, the Claimant has misread his entitlement to overtime. According to the evidentiary record, call outs customarily require that a Track Supervisor return to a work site. Overtime is not automatically triggered by a single phone call after work. Consequently, the Claimant must return the overtime he improperly received between November 1 and November 15, 2007 in violation of the Maintenance of Way Operating Rules where he did not physically return to work after hours. However, given the absence of compelling proof that the Claimant acted surreptitiously or intentionally to defraud the Carrier, the discipline imposed is excessive.

The discipline shall be reduced to a ten-day actual suspension, and the Claimant shall be paid the difference between wages attributable to the fifty-one day actual suspension that he may have lost, less the deduction for the overtime payments he must return, which shall be subtracted from any back pay due and owing. The Board retains jurisdiction to resolve any dispute that may arise regarding the computation or implementation of the remedy ordered pursuant to this decision.

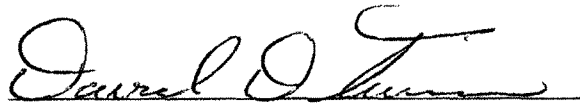
The instant claim is sustained in part and denied in part. We so find.


Daniel F. Brent, Impartial Chair

Dated: 6-3-09

☒ I concur. ☐ I dissent.

Glenn W. Caughron, Carrier Member

Dated: 6-18-09

☒ I concur. ☐ I dissent.

David Tanner, Organization Member

Dated: 6-15-09