

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 6986

BNSF RAILWAY COMPANY

(Former St. Louis – San Francisco Railway Co.)

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 6986 Case No. 18
Carrier File No. 12-08-0030
Organization File No. B-2441-8
Claimant: Russell T. Hulsey

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on December 4, 2007, when Claimant Russell T. Hulsey was dismissed for violation of Maintenance of Way (MOW) Operating Rules 1.4 – Carrying out Rules and Reporting Violations, 1.6 – Conduct, 1.15 – Duty-Reporting or Absence, and 1.19 – Care of Property.
2. As a consequence of the Carrier's violation referred to in part (1) above, we request that the charges be removed from the Claimant's record, that he be returned to service, and that he be paid for all lost time.

This claim was discussed in conference between the parties.

particularly a Company credit card. According to the Organization, there was no evidence that the Claimant was implicated in this illicit activity.

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

FINDINGS AND DECISION

Public Law Board No. 6986 (the Board) finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended. Further, the Board has jurisdiction over the parties and the subject matter involved.

All Carrier employees have a duty of fair dealing and honesty with their employer. Employees who violate this standard of conduct subject themselves to the imposition of substantial discipline, up to and including summary termination of their employment. The facts and circumstances underlying the instant case occurred in 2003, and were not discovered by the Carrier until an investigation of misconduct by Supervisor Matt Wyrick in 2007. Mr. Wyrick was permitted to resign his employment at the conclusion of the Company's investigation.

NATURE OF THE CASE

The Claimant, Russell T. Hulsey, was dismissed for violation of Maintenance of Way Operating Rules 1.4 – Carrying Out Rules and Reporting Violations, 1.6 – Conduct, 1.15 – Duty Reporting or Absence and 1.19 – Care of Property. According to the Carrier, the Claimant traveled to Tulsa, Oklahoma to play golf with his Supervisor using airline tickets that were purchased by the Supervisor using a Company credit card. The Claimant was also terminated for falsifying time keeping records during April and September, 2003, when it is alleged that he went on this golfing excursion on days for which he was paid by the Company.

The Organization grieved the imposition of discipline as being without just cause, contending that the Claimant had no basis for knowing that the airline tickets had been purchased by a Company credit card, and that he did not falsify a time record or steal time from the Company because the Claimant used compensatory time that he had earned and received permission to use from his Supervisor. The Organization characterized the Carrier's interpretation of the facts underlying the instant case as guilt by association, as the Claimant traveled with a Supervisor who was misusing Company assets,

Mr. Wyrick's abuse of Company-issued credit cards has been chronicled in several cases previously submitted to this Board. His illicit activities were not only adverse to the interests of the Carrier, but also drew other employees whom he supervised under scrutiny and resulted in the imposition of discipline.

Employees were obligated under the Maintenance of Way Rules and Carrier Policies to be reasonably suspicious of activities that were patently contrary to the interests of the Carrier, or were too good to be true. Employees are obligated to report such circumstances to the Carrier, even if their own Supervisor is implicated. However, the proof submitted by the Carrier in the instant case does not substantiate the allegations upon which Claimant Hulsey's termination was predicated.

Nothing in the record establishes that Claimant Hulsey knew that the airline tickets he used to fly from Memphis to Tulsa to play golf on September 10 and 11, 2003 had been purchased by Mr. Wyrick using a Carrier credit card. The record contains no basis for Mr. Hulsey to have known that Foreman Kenny Avery's credit card was charged for the American Airlines ticket that he used to fly from Memphis to Dallas-Ft. Worth. Mr. Hulsey testified without refutation that he paid Mr. Wyrick for these tickets in cash. His failure to get a receipt for these payments was entirely understandable under the circumstances. Mr. Hulsey

testified that he flew to Tulsa after a full work day, repairing a bridge across the Mississippi River, that commenced at 5 a.m. There is no evidence that the flight taken by Mr. Hulsey did not occur after 5 p.m., when his ten-hour shift would have concluded.

Mr. Hulsey further testified that he used earned compensatory or “mud” time with the permission of his Supervisor on September 11. This explanation of why he received payment of wages when he was actually, by his own admission, in Tulsa playing golf is entirely credible, especially given the extensive testimony introduced by the Organization chronicling the long-standing practice under which employees work long hours without earning overtime, but are then permitted to use compensatory or “mud” time. As the Organization acknowledged, this practice is contrary to the agreements between the Carrier and the Organization. Nevertheless, the Organization tolerates this common practice because it has not been the source of grievance or complaint by bargaining unit employees.

The Organization’s representative cited many excerpts from the transcript which established persuasively that the Claimant was unaware that he was violating Carrier Rules. Given the protracted delay between the occurrence of these events and the Carrier’s investigation after it discovered Mr. Wyrick’s malfeasance, the Claimant’s inability to

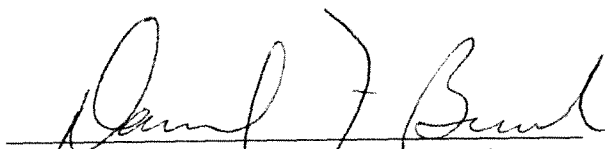
provide detailed recollection of these events is also understandable. Nevertheless, the Carrier has the burden of persuasion to establish by substantial evidence that an employee has defrauded the Carrier or otherwise failed to report to the Carrier misconduct by co-workers acting to the detriment of the Carrier. The record in the instant case establishes that the Claimant was entitled to use compensatory time that he earned and that he used in a manner similar to other employees on his work gang and in his job title.

The Carrier's speculative conclusion that the claimant was a co-conspirator with Mr. Wyrick and others in defrauding the Carrier was unable to overcome the more persuasive testimony offered by witnesses who described in detail a long-standing practice extending back several decades permitting employees to accrue and utilize compensatory or "mud" time to avert overtime, a practice that inures to the benefit of the Carrier. Nothing in the record established persuasively that the Claimant received payments to which he was not entitled, that he was aware of the misconduct of his Supervisor, or that he violated the Maintenance of Way Rules 1.4, 1.6, 1.15 and 1.19 for which he was cited.

The reason provided to the Claimant in the termination letter dated December 4, 2007 is "falsification of time keeping during September of

2003 and accepting Company-purchased airline tickets for personal use.” There is no basis to conclude that Claimant knew that these were Carrier-purchased airline tickets, as the Carrier has not effectively refuted the Claimant’s assertion that he repaid his Supervisor. Although this is a self-serving assertion, there is no basis in the evidentiary record establishing that the Claimant knew, or had reason to know, how Supervisor Wyrick had obtained the airline tickets or that they were obtained to the detriment of the Carrier. Furthermore, the evidentiary record does not establish persuasively by sufficient substantial evidence that the claimant was paid for any compensatory time that he had not earned or that he used without the knowledge and permission of an appropriate Supervisor.

Therefore, based on the evidence submitted, the termination of Russell T. Hulsey on or about December 4, 2007 violated the collective bargaining agreement between the parties. The claimant shall be reinstated forthwith to his former position with uninterrupted seniority, wages and fringe benefits, less any substitute interim earnings. The Board hereby retains jurisdiction to resolve any dispute that may arise regarding the computation or implementation of the remedy ordered pursuant to these findings and opinion. We so find.


Daniel F. Brent, Impartial Chair

Dated: 9-3-09

() I concur. ☒ I dissent.

Michelle D. McBride
Michelle D. McBride, Carrier Member

Dated: 9/8/09

☒ I concur. () I dissent.

R.C. Sandlin
R.C. Sandlin, Organization Member

Dated: 9/11/09