

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

vs.

**BNSF RAILWAY COMPANY**

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Case No. 509 – Award No. 509 – S. Hopkins  
Carrier File No. 14-19-0071  
Organization File No. 1600-SL13D2-176

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**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of Heartland District 900 employee Mr. Sean Hopkins (7427412) for reinstatement with all seniority rights restored and all entitlement to, and credit for benefits restored, including vacation and health benefits. The Claimant should be made whole for financial losses as a result of the violation, including compensation for:

- 1.) Straight time for each regular workday lost and holiday lost, to be paid at the rate of the position assigned to the claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by the claimant while wrongfully removed from service).
- 2.) Any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the Claimant was out of service.
- 3.) Overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time Claimant was removed from service, or on overtime paid to any junior employee for work the Claimant could have bid on and performed had the Claimant not been removed from service.
- 4.) Health, dental, and vision care insurance premiums, deductibles, and co-pay that he would have not paid had he not been unjustly removed from service commencing, continuing forward and/or otherwise made whole.
- 5.) All notations of the dismissal should be removed from all Carrier records.

## **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, S. Hopkins, had been employed by the Carrier since 1992. On October 16, 2017, the Carrier scheduled an investigation for October 27, 2017, on charges that Claimant had falsified his payroll and weekend travel allowance on June 6, 7, and 12, 2017, while assigned as Foreman to SC03-System Surfacing Gang working in Havre, MT. The investigation eventually convened on January 16, 2019, following seven postponements.

At the opening of the hearing, Claimant's Organization representative requested that the investigation be further postponed, as Claimant was on medical leave and unable to attend. He acknowledged that Claimant was aware of the hearing. The Organization was not able to provide any medical documentation that Claimant was not able to attend. There was no discussion of whether it was possible for him to testify by telephone. The Hearing Officer denied the request and proceeded in Claimant's absence. On February 12, 2019, the Carrier found Claimant guilty of the alleged falsification on June 7 and June 12, 2017, and dismissed him from service.

Courtney Austin, Project Manager in the Anti-Fraud team in the Carrier's Compliance and Audit Department, testified at the investigation that she had received a confidential tip that Claimant had stolen time by submitting records for days during the week of June 5, 2017 showing that he had worked when he had not.

Ms. Austin explained that her initial review of timekeeping data showed that Claimant had been scheduled for vacation on June 5 through 8, 2017. She stated that these entries had been made by the machine operator and backup timekeeper, Luke Didier, except for June 7, when it was entered by an unknown person. For Friday, June 9, Claimant entered the time himself, as approved absence.

Ms. Austin added that Claimant later entered the system and "updated" June 5 and 6, but kept them as floating vacation. However, the records showed that he changed June 6, 7, and 8, 2017, from vacation to working, with straight time, overtime and meal allowance.

Ms. Austin stated that she found no evidence that Claimant had been at the work location. She found no evidence that he had used Carrier lodging during the week of June 5, 2017. She added that Claimant had not fueled the Carrier vehicle that week, although Mr. Didier had done so.

She also explained that Claimant entered weekend travel code 55 for the weekend before June 5, 2017 and the weekend after June 9, 2017. She noted that Claimant indicated he left work to go home on June 8, 2017 and returned to work on June 12, 2017, which would have entitled him to the allowance that weekend if he was at work on June 8, as he had an approved absence on June 9.

Ms. Austin explained Information Technology records purporting to show that Claimant logged into the payroll system from the Minneapolis/St. Paul Airport on June 8, far from the work location, the same location from which he had logged him on June 6, 2017, when he was legitimately on vacation. However, Claimant was not charged with falsifying his time on June 8 when he changed it from vacation to work, and the same Information Technology records showed that Claimant logged into the system on June 12, 2017 from Boise, Idaho, when Carrier lodging records showed that he had stayed in Havre, Montana both June 11 and June 12.

The Carrier called Mr. Didier as a witness, and he confirmed he was entering time for the gang during the week in question. He recalled that Claimant had taken “two or three” days off, and he put him down for floating vacation days.

We have carefully reviewed the record in its entirety. The Carrier contends that it has proven, by substantial evidence, that Claimant falsified his pay records during the week of June 5-9, 2017, by changing, in the payroll system, originally-scheduled vacation days to workdays, while actually remaining on vacation. The Carrier asserts that this conduct constitutes theft and fraud sufficient to justify dismissal. On the basis of this record, we strongly disagree.

The Carrier presented a flawed, confusing and inadequate case to justify its decision to dismiss Claimant. Ms. Austin, on the basis of a confidential tip, purported to investigate Claimant’s whereabouts at the critical times. First, as the Organization points out, the investigation notice charged Claimant with this conduct on June 5, but Ms. Austin conceded at the hearing that there was no issue on that date as Claimant did not change the original vacation notation and remained on vacation.

Ms. Austin determined that Claimant had not been at work at all that week, and that he falsified his entry for June 6, because, she stated, she could find no evidence that he had been present at the location. This conclusion she based upon the lack of Carrier-approved lodging records showing him there, although he could well have stayed elsewhere in the area, and the fact that he had not fueled the Carrier vehicle that week, even though he had been legitimately off work for at least three days, two vacation and one approved absence, that week. Such evidence does not approach what would be necessary to show that Claimant falsified his records for June 6.

As for Claimant’s supposedly falsified claim to weekend travel allowance, Ms. Austin conceded that if Claimant had been at work on June 8, 2017, he would have been entitled to the allowance. His time records showed that he was at work that day—changed from the original vacation entry—and the Carrier did not charge that there was anything fraudulent about that entry. Therefore, the Carrier cannot piggyback onto that a charge that the weekend allowance claim was falsified. For this reason, we find the Carrier’s technology record supposedly showing Claimant at the Minneapolis airport that day irrelevant. In any event, there are questions about those records, as they show Claimant far away from his worksite on June 12 when lodging records for the day before and the day after place him squarely at the worksite.

Finally, it would appear that the easiest way for the Carrier to investigate and prove its case would have been to call employees on the gang with first-hand knowledge of whether Claimant

was at work at all that week. The one employee it did call, Mr. Didier, testified that Claimant had been on vacation only two, possibly three, days that week, leading to the conclusion that he in fact was at work some of the days, contrary to the Carrier's contention that Claimant was not there at all.

In sum, we find the Carrier's case completely lacking in probative evidence, let alone evidence to prove charges as serious as those leveled against Claimant. The claim will be sustained.

**AWARD**

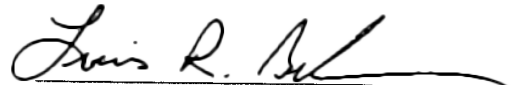
**Claim sustained.**



**DAN NIELSEN**  
Neutral Member



**SAMANTHA DAIGLE**  
Carrier Member



**LOUIS R. BELOW**  
Organization Member

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