

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
and) Case No. 123
UNION PACIFIC RAILROAD COMPANY) Award No. 100
_____)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: April 22, 2008

STATEMENT OF CLAIM:

1. The dismissal of Foreman Samson Wilson, Jr. for alleged violation of Union Pacific Operating Rule 1.6 Conduct (4) in connection with the allegation that he allegedly falsified time for March 8, 2007 is unjust, unwarranted based on unproven charges and in violation of the Agreement (System File MW 07-74/1476259 MPR).
2. As a consequence of the violation outlined in Part (1) above, Mr. Wilson shall have his personal record cleared of all charges and be reinstated with all back pay, seniority unimpaired and all other rights due to him by the collective bargaining agreement.

FINDINGS:

Public Law Board No. 6402 upon the whole record and all of 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 March 21, 2007, Claimant was notified to report for a formal investigation on March 29, 2007, concerning his alleged dishonesty by falsifying time for March 8, 2007. The hearing was held as scheduled. On April 19, 2007, Carrier notified Claimant that he had been found guilty of the charge and was dismissed from service.

Carrier contends that the Board lacks jurisdiction because "[t]he Organization has fatally

neglected to advise the Carrier how the agreement was allegedly violated by citing any provision of the current UP BMWED Agreement which they allege the Carrier had violated and/or allegedly would support Claimants' (sic) contentions in this case." Our review of the record compels us to disagree. The letter of claim, dated May 2, 2007, clearly stated the relief sought and stated that such relief was sought "because the carrier has failed to meet the burden of proof at the investigation held on March 29, 2007, in Spring, Texas." There is no question that the Organization put Carrier on notice as to the basis for the claim. Although the letter of claim did not expressly cite the discipline rule by number, it cannot be maintained with a straight face that Carrier did not understand that was the provision of the Agreement the Organization was claiming was violated.

The record reflects that Claimant's gang was working compressed halves and was scheduled to work March 1 - 8, 2007. There is no dispute that Claimant did not work on March 8, but that on March 12, the Timekeeper called him and Claimant reported that he and the other members of the gang worked on March 8. The critical issue is whether Carrier proved by substantial evidence Claimant's dishonest intent.

The record reflects that shortly after reporting that he and the other gang members had worked on March 8,¹ Claimant called the Timekeeper back and advised that he had not worked on March 8, that the Track Supervisor had authorized the day off but that if the Supervisor did not want to pay him, the Timekeeper should charge him for a personal day. Despite this second call, the Track Supervisor did not allow a correction to the time report.

When Claimant questioned the Track Supervisor as to why he did not allow Claimant's correction to the time report, the following exchange occurred:

- Q. If Mr. Wilson called and corrected the mistake that was made, why couldn't the time had - why - why did have to taken other - other steps?
- A. Cause you was already dishonest.
- Q. One - one minute, I became dishonest when I tried to correct the mistakes? Is that correct?
- A. It was longer than one minute.
- Q. How long was it?
- A. Approximately 20-30 minutes.

¹Witness estimates of the time between the first and second calls ranged from 10 minutes to 20-30 minutes.

And you had all weekend to take care of it? What wait until we had to call you?²

A further exchange between Claimant and the Track Supervisor took place:

Q. So, on the 12th, when Wilson turned that time in and made the correction, couldn't that have been changed?

A. Yes, it could have.

Q. But you choose not to?

A. If a man's dishonest, I'm just following procedure.

Q. But you choose not to?

A. Cause that's procedure.

Q. But

A. You turn - you turned the time in and weren't there.

The Track Supervisor's testimony does not make sense. The Track Supervisor offered no reasonable explanation for concluding that Claimant's inaccurate time report for March 8, 2007, was the product of dishonesty, rather than an honest mistake, when Claimant called to correct the report shortly after he gave it. We fail to see how the fact that the Timekeeper had to call Claimant for the time report supports an inference of dishonesty. It is just as likely that Claimant was caught off guard by the Timekeeper's call and made an honest mistake. Beyond that, the Track Supervisor merely stated that he refused to correct the time report because Claimant was dishonest without offering any support for his conclusion of dishonesty.

Other aspects of the Track Supervisor's testimony are also troubling. Claimant testified that he called the Track Supervisor on March 7 and asked to take March 8 off, and that the Track Supervisor approved the request. Claimant testified that he asked the Track Supervisor about alerting the Foreman of the gang working the remainder of the compressed half to the status of the work, and the Track Supervisor advised him to leave the report in the gang truck.

The Track Supervisor, however, testified that on March 7, Claimant merely told him that Claimant had been unable to reach the Foreman of the other gang and therefore was going to leave the report in the gang truck. The Track Supervisor related that he told Claimant that the suggested procedure would be okay but later wondered why Claimant would have to leave a

²The transcript reflects this as a question but it makes sense only as a further answer from the Track Supervisor and we assume that the reflection in the transcript is a mistake.

report in the gang truck as Claimant was scheduled to work on March 8. Consequently, on March 8, the Track Supervisor called the gang phone and learned that no one on Claimant's gang had come to work that day.

Generally, as an appellate body that does not observe the witnesses testify, we defer to credibility determinations and the resolution of conflicts in the testimony made on the property. However, here too, the Track Supervisor's testimony does not make sense. It does not make sense that if Claimant intended to take an unauthorized day off on March 8 that he would call the Track Supervisor to advise that he would be leaving the report in the gang truck. Furthermore, the record contains no explanation of why, if the Track Supervisor found Claimant's inquiry about leaving the report in the gang truck peculiar, he did not try to reach Claimant to seek clarification.

On March 12, when the Timekeeper called Claimant to obtain the time for Claimant's gang, the Track Supervisor was present and tape recorded the telephone conversation between Claimant and the Timekeeper. The Track Supervisor admitted that he did not notify Claimant that he was taping the conversation and certainly did not have Claimant's consent to the taping. The Track Supervisor testified that he would not tape record whenever a time report was phoned in but would do so, "[o]nly when we have a discrepancy." This explanation also makes no sense. The Track Supervisor recorded the telephone conversation from the outset. He could not know until Claimant actually reported the time for March 8 while being recorded that there was a discrepancy.

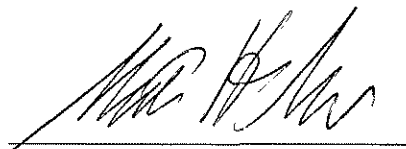
One might argue that the Track Supervisor's unlikely account of his March 7 conversation with Claimant, his inexplicable decision to surreptitiously record Claimant's telephone report of the gang's time on March 12 and his inexplicable refusal to accept Claimant's correction of the time report on March 12 together support an inference that the Track Supervisor was trying to build a case for Claimant's dismissal. We need not decide whether to draw such an inference to resolve this case. It is sufficient to hold that the record fails to support a finding of dishonest intent, as opposed to an honest mistake, with substantial evidence.

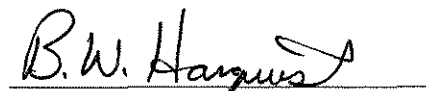
AWARD

Claim sustained.

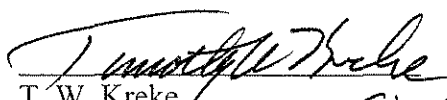
ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto


Martin H. Malin, Chairman


B. W. Hanquist
Carrier Member

Sept 17, 2008


T. W. Kreke
Employee Member

Sept 17, 2008

Dated at Chicago, Illinois, August 31, 2008