

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 180

AWARD NO. 178

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

Carrier's File

1517221

AND

ORGANIZATION

Brotherhood of Maintenance of Way Employees
Division of International Brotherhood of Teamsters

System File

J-0948U-253

STATEMENT OF CLAIM

1. The discipline (removed and withheld from service, and subsequent Level 5 discipline and dismissal by letter dated December 23, 2008) imposed upon Mr. Brock J. McDonald for the alleged violation of Union Pacific General Code of Operating Rules (GCOR), Rule 1.6 (Conduct) was harsh, unjust, unwarranted and in violation of the Agreement (System File J-0948U-253 / 1517221)
2. As a consequence of the violation referred to in Part 1 above, we request that Claimant B. McDonald be reinstated to service and be made whole as outlined in Rule 48(h) of the Agreement.

STATEMENT OF BACKGROUND

Claimant, a Track Inspector with two and a half (2 ½) years of service was assigned on Gang 5279 at Lexington, Nebraska on Saturday, October 25, 2008 and again on Wednesday, October 29, 2008. In reporting compensation due him in connection with his assigned work, Claimant reported he had worked four and one-half (4 ½) hours of overtime on October 25, 2008 in addition to the regular eight hours he worked that day, and eight (8) hours at the straight-time rate of pay on October 29, 2008. Subsequently, Carrier cited Claimant to attend an investigation pertaining to the following charge:

... to develop the facts and place responsibility, if any, that while employed as Track Inspector on Gang 5279, at Lexington, Nebraska, you allegedly paid yourself for time not worked on October 25, 2008 and October 29, 2008.

These allegations, if substantiated, would constitute a violation of Rule 1.6 (Conduct), as contained in the General Code of Operating Rules, effective April 3, 2005. Please be advised that if you are found to be in violation of this alleged charge, the discipline assessment may be a Level 5, and under the Carrier's UPGRADE Discipline Policy may result in a permanent dismissal.

With respect to the claim for overtime pay on October 25, 2008, Supervisor Todd Gayman testified that at 11:00 p.m. he called Claimant and asked him to go look at a rough track spot at Wood River. According to Gayman, Claimant declined the call out apprising he was at a bar and was not able to go on duty and perform the requested work assignment. Although Claimant declined the call out and did not perform any work in connection with Gayman's requested work assignment, he nevertheless submitted a claim for four and one-half (4 ½) hours of overtime pay which was inclusive of three (3) hours of call out pay and an additional 1 and ½ hours of reported overtime. Joe Dean, Vice Chairman of the Unified System Division of the Brotherhood Maintenance of Way, representing Claimant on behalf of the Organization explained to the Hearing Officer conducting the investigation Claimant's misunderstanding regarding entitlement to compensation in connection with receiving a call out work assignment. Dean provided the following explanation:

Basically, we [Claimant and Dean] had this discussion during the the last recess, and somewhere along the line I think Mr. McDonald was of the opinion that if you got called on the telephone, you was entitled to a three-hour call. And I don't know how that ever evolved or where – how it came about, because like I told him, it states clearly in the agreement book that your time begins and ends at your assembly point. So just because you receive a phone call at night doesn't uh- you actually have to go to that call, and you get paid – if you work one hour, you still get paid three hours for the work. If you work four hours then you get paid the four hours for the work, but you're entitled to a three-hour call, but just not because you answer your phone.

In connection with this explanation, Dean averred that Claimant was probably misinformed somewhere along the line as to why he turned in that amount of time for that call. In his testimony, Claimant affirmed Dean's explanation was correct that he had been led to believe from both foremen and timekeepers that if you were called by a supervisor or manager or director to talk about anything related to the job or what's

going on, even if you were not able to make it, that it still constitutes a three (3) hour call out, noting that this accounted for three (3) hours of pay of the total of four and one-half (4 ½) hours of overtime he claimed as compensation for October 25, 2008. According to Claimant, when Gayman called him the evening of October 25th, he spoke with Gayman for about twenty (20) minutes. Claimant testified that on October 25th he did not take his half hour lunch break and that he actually worked an hour of overtime. Claimant explained that of the 4 ½ hours he claimed for overtime pay, 1 and ½ hours he attributed to the hour of overtime he worked. However, Claimant further explained that what he should have reported was the half hour he worked instead of taking his lunch break, and the one (1) hour of overtime he worked.

