

**PUBLIC LAW BOARD NO. 5850**

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**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**vs.**

**BNSF RAILWAY COMPANY**

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Case No. 508 – Award No. 508 – F. Baca  
Carrier File No. 14-19-0147  
Organization File No. 2417-SL13C5-195

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**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of Freddie Jr Baca (1157411), for the removal of the Claimant's Dismissal for the violation of MWOR 1.6 Conduct and MWOR 1.13 Reporting and Complying with Instructions. In addition, we request all record of discipline be removed from the Claimant's record. The Claimant shall be made whole as a result of the Carrier's actions.

**FINDINGS:**

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, F. Baca, had been employed by the Carrier since 1997. On March 29, 2019, following an investigation, the Carrier found Claimant guilty of dishonesty and falsification of time, in violation of Carrier Maintenance of Way Operating Rules (MWOR) 1.6—Conduct, and 1.13 Reporting and Complying with Instructions, in connection with the manner in which he reported his time in connection with filling a relief assignment pending bid. The Carrier dismissed him from service.

The facts of this case are largely undisputed. At the relevant time, Claimant had been working as a mobile B&B Foreman, providing flagging protection for contractors working on Carrier projects. His assigned hours were 0700 to 1730, four days per week.

Claimant's supervisor, Skylar Lempinen, explained at the investigation that on January 24, 2019, he had a phone conversation with Claimant about a rail grinder operator position coming to the territory the week of January 28, 2019 and Claimant's desire to bid on the position, which would be posted that week. Claimant was ultimately awarded the bid. The hours of this position were 1800 to 0200.

Mr. Lempinen explained that it is common practice to request relief for a position pending bid, and the matter is then handled by Workforce Management (Manpower), which will place the employee in the relief position. Mr. Lempinen stated that Claimant told him he would bid the position but would also accept it as a relief assignment pending bid. Mr. Lempinen therefore understood that Claimant would go to Belen, New Mexico, on Monday, January 28, 2019 to wait for the rail grinder, which was in transit, to arrive.

Claimant traveled to the Belen area, arriving on Monday, January 28, 2019, and checked into Isleta Hotel and Casino, in Isleta, New Mexico, which is not Carrier-approved lodging. He remained there, apparently without leaving and not appearing on Carrier property, for three days, until the grinder appeared on Thursday.

Claimant was apparently responsible for submitting his own time records. Mr. Lempinen stated that it had been his expectation that Claimant, having accepted the relief job, would work the hours of the new position, and submit only eight hours of straight time, between 1800 to 0200, beginning on January 28, 2019, and each day thereafter, during the relief and once the actual bid took effect.

On February 5, 2019, Mr. Lempinen was notified that his cost center had been overrun with overtime. He learned that Claimant had charged multiple hours of overtime and double time to his cost center during the time the bid was pending.

Mr. Lempinen testified that he contacted Manpower and spoke with representative Melissa Santini, who, he learned, had discussed the matter with Claimant on January 29, 2019. An audio recording of that conversation was played into the investigation record.

Claimant and Ms. Santini discuss that Claimant had received the job which had been put out for bid. Claimant also stated that he had been told Ms. Santini would put him on relief until the bid took effect, and, if she did so, Claimant would pay himself only at night, that is, according to the new job's hours. Otherwise, he stated, his understanding was that he went to the new job but still paid himself "regular" time, that is, as if he were still on his old position.

Ms. Santini replied that if "he" called and told her to put Claimant on relief she would do so, but that was between him and Claimant. However, Ms. Santini repeated, on relief he had to work "the hours of the gang you're on," that is, the new gang.

Claimant repeated that he should be on his "regular" hours. Ms. Santini asked if Claimant wanted her to put him on the new gang, but she could not force him. Claimant replied that he did not think "they'd get (him) for falsifying time" and didn't want to get in trouble but he "wanted to make that money."

