

**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. 535 – Award No. 535 – W. Batiste  
Carrier File No. 14-20-0034  
Organization File No. 2421-SL13C5-1950

**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of Wallace Batiste (1731470) Seniority date October 05, 2015, for reinstatement with seniority rights restored and all entitlement to and credit for, benefits restored, including vacation, and health insurance benefits. The Claimant shall be made whole for all financial losses as result of the violation, including compensation for: 1) straight time pay for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to Claimant at the time of suspension from service (this amount is not reduced by any outside earnings obtained by the Claimant while wrongfully suspended); 2) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while Claimant was out of service. 3) Overtime pay for lost overtime opportunities based on overtime paid to any junior employee for work the Claimant could have bid on and performed had the Claimant not been suspended. 4) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly dismissed from service commencing November 22, 2019, continuing forward and/or otherwise made whole. 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, W. Batiste, had been employed by the Carrier since 2007. On October 15, 2019, the Carrier charged Claimant to attend an investigation in connection with alleged falsification of time worked on October 9, 2019. On November 22, 2019, following an investigation conducted on October 25, 2019, the Carrier found Claimant guilty of the allegations. The Carrier determined that Claimant had violated Maintenance of Way Operating Rule (MOWOR) 1.6 Conduct and dismissed him from service.

At all times relevant, Claimant was working as a Foreman on Section Gang TSEC1656 out of Casey, Texas. Claimant's gang was scheduled for five workdays from 7:00 a.m. to 3:30 p.m., with a 30-minute lunch break from 11:30 a.m. to 12:00 p.m. As foreman, Claimant was responsible for entering the gang's time.

Division Roadmaster Wyrick Tatum testified at the investigation that he was Claimant's supervisor and was responsible for reviewing time and ensuring all time is accurately entered into the system. He stated that on October 9, 2019, he was at Casey Depot meeting with Trainmaster Michael Manning from approximately 2:37 p.m. to about 4:00 p.m. When he drove through the yard, he noticed both the company truck and the backhoe, which gang uses to complete their work tasks, parked there. He went into the office to look for Claimant and his crew, and stayed until about 4:00 p.m., but they were gone.

Mr. Tatum provided still shots from the security video footage showing the gang's truck returning to the parking lot at about 12:19 p.m., where it remained until the gang exited the truck at 2:33 p.m. and left for the day. He stated that the employees should have taken a lunch break during that time. Mr. Tatum pointed out that photos showed employee Paul Black left the depot at about 2:33 p.m.; then Donald Pugh got in his truck at about 2:34 p.m. Claimant left at about 2:35 p.m.

Mr. Tatum also entered still shots from the security video showing that at 7:07 a.m., after the start of the shift, Claimant's vehicle is not present in the yard parking lot, only that of his gang member Donald Pugh. He further explained that the video recording from which the photos were taken show that Claimant's car was not in the parking lot at any point before 8:01 a.m. Mr. Tatum stated that he was identifying the cars based on his knowledge of the vehicles the gang members drive to work each day. The Organization objected to admission of the photos, alleging there was no way to verify that they were of Claimant's vehicle.

Mr. Tatum offered into evidence the Engineering Time Review showing the time Claimant entered for October 9, 2019, as well as the pay codes used, the total regular and overtime hours, and that the time was submitted on October 14, 2019. The document shows that Claimant entered, for himself, eight hours of regular time from 7:00 a.m. to 3:00 p.m., as well as overtime for lunch from 3:00 p.m. to 3:30 p.m., and one hour of overtime from 6:00 a.m. to 7:00 a.m., for a total of 1.5 hours of overtime. The record shows that the other gang members also worked through lunch, for .5 hours of overtime, but not that they started work early.

Mr. Tatum testified that on October 12, 2019, he reviewed and rejected Claimant's October 9, 2019, time entries. He explained that personal expectations for his team, as well as the Carrier's Engineering Instructions, require employees to enter their time daily.

Mr. Tatum stated that because he did not authorize Claimant to work before 7:00 a.m. or through lunch he rejected the time. He explained that the status on the time entries therefore changes, and it shows, "Status: Pending Review—Rejected," with "Reject Comments" as "Explain Overtime." He further added that even if he rejects the time, the employees are still paid for it. He stated that there is a process through timekeeping to recoup overpayments after investigations.

Mr. Tatum added that when he rejects the time, it goes back the person responsible for the entries, here Claimant, for correction. He did not personally speak to Claimant about it. In addition to not being approved for the claimed overtime, Mr. Tatum, stressed, Claimant did not actually work from 6:00 a.m. to 7:00 a.m.

