NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 174, (Case No. 195)

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION - IBT RAIL CONFERENCE

vs

UNION PACIFIC RAILROAD COMPANY (Former Missouri Pacific Railroad Company)

William R. Miller, Chairman & Neutral Member
T. W. Kreke, Employee Member
K. N. Novak, Carrier Member

Hearing Date: January 18, 2012

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. **The dismissal of Welder G. Adams for violation of Rule 1.6 Conduct as contained in the General Code of Operating Rules (GCOR) in connection with his alleged failure to properly report his payroll between January 27 and February 1, 2011 is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File UP-232-WF-11/1545607).**

2. **As a consequence of the violation referenced in Part 1 above, Mr. Adams shall have his personal record cleared of all charges, compensated for all time lost, have all seniority and vacation rights unimpaired and all other rights due him by the collective bargaining agreement."**

FINDINGS:

Public Law Board No. 6402, 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.

On February 4, 2011, Claimant was notified to appear for a formal Investigation on February 15, 2011, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as Welder on Gang 9224, you allegedly failed to properly report payroll between the dates of January 27, 2011, and February 1, 2011.

These allegation, is substantiated, would constitute a violation of Rule 1.6 Conduct

as contained in the General Code of Operating Rules, effective April 7, 2010. Please be advised that if you are found to be in violation of this alleged charge the discipline assessment may be a Level 5, and under the Carrier's UPGRADE Discipline Policy may result in permanent dismissal."

On February 24, 2011, Claimant was notified that he had been found guilty as charged and was dismissed from service.

It is the position of the Organization the Carrier erred in the dismissal of the Claimant. It argued that there was no intentional wrongdoing on the part of the Claimant and any mistakes he made on his personal payroll were the product of negligence and/or ignorance, and not of intentional misconduct. It asserted the Carrier never proved that Claimant intentionally requested more monies than he was due and as such no misconduct was proven. It further argued that his Supervisor approved the payroll and received no discipline for the like and/or similar violation. Additionally, it argued that when the errors were discovered the Carrier deducted monies from the Claimant's earnings and restitution was made. It further suggested that if the Carrier had proven its case, which it did not, the penalty was inappropriate because there was no showing of intentional misconduct. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the Claimant admitted at the Hearing he submitted time not worked and per diem he was not qualified to receive on pages 42, 44 and 45 of the Transcript. It argued that he testified that on January 27, 2011, he left work at 11:00 a.m., which was verified by his co-workers Welders Vera and Moran while the rest of the gang worked until 10:00 p.m. According to it, the Claimant entered into payroll that he worked the same amount of hours as worked by the rest of the gang (15 hours at his overtime rate of pay). It further argued that on January 31, 2011, Claimant took a required DOT physical that was 33 miles from his residence, but he still put in for $57.00 per diem on that day even though he admitted you have to have worked at least 50 miles from your residence to be qualified to receive such per diem and on February 1, 2011, he claimed 3.5 hours at his overtime rate even though he did not perform any compensable overtime work on that date. The Carrier closed by stating that Claimant's actions amounted to dishonesty and because of that it closed by asking that the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and notes that there is no dispute that the Claimant erroneously reported his time and expenses on the dates contained in the charges which the Claimant does not deny, however, the question is was it done purposefully or accidentally. On pages 42 and 43 of the Transcript the Claimant was questioned regarding January 27, 2011, as follows:

"Q: I see here that you've turned in 15 hours of overtime for that day. Yet,

you left at 11:00. Mr. Vera said that they worked until 10:00 o'clock that night. How come your payroll says the same as theirs, and you let at 11:00 that night. How come your payroll says the same as theirs, and you left at 11:00 o'clock and they didn't get in until 10:00?

A: Well - -

Q: You left at 11:00 a.m., they got in at 10:00 p.m.

A: Well - -

Q: So, how did - - how come you have the same overtime?

A: Well, the way it is in between the rails, and the way it is in the office is totally different. Basically, the brotherhood look out for one another. And this is how it's normally been, and this how - - the way it goes. When you on the travelling gang, or on the per diem gang, even on the division gangs, if one of your brothers has to leave or has the furthest to drive to raise any red flags, everybody gets the same time...."
(Underlining Board's emphasis)

It is clear from the testimony above that the Claimant admitted he left work at 11:00 a.m., on January 27, 2011, which was further verified by the testimony of Welders Vera and Moran. The record also reveals that the rest of the gang worked until 10:00 p.m. and Claimant entered into his payroll that he worked the same amount of hours as worked by the rest of the gang (15 hours at his overtime rate of pay). Claimant did not deny that fact, but instead argued that he followed the cultural practice in the field of everybody on a crew putting in the same amount of time whether they worked the entire amount of time or not. That allegation was contradicted by the testimony of one of Claimant's co-workers, Welder Moran, who testified that you put in for what you work. Moran was questioned on page 36 of the Transcript as follows:

"Q: So, if Mr. Adams turned in the same 15 hours of overtime that you got on that day, would have been correct in his time reporting?

A: No, sir." *(Underlining Board's emphasis)*

On pages 45 and 46 of the Transcript the Claimant was questioned as to whether or not he was entitled to a per diem on February 1, 2011, while being at home as follows:

"Q: What is the rule on getting per diem? How far do you have to be from your house to get per diem?

A: They say 50 miles.

Q: Is 33 miles less than 50 miles from your house?

A: No, that's - - well - - No - - I'm asking you a question, I mean 50 miles is the rule according to the new agreement, 33 miles is from house to the DOT physical. No, I shouldn't have got, I guess, according to the rule, I shouldn't have got the $57.00, I guess...." *(Underlining Board's emphasis)*

The Organization made a strong argument on behalf of the Claimant that the Rule covering the per diem based upon an "on line" headquarters point had recently been changed (January 1, 2011) and was the cause of his confusion and misinterpretation in putting in for the allowance. That argument while novel does not fit this particular situation because Claimant testified on page 44 of the Transcript he was at home on January 31, 2011, wherein he obtained a required Department of Transportation (DOT) physical, on company time and pay. The Claimant took that physical at a location approximately 33 miles from his residence and turned in $57.00 for his per diem that day even though he was not "on line" nor was he over 50 miles from his home. Additionally, Claimant also claimed three and one-half (3.5) hours at his overtime rate for February 1, 2011, even though he did not perform any overtime service on that date (See page 45, Transcript).

Claimant's "cultural practice and/or everybody does it" argument does not excuse intentional dishonesty. Claimant did not make a mistake or error account of confusion, but instead purposely put in for time that he did not earn. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged having violated GCOR 1.6: Conduct.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had seven years with a good work record. However, countless tribunals have recognized the importance of employees being honest in their dealings with their employers and have upheld dismissal for first offenses of theft and/or dishonesty on a consistent basis. Therefore, the Board finds and holds that the assessment of dismissal was not excessive, arbitrary or capricious and was in accordance with the Carrier's UPGRADE Policy. The discipline will not be set aside and the claim will remain denied.

AWARD

Claim denied.

William R. Miller, Chairman

K. N. Novak, Carrier Member

T. W. Kreke, Employee Member

Award Date: 4-5-2002