Claimant stated that he would wait to get a call from management, which he was "betting would not happen." Claimant stated that he would do it this way, "just flow with the work," and if management "chewed (him) out, they chew (him) out. Then they can delete it."

Mr. Lempinen testified that after he listened to this recording he called Claimant, who told him he had been entitled to the overtime pay because he was on standby waiting for the relief position. He explained that he asked Claimant what he had been doing when he decided he was not going to take the relief position, and he explained that he had been at the Isleta Hotel and Casino for the three days.

Mr. Lempinen stated that Claimant had never told him he intended to remain on his regular position. He added that a supervisor must approve overtime every time it is worked, and Claimant never informed him that he intended to work overtime. He believed that Claimant had been dishonest by leading him to believe he was accepting the relief position, driving to Belen and performing no work for the Carrier, while paying himself around the clock while performing no work.

Mr. Lempinen explained that Claimant would be working his regular hours if he did not relieve pending bid, but Claimant told him he would accept the relief and Mr. Lempinen would not have sent him to Belen otherwise. He would have had Claimant stay at his flagging job and had an inspector chase the rail grinder until the bid came in.

Mr. Lempinen stated that he also expected that Claimant would have gone to the Belen Depot to wait for the rail grinder to arrive, not that he would stay at a hotel and casino for three days, performing no work for the Carrier and paying himself around the clock.

Claimant testified at the investigation that his position on January 28, 2019 was foreman/inspector, and his assignment was to go to Belen to wait for the rail grinder. Mr. Lempinen told him he had to be there Monday, January 28, 2019. He contended that he and Mr. Lempinen never mentioned relief, just that he should show up and perform the rail grinder work. So, he stated, he contacted Manpower and asked whether he was on relief or his regular hours. He stated that he did not believe it was pertinent to call his boss, as the rail grinder could show up at any time.

However, Claimant also stated that he had a text exchange with Mr. Lempinen about 10 minutes after he spoke to the Manpower representative but did not produce any text messages. He contended that he told Mr. Lempinen Manpower had not put him on relief so he had to pay himself regular time and overtime, and Mr. Lempinen told him that was fine.

Claimant explained at the investigation how he calculated his time while he was waiting for the grinder to arrive. He stated that starting Monday at 0700 to 1730 he was on straight time, a 10-hour day with lunch. At 1800 he was on unassigned hours so that put him on overtime, and, at the 16<sup>th</sup> hour, 10 or 10:30, he was entitled to double time until 2:00. On Tuesday morning, he stated, he resumed his regular hours at 0700, but he had not had eight hours' rest so he was entitled to 10 hours of continuous service, so his regular 0700 to 1730 shift became 10 hours of overtime

and paid at double time. He stated that he was entitled to calculate his time in this manner because he was waiting all night for the machine to arrive.

The Carrier states the record is clear that Mr. Lempinen that he would accept assignment as a relief pending bid, and an employee who accepts a relief assignment takes on the hours and attributes of the position he is relieving. Therefore, Claimant, as the relief, would have assigned hours of 1800 to 0200 Monday through Friday and would receive compensation based upon those hours, not the hours of his mobile B&B Foreman position. The Carrier states that because Claimant agreed to accept the relief assignment, Mr. Lempinen instructed him to report to Belen, New Mexico on Monday, January 28, 2019 to wait for the rail grinder to arrive.

However, the Carrier stresses, Claimant chose not to report to Belen as instructed but got a room in Isleta, New Mexico at the Isleta Hotel and Casino rather than a Carrier-approved corporate lodging. He submitted expenses based on his daytime assignment, resulting in extensive unauthorized overtime and double time costs to the Company. His statements during his call with the Manpower representative make it clear that he knew he was supposed to be put on relief, and paid accordingly, but he refused to do so because he wanted to make more money. He assumed he would not be caught. It is well settled, the Carrier urges, that dishonest conduct such as Claimant's warrants dismissal. The claim should be denied.