Truck Driver Donald Pugh testified that on October 9, 2019, he was working with Claimant. He could not recall what time they started or ended work that day but stated that they should have started at 7:00 a.m. and ended close to 3:30 p.m., which are the gang's start time and end time, respectively. Mr. Pugh explained that he normally drives a white Nissan Titan, which he identified in the photos Mr. Tatum provided, and acknowledged that the photos showed him arriving at 7:07 a.m. He was not sure what car Claimant was driving that day, as Claimant has multiple vehicles, but identified one of Claimant's vehicles in a photo arriving at 8:01 a.m. Mr. Pugh also identified the section truck in the parking lot and identified the location in the photos as Casey Yard.

Backhoe Operator Paul Black also testified at the investigation that he was working with Claimant on October 9, 2019, and that their start and end times are normally 7:00 a.m. and 3:30 p.m., respectively, although he explained that the gang was set up to be in at 6:00 a.m. every day; he did not explain why that was the case. He did not recall the exact time they left that day, but acknowledged that it looked like the gang left before 3:30 p.m. He noted that if an employee leaves early, he is only paid through the time that he stops working, not the whole day. Mr. Black identified Casey Yard in the photos Mr. Tatum provided, as well as the backhoe he operates, the section truck, and Mr. Pugh's vehicle. Mr. Black did not recall which of his vehicles he drove to work that day, nor could he recall exactly which car Claimant drove to work. Lastly, he explained that October 9, 2019 was not a significant date for him and was over two weeks prior to the investigation, so he could not be 100 percent accurate in his recollection.

Claimant testified that his start and end times on October 9, 2019 were 7:00 a.m. and 3:30 p.m., respectively and that the gang did not take a lunch, likely because of whatever task they were working on, although he could not recall what the task was. He further explained that most days the gang works through lunch, but he could not recall whether they actually took a lunch break that day. Though he was unable to recall exactly what time he ended work that day, Claimant did acknowledge that according to the photos, it appeared his truck did not arrive at the lot until 8:02 a.m. and left the lot for the day at 2:35 p.m.

Claimant explained that because October 9, 2019, was not a significant day for him and because it was over two weeks prior to the investigation, the details of the day were not fresh in his mind. He explained that he entered the gang's time, including for himself, and there was an

input error with the time entered for October 9, 2019. He specified that the 6:00 a.m. to 7:00 a.m. time should not have been entered and was a mistake when he entered the time five days later. Claimant added that all the time for that day was an input error and might have been time that should have been entered for a different date. He maintained that if he did not report to work until 8:00 a.m. or if he left work at 2:30 p.m., he would have started and stopped this time accordingly.

Claimant testified that it was never his intention to defraud the Carrier, and he could just go back and correct his hours. He stated that no one told him he claimed these hours and he did not know those were the hours inputted until the day of the investigation. Had someone contacted him, he stated, he would have gone in and fixed it.

Claimant previously received a Level-S 30-day Record Suspension with a three-year review period for failing to properly stow the boom on a section truck and striking a bridge, resulting in damage to the equipment, on August 9, 2013. On May 10, 2016, Claimant received a Formal Reprimand with a one-year review period for failing to protect the track after changing ties, and then received a Level-S 30-day Record Suspension with a three-year review period on October 12, 2016, for failing to properly place a slow order. Prior to the instant discipline, Claimant received a Level-S 30-day Record Suspension with a three-year review period on February 6, 2017, for exceeding the limits of his track authority.

The Organization first contends that the hearing was far from fair and impartial, asserting that the Hearing Officer had no control over the hearing or witnesses and was caught colluding with Mr. Tatum outside of the sequester room during the recess and immediately before Mr. Tatum was recalled as a witness and introduced additional exhibits. At another point during the hearing, the witnesses were not in the correct sequester room and the Hearing Officer was unable to locate several exhibits, which were later found in Mr. Tatum's possession. Additionally, the Organization asserts that when its representative approached the sequester room to speak with the other two witnesses during the recess, Mr. Tatum tried to prevent him from doing so and another Carrier official threatened to remove him from the property. The claim should be sustained on this basis alone.

The Carrier maintains that the Organization's arguments that the hearing was not conducted in a fair and impartial manner are unfounded. Mr. Tatum explained at the investigation that he left the original sequester room because the employee whose office it was needed to use it, and there was no evidence of collusion or impropriety concerning the hearing exhibits. There was no showing of prejudice to Claimant, and therefore no grounds for sustaining the claim on this basis.

On the merits, the Carrier argues that it proved Claimant's guilt by substantial evidence. The Carrier asserts that the Organization's argument that Claimant's dishonesty was merely an error that could easily be fixed is incorrect. Claimant acknowledged that he did not arrive at the depot until 8:02 a.m. on the date at issue and left at 2:35 p.m., even though he entered time from 6:00 to 7:00 a.m. as well as through lunch and until 3:30 p.m.

Moreover, the Carrier stresses, despite the Organization's contention that Claimant had no notice of the incorrect entries, Mr. Tatum in fact rejected them, and returned them to Claimant with comments requesting an explanation for the overtime. Claimant failed to respond.