Claimant's supervisor, Manager of Track Maintenance, Charles Foster testified that when he reported for work at 6:30 a.m. Wednesday morning, October 29, 2008, he observed the hi-rail truck used by Claimant to perform his duties located in front of the Maintenance of Way building with a flat tire. Foster related that morning he was with the section crews performing work and that between the time he reported to work and approximately 9:30 a.m., he had not heard anything over the radio pertaining to Claimant getting track and time from the dispatcher which led him initially to believe that Claimant was not at work or that he was starting work late. According to Foster, he then checked on the hi-rail truck at this later time and observed the truck was still located in front of the Maintenance of Way building and still had a flat tire. Foster related he began calling Claimant a couple of times between 9:30 a.m. and 11:30 a.m. but received no answer. Not hearing from Claimant, Foster testified that at approximately 11:30 a.m. he called the sections to instruct them to start patrolling their track since Claimant was not out there performing the work of inspection. Foster further testified that at the end of the day at around 4:30 / 4:40 p.m. he observed Claimant's hi-rail truck still parked at the same location and still with a flat tire, specifically, the right rear tire.

In his investigation pertaining to whether Claimant actually worked on October 29th, Foster noted that in his pay period report covering the last half of October, starting from October 16, 2009 through October 31, 2009, Claimant indicated he had worked a regularly scheduled eight (8) hours on the 29th. The record evidence reflects that Claimant timely filed a FRA Track Inspection & Defect Report showing he had conducted a Hi-Rail Walk inspection of track from Mile Post 208.30 to 282.00 going from Kearney Subdivision to North Platte Service Unit. According to Foster, the designation of Hi-Rail Walk means that the track was inspected by using the hi-rail truck and that inspection of the switches was accomplished by walking the switches. Foster explained that when track is inspected by hi-rail, the person performing the inspection is required to have a permit issued by the dispatcher. Foster testified that he obtained all of the permits issued to Track Inspectors on the Kearney Subdivision for October 29, 2008, that the total number of permits issued on that date totaled to twenty-two (22) and that Claimant was not among the inspectors listed as having been issued a permit by the dispatcher. Further, with regard to the FRA Track Inspection & Defect Report pertaining to Claimant's professed inspection performed on the 29th, Foster explained

the procedure of "track traversing" which procedure entails driving the hi-rail truck at a speed of 25 miles per hour on the track the inspector is traversing while inspecting the adjacent track. Foster noted that Claimant's FRA report for the 29th shows that no track was traversed by Claimant in performing the track inspection of track 4073/No 3 from Mile Post 208.30 to Mile Post 282.00. Foster explained that if track is inspected by walking as opposed to hi-railing, an inspector cannot perform a walking inspection alone as such an inspection requires a "look out" person to accompany the inspector. In other testimony, Foster asserted that track cannot be inspected from the adjacent track by riding along the right of way road in a vehicle.

Claimant testified the hour of overtime he worked on October 25th entailed inspecting the yard tracks explaining he had previously been away for one (1) week attending FRA training and, as a result it caused him to be about two (2) weeks behind in inspecting the yard tracks. According to Claimant, Foster told him at some previous time he needed to keep up the inspection of yard tracks as they were having problems keeping the yard tracks in service. Claimant related that he worked the overtime without needing to obtain approval from Foster given the immediacy of keeping the yard tracks in service. Foster, on the other hand testified that Claimant did not have authority to work any overtime without his approval first.

Claimant explained that on October 29th he did not have his own phone with him but rather he had a family member's phone but that he checked his voice mail throughout the day but asserted he had not received any voice mails. Claimant testified that the morning of the 29th, before he got air in the tire that was flat on his hi-rail he used his private vehicle to drive beside an adjacent track as a means of inspecting the track. According to Claimant, he was told he could do this by one of the managers of special inspections and that it would be considered as an inspection. Claimant related that in and around 11:30 a.m. toward Noon, he got air in the flat tire, then had a briefing with an unidentified dispatcher at around 12:30 / 1:00 p.m. and next proceeded to Mile Post 208, getting there at about 2:00 p.m. Claimant testified he drove from Mile Post 208 to just the other side of Lexington inspecting track from Track 3 from the right of way. According to Claimant, he returned to the depot at about 3:15 / 3:30 p.m. and parked the hi-rail in the same exact spot he always parks it in. When confronted with his FRA report for October 29th showing that his inspection from Mile Post 208 to Mile Post 282, River Bridge at North Platte, Claimant was unable to provide clarification regarding his earlier testimony that he had driven the right of way to Lexington other than to say he made a mistake on the FRA report and failed to correct the mistake.

