Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD THIRD DIVISION

Award No. 43201 Docket No. MW-42602 18-3-NRAB-00003-140313

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -

(IBT Rail Conference

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company former Missouri

(Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to allow Mr. D. Cooksey to promptly return to duty following his being exonerated of charges associated with a disciplinary Investigation held on April 4, 2013 (System File UP511JF13/1585937 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Cooksey be compensated for eleven (11) hours per day at the applicable straight time rate, any and all holidays within the claim period and all overtime acquired by Gang 9132, beginning on February 21, 2013 and continuing."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

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Parties to said dispute were given due notice of hearing thereon.

This claim seeks compensation for the Claimant for the time period he was held out of service commencing February 22, 2013, until he returned to work in June, 2013. The Claimant was working as a Track Foreman on Gang 9132 when he was charged with two separate Rule 1.6 Conduct violations (Careless of Safety and Dishonesty) for incidents occurring on February 21, 2013. An Investigation was held on April 4, 2013, and the dishonesty charges were eventually expunged from his record, but the Careless of Safety charge was upheld, and the Claimant was assessed a Level 5 dismissal. The record contains a copy of an April 22, 2013 Leniency Agreement executed by the Claimant and the Organization, which provided the Claimant an opportunity to return to service under specified conditions. Included were an acknowledgement of responsibility by the Claimant and agreement that there would be no pay for time lost while out of service, an 18 month probationary period, the Claimant's right to bid to a vacancy or be recalled to service, and a mutual release concerning any matters arising from the February 21, 2013 incident. The underlying basis of the Organization's claim is its assertion that the Claimant was not granted password access to the Carrier's ITrak computer system to enable him to bid until he did so on June 2, 2013. The Carrier stated that the Claimant was returned to service as of April 25, 2013 with full access to his ITrak bidding opportunities, but knowingly chose not to bid on a position until June 2, 2013.

The Organization asserts that the Leniency Agreement is irrelevant in this case, as it related to a different charge, and that the Claimant was exonerated from the Dishonesty charge leading to his removal from service on February 22, 2013. It maintains that the Claimant's password was removed from the ITrak system preventing him from exercising his seniority, and that the Carrier is responsible for the delay in returning him to service, his lost time is compensable, as well as the time he was held out of service on unfounded charges.

The Carrier argues that the claim for monetary compensation for the period that the Claimant was held out of service until he was returned to service under the Leniency Agreement is moot, as it was specifically addressed and resolved in the Leniency Agreement. It contends that it was the Claimant's own actions that resulted in his failure to timely return to service, since he was reinstated as of April 25, but chose not to bid on a position until June 2, 2013. In support of this assertion,

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the Carrier attached copies of the Claimant's ITrak documentation to its August 5 denial, showing that the Claimant accessed the website two different times on April 25, 2013, and chose not to submit a bid until June 2, 2013. The Carrier posits that, at best, the Organization has raised a fundamental dispute of fact with respect to the Claimant's password log in to ITrak, that negates its ability to meet its burden of proof in this case, citing Third Division Awards 26478 and 37204.

A careful review of the record convinces the Board that the Organization has failed to sustain its burden of proof in this case. We are unable to accept the Organization's claim that the Leniency Agreement, executed by the Claimant and the Organization on April 23, 2013, returning the Claimant to work, does not apply in this case. The Organization and the Claimant were aware of the results of the April 4 Investigation, which were set forth in writing in a letter dated April 19, when they entered into the Leniency Agreement which acknowledges the Claimant's responsibility (for the remaining charge) and accepts his return to service without pay for any lost time. The remedy request in this claim, which encompasses the period of February 21 to the date of the Claimant's return to service on April 25, 2013, is moot, and directly addressed in the Leniency Agreement.

With respect to the Organization's contention that the Claimant was not permitted access to the ITrak system to bid on positions, thereby denying his return to service until June, 2013, the Board is unable to find any direct evidence submitted by the Organization or the Claimant concerning an inability to log onto the ITrak system. The Carrier submitted the Claimant's ITrak log and bid cards showing that the Claimant did, in fact, log into the ITrak system on two different occasions on April 25, 2013, and did not submit a bid until June 2, 2013. Since there is no statement from the Claimant in the file contesting this evidence, we find no irreconcilable dispute in fact. Rather, the Organization has failed to sustain its burden of proving its assertions, as well as any violation in this case.

AWARD

Claim denied.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD By Order of Third Division

Dated at Chicago, Illinois, this 30th day of May 2018.