The Organization asserts that Claimant committed no misconduct and the Carrier has failed to meet its burden of proving, by substantial evidence, just cause for the discipline issued against him. While Mr. Lempinen did instruct Claimant to report to Belen to wait for the grinder, he apparently assumed Claimant would be on relief until his bid on the position took effect the following week, but when Claimant contacted Manpower he was informed that such was not the case. Therefore, it was appropriate for Claimant to work his regular position's hours, including the resulting overtime. His actions were not dishonest. The claim, the Organization urges, should be sustained.

We have carefully reviewed the record in its entirety. There is no dispute that Mr. Lempinen instructed Claimant to go to Belen to wait for the rail grinder to arrive. Claimant's bid for the position did not take effect until the following Monday, and it is correct, as the Organization asserts, that Mr. Lempinen assumed that Claimant would fill the position on a relief basis until then.

Claimant traveled to the new location, booked himself into a hotel/casino, and stayed there for three days until the grinder arrived. There is no dispute that his previous position worked day hours, and the new one night hours. Claimant maintained that during this time he was still, for pay purposes, in his old job with day hours, and was entitled to overtime, and double-time pay, throughout the rest of the day and all through the night.

The propriety of Claimant's conduct—paying himself around the clock for performing no work, including escalating his overtime payments by claiming he had not had eight hours' rest when it appears that all he did was rest—certainly raises questions on its face. The notion that he honestly believed he was entitled to double time because of lack of rest for hours *actually spent sleeping* is difficult to credit. However, even more importantly, it is apparent from Claimant's

conversation with Manpower that he was well aware that he should have been paid according to the hours of his new position, claiming only those regular hours. The Manpower representative told him repeatedly that this was the case, but, clearly, he chose to take advantage of the technical glitch that Manpower had not actually put him in the new position, even though the Manpower representative told him he could do that himself.

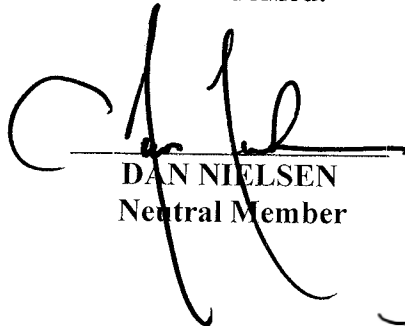
In declining to do so, he stated that he did not think "they would get him for falsification," and he wanted the considerable extra money. His own words to Manpower were an acknowledgement that Claimant knew his actions were fraudulent. He doubted he would be caught and believed that, if he were, he would suffer no greater penalty than having the payments reversed. This was an unrealistic view of the severity of his conduct.

Claimant chose to stay in a hotel casino rather than Carrier-approved lodging and made no effort to perform any work for the Carrier. He chose, concurrently, to pay himself at a highly exaggerated rate, even after being told repeatedly by the Manpower representative that he should be paid according to the new gang's hours. He refused to allow the representative to correct his status. He deliberately took money from the Carrier, knowing he was not entitled to it. His conduct was blatantly fraudulent and dishonest. The Carrier has met its burden of proving his guilt by substantial evidence.

With respect to the penalty, Claimant was a long-term employee with a minimal disciplinary record. Nevertheless, as the Carrier states, dishonesty is one of the most serious offenses an employee can commit, as it strikes at the heart of the trust necessary in an employer-employee relationship. It is well recognized that such conduct is grounds for dismissal, even for a first offense. Therefore, we cannot find that the Carrier's decision to assess that penalty represents an unfair, arbitrary or discriminatory exercise of its discretion to determine disciplinary penalties.

#### AWARD

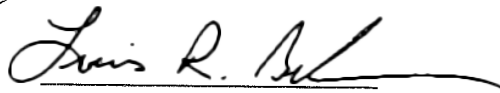
**Claim denied.**



**DAN NIELSEN**  
Neutral Member



**SAMANTHA DAIGLE**  
Carrier Member



**LOUIS R. BELOW**  
Organization Member

**Dated this 9th day of June, 2021.**