By letter dated December 23, 2008 Carrier notified Claimant that based on the evidence adduced at the investigation, he was found to have violated GCOR Rule 1.6 (Conduct) and accordingly was being assessed the Level 5 discipline of dismissal from service. Thereafter, the Organization appealed the disciplinary action of dismissal and as the Parties were unable to reach a mutually satisfactory resolution of the claim on the property, the claim comes now before the Board for decision

ORGANIZATION'S POSITION

The Organization raises two (2) procedural objections both pertaining to its contention that Carrier failed to provide Claimant a fair and impartial hearing. As such, the Organization asserts these two (2) procedural deficiencies warrants reversing the discipline of dismissal from service assessed Claimant.

First Procedural Objection

The Organization asserts Carrier wrongfully took Claimant out of service prior to convening the investigation to determine whether or not Claimant was guilty of the charge of having violated Rule 1.6 (conduct), thereby having the effect of prejudging Claimant's guilt. The Organization concedes that while it recognizes Carrier's right to withhold employees from service this right is not an unfettered one in that the Board has consistently held that a carrier's option to exercise this right is limited to situations where retaining the employee in service may endanger the employee himself, or other employees, the public or otherwise may adversely impact the carrier's operations. In pertinent part, Rule 48, Paragraph A reads as follows:

An employee whose application has been approved will not be suspended or dismissed without being given a fair and impartial hearing, except that, if the offense is considered sufficiently serious, the employee may be suspended pending the hearing and decision.

In addition, the Organization contends Rule 48, Paragraph (o) restricts Carrier's right to remove employees from service pending investigation to serious and flagrant violations. Rule 48 (o) reads as follows:

It is understood that nothing contained in this rule will prevent the supervisory officer from suspending an employee from service pending hearing where serious and/or flagrant violations of Company rules or instructions are apparent, provided, however, that such hearing will be conducted within thirty (30) calendar days from the date the employee is suspended and a decision rendered within twenty (20) calendar days following the date the investigation is concluded.

The Organization argues that the violation allegedly committed by Claimant did not rise to the type of sufficiently serious and/or flagrant violation as that envisioned by either cited provision of Rule 48 and, as a result, Carrier violated this Rule of the controlling Agreement.

Second Procedural Objection

The Organization contends that Carrier did not afford Claimant a fair and impartial hearing as required by Rule 48, Paragraph (c) in that it failed to provide the precise charge against Claimant in the Notification of Investigation which hampered its effort to establish an adequate defense in Claimant's behalf. The charge reads in pertinent part as follows:

. . . to develop the facts and place responsibility, if any, that while employed as Track Inspector on Gang 5279, at Lexington, Nebraska you allegedly paid yourself for time not worked on October 25, 2008, and October 29, 2008.

These allegations, if substantiated, would constitute a violation of Rule 1.6 (Conduct), as contained in the General Code of Operating Rules, effective April 3, 2005. Please be advised that if you are found to be in violation of this alleged charge, the discipline assessment may be a Level 5, and under the Carrier's UPGRADE Discipline Policy may result in a permanent dismissal.

The Organization submits that the way in which the charge was stated, it could not be determined how Claimant allegedly failed to accurately report his time and therefore was in violation of Rule 48, Paragraph (c) which requires Carrier to apprise the charged employee of the precise nature of the charge(s). Additionally, the Organization asserts, Carrier compounded its violation of this Paragraph of the Rule by not providing it notice of the imprecisely stated charge sufficiently in advance of the time set for commencement of the hearing, thereby depriving it of the opportunity to prepare a proper defense. Paragraph (c) reads as follows:

Prior to the hearing, the employee alleged to be at fault will be apprised in writing of the precise nature of the charge(s) sufficiently in advance of the time set for the hearing to allow reasonable opportunity to secure a representative of his choice and the presence of necessary witnesses. The General Chairman will be furnished a copy of the charges preferred against an employee.

Based on the foregoing discussion of the procedural deficiencies associated with Carrier's handling of the disciplinary action taken against Claimant, the Organization submits that the discipline assessed Claimant cannot be permitted to stand.

As to the merits of the claim, the Organization asserts Carrier did not meet its required burden of proof to establish Claimant's guilt of the charge that he violated Rule 1.6 (Conduct). The Organization maintains that at the Investigation, Claimant provided a reasonable explanation with respect to his submission of pay for both dates in question,

October 25 and October 29, 2008. The Organization asserts that a thorough reading of the hearing transcript clearly shows that Claimant's claim for pay for those two (2) days was predicated on misinformation given to him by other people as to what he was entitled to claim and receive. The Organization opines that Claimant's misguided actions could have been addressed by Carrier not by dismissing him from service but rather by providing him with further education and training on the property.