Moreover, Claimant's assertion that he entered the wrong time under the wrong date does not help him, as it would mean that there is a second date for which Claimant entered incorrect work hours. Further, Claimant knew his actions were improper, and he had several opportunities to correct his error but failed to do so. The Carrier notes a similar case, First Division Award 25917, where it was held that because the employee did not act until he had been caught, the attempt at amelioration was irrelevant.

The Carrier concludes that still shots from the parking lot security cameras show Claimant's vehicle reporting at approximately 08:01 a.m. and departing at approximately 2:33 p.m., which does not align with his claimed time for that day. All Company witnesses were able to identify Claimant's vehicle and the time stamp on the video when the vehicle arrived and left. The Carrier further asserts that Claimant admitted, during the investigation, to leaving at 2:35 p.m. No further proof of guilt is needed.

With respect to the penalty, the Carrier notes, arbitral authority is clear that dishonesty, standing alone, is a dismissible offense. The claim should be denied.

The Organization argues that Claimant had no intent to defraud the Carrier but instead made a simple mistake. Evidence shows that the hours for October 9, 2019, were not entered until October 14, 2019. The Organization states that the five-day time gap contributed to the Claimant's input error. Additionally, the time was submitted on October 14, 2019, but the Carrier claims to have had first knowledge of the issue on October 12, 2019, which the Organization states is simply not possible and indicates that the Carrier wrongfully dismissed Claimant.

Lastly, the Organization asserts that had Mr. Tatum contacted Claimant directly about his error, Claimant would have had a chance to correct his time entries. Even so, the Carrier has remedial processes to recoup the overpayment through timekeeping, and for these reasons, Claimant's dismissal is unwarranted. The Organization maintains that Claimant did not violate any Rules and should be reinstated.

We have carefully reviewed the record in its entirety, and find that the Carrier has provided substantial evidence of Claimant's guilt. There is no dispute as to the facts of this case and, therefore, no merit to the Organization's arguments that Claimant was prejudiced by procedural errors. On October 9, 2019, by video evidence and Claimant's admissions, Claimant arrived at work approximately one hour late. Claimant was identified in the security photos as having first entered the depot lot at 8:02 a.m. on October 9, approximately two hours after he claimed to have started work. He and his crew were also identified as leaving the depot around 2:30 p.m. in their personal vehicles, approximately an hour before the end of their shift.

While the record is unclear as to exactly when Claimant entered his time, it is undisputed that he claimed to have arrived at work one hour *early* on October 9, 2019, although his entry does not show early arrival for his crew members, that the crew worked through lunch, and that they

worked their entire shift. Claimant admitted that the entries were incorrect, but maintained they were a simple mistake and, given the opportunity, he would have corrected them.


Therefore, the determinative issue in this case is whether Claimant's explanation is credible, or whether he deliberately falsified his time. Claimant maintained that he entered the time five days after the day at issue and likely confused that day with another. We cannot accept this contention. To arrive that late and leave that early, with their equipment idle at the depot for hours, is not something a supervisor would likely have forgotten five days later. Moreover, there is no evidence of any time record showing such a shortened day. If there was a day or project that necessitated the kind of overtime Claimant entered for October 9, 2019, Claimant failed to describe it. It is also telling that Claimant entered an extra hour of overtime for himself, but not his crew, showing that the entries were in fact made deliberately. Again, Claimant offered no description of any job or workday on which he would work overtime in the absence of his crew.

We also cannot accept that Claimant was denied an opportunity to explain or correct the time. Although he claimed he was unaware until the hearing of the specific problem, he did not dispute Mr. Tatum's assertion that when the supervisor rejects time, the record is returned to the employee to explain or correct it. Moreover, the investigation notice was issued on October 15, 2019, less than a week after the day in question, and Claimant would have had the opportunity then to investigate and attempt to correct the record. Why he chose not to do so we cannot say. However, the totality of the circumstances convinces us that Claimant indeed falsified the record as alleged. The Carrier has met its burden of proving his guilt by substantial evidence.

Claimant was a fairly long time employee and the proven dishonesty here is a small amount of hours on one day. However, it is well settled that dishonesty such as this is one of the most serious offenses an employee can commit, as it goes to the trust necessary to the employer-employee relationship. As the Carrier states, it is universally recognized that even small amounts of time theft such as occurred here are grounds for discharge, even for a first offense. We therefore cannot say that the Carrier's determination that discharge is warranted represents an unfair, arbitrary or discriminatory exercise of its discretion to determine the appropriate disciplinary sanction.

**AWARD**

**Claim denied.**

  
**DAN NIELSEN**  
**Neutral Member**  
**LOGAN MCKENNA**  
**Carrier Member**  
**JEFFERY L. FRY**  
**Organization Member**

**Dated this 31 day of August, 2023.**