Based on the foregoing argument asserted, the Organization requests the Board to sustain the instant claim in its entirety and to award the requested remedy.

CARRIER'S POSITION

Carrier denies the Organization's second procedural objection that Claimant was deprived of a fair and impartial hearing asserting the record evidence shows Claimant was afforded all requisite elements of due process which include being apprised in writing of the precise charges brought against him and the notice of investigation was presented sufficiently in advance of the hearing to afford a reasonable opportunity to prepare a defense. Claimant was afforded his right to Union representation, as well as the opportunity to testify in his own behalf, present witnesses in support of his claim and introduce any evidence that would advance his cause. Additionally, Claimant and his Organization representative were permitted to question and cross-examine all witnesses and to examine all written evidence presented. Given that Claimant was afforded all these requisite elements of due process, Carrier submits there is no reason to alter the discipline assessed predicated on this procedural objection raised by the Organization.

As to the first procedural objection raised that Claimant was prejudged by withholding him from service pending commencement of the investigation, Carrier asserts that Claimant's misconduct of submitting pay claims for work he did not perform equates to the felony act of theft, in that by so doing, it was deprived of his services and, in addition, it would have suffered a monetary loss for having to pay for services not provided. Carrier maintains that theft falls within the definition of serious and/or flagrant violations as that term is envisioned by Rule 48, Paragraph (o).

In contradiction to the Organization's position on the merits of the claim, Carrier maintains it provided the required quantum of proof in the form of "substantial evidence" as that term is universally understood among the Parties to show that Claimant acted in violation of GCOR Rule 1.6 (Conduct) when he submitted claim for pay for both October 25 and 29, 2008 for work he did not perform. The undisputed record evidence adduced at the investigation with respect to the pay claim submitted by Claimant for the three (3) hours of overtime associated with a call out revealed the claim was completely bogus as Claimant himself admitted when offered the overtime he declined to work the call out

PLB NO. 6302
AWARD NO. 178

the evening of October 25, 2008. Carrier maintains that Claimant's explanation he submitted the claim for overtime pay based on misinformation received by others as to what he was entitled to claim is not at all credible. Carrier asserts that Claimant's account that he performed eight (8) hours of service on October 29, 2008 by inspecting track is equally, if not more incredible than the account he offered in his defense of submitting a compensation claim for three (3) hours of call out pay. The Carrier submits that just on the basis alone that Claimant's hi-rail truck stood parked with a flat tire for the entire tour of duty on October 29th is sufficient evidence, in and of itself, to refute Claimant's account that he put air in the flat tire later that morning and performed the work of inspecting track from Mile Post 208 to Mile Post 282. In addition to his incredible account of having aired the flat tire, Claimant presented contradictory testimony regarding the location of the track he inspected with the location of the track he indicated he inspected on the FRA report. The Carrier submits it is particularly noteworthy that not one person who testified at the investigation testified they saw Claimant at work at any time during the eight (8) hour tour of duty on October 29th or that they had had any contact with him whatsoever.

With regard to the quantum of discipline assessed here of dismissal, Carrier reminds the Board that once substantial evidence is proffered to support the level of discipline assessed, the Board is without authority to alter that level unless the quantum of discipline in question is shown to be arbitrary, capricious, or an abuse of discretion. Carrier submits that stealing time is a serious offense and Boards have supported carriers by holding that even the occurrence of one (1) such offense of stealing is significant and sufficient enough to warrant dismissal even when the charged employee is a long-term employee which is not the case here. Carrier posits that it is not required to retain in its employ a person who would commit such dishonest behavior as committed here by Claimant and it cannot be said that its action of dismissing Claimant from service given the commission of such dishonest behavior can be deemed as being arbitrary, or capricious, or an abuse of managerial discretion.

Based on the foregoing argument asserted, Carrier urges the Board to deny the instant claim in its entirety.

FINDINGS

Public Law Board No. 6302, upon the whole record and all 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.

The Board concurs in the Carrier's position that neither of the procedural objections raised by the Organization have validity as applied to the subject circumstances. With

regard to the procedural objection that the charge leveled against Claimant was imprecise and was not conveyed sufficiently in advance of the time set for hearing, the Board is of the view there was nothing imprecise about the charge in light of the apparent misconduct engaged in by Claimant. At the time Carrier formulated the charge it had knowledge that there was "something" amiss pertaining to the claim for pay submitted by Claimant in connection with the dates of October 25 and October 29, 2008, and that, "something" was, a suspicion he had not performed work for the compensation he was requesting. Carrier succinctly captured this suspicion in the charge when it stated, "you allegedly paid yourself for time not worked on October 25, 2008 and October 29, 2008". The Board is simply at a loss to understand the Organization's position that this statement of the charge is imprecise. As to the second half of this objection that the charge was not conveyed sufficiently in advance of the time set for hearing, the Board references the fact that the investigation was postponed at the request of Claimant deferring commencement of the hearing from November 26, 2008 to December 8, 2008 thereby extending it for another twelve (12) days. Thus from the notice date of November 20, 2008 that the investigation was to convene on November 26, 2008 until its postponement to December 8, 2008, the Organization had a total of eighteen (18) days to prepare a case in Claimant's defense. This was sufficient time in advance of the hearing for the Organization to seek clarification of the charge if it really believed the charge against Claimant was imprecise to the degree that it was handicapped in preparing an adequate defense. Thus the Board concludes this procedural objection lacks any validity at all.

With regard to the procedural objection raised by the Organization that Carrier lacked contractual authority under the provision of Rule 48 (o) to withhold Claimant from service pending the holding of an investigation predicated on the assertion that Claimant's alleged misconduct did not rise to the level of a serious and/or flagrant rules violation, the Board is in full concurrence with the Carrier's position that Claimant's action of submitting claims for pay for work he never performed amounts to stealing both time and money and that such acts of theft do fall within the parameters of a serious and/or flagrant violation of the rules, here specifically, Rule 1.6 (Conduct). In so finding, Carrier was well within its contractual right in exercising its discretion pursuant to Rule 48 (o) to remove Claimant from service pending the holding of an investigation given the type of alleged misconduct that was suspected.

As to the merits, the Board considers the defense raised by the Organization relative to Claimant's claim for overtime pay in connection with the three (3) hour call out to border on the ludicrous. The Board knows of no situation in the railroad industry such as the situation under scrutiny here where an employee is led to believe or told by others, co-workers and supervisory personnel included, that it is contractually acceptable to claim pay for time not worked. While the Board acknowledges that Claimant has comparatively little service experience as a railroad employee, nevertheless, Claimant must have been aware simply by his own life experience that it is not possible to get something in return for nothing, or put another way as economist often conceptualize this proposition, "there is no such thing as a free lunch". The Board is not persuaded in

the least by the Organization's defense of Claimant that his claiming pay for the three (3) hour call out which he readily admits he did not work was a simple mistake on his part or that he made such claim for pay because he had been misled to do so by the advice he received from co-workers and/or supervisors alike. We are convinced instead that Claimant knew very well he was not entitled to pay for work he never performed and that his action to deceive Carrier to obtain the pay was very much a conscious decision on his part. Granting that Claimant is not altogether dense, it is just not believable that he thought being on the telephone with Gayman for a period of twenty (20) minutes regarding Gayman's request to call him out to work the evening of October 25, 2008 constituted a basis for claiming overtime pay for a minimum three (3) hour call out.

As to the pay of eight (8) hours straight-time Claimant claimed for having worked his regularly scheduled hours on October 29, 2008, the record evidence is rife of contradictions indicating Claimant's testimony regarding the circumstances surrounding this day of work did not represent at all the truth of the matter. According to eye-witness account proffered by MTM Foster, Claimant's hi-rail truck remained parked in the same location for the entire day and that at all times he observed the hi-rail truck, it had a flat rear tire. We find Claimant's account contrary to that of Foster's that at around Noon time he aired the tire and proceeded to drive the hi-rail truck to perform track inspection to be untruthful. We further find Claimant's explanation for the discrepancy in his testimony with what he reported on the FRA report he filed as to the direction he headed when inspecting the rail not to represent the truth of the matter. Furthermore, the record testimony revealed without contradiction, that Claimant falsified information he reported on the FRA reports he submitted for the dates of October 25 and 29, 2008.

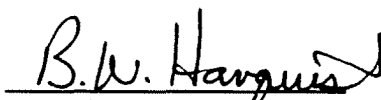
AWARD NO. 178


We concur wholeheartedly with Carrier's view that Claimant, by his actions of claiming pay he was not entitled to receive, can no longer be deemed a trusted employee and that once the bond of trust between employer and employee is broken which is central and essential to the employment relationship, it can never be repaired. Therefore we find that Carrier, having presented substantial evidence Claimant violated GCOR Rule 1.6 (Conduct) by his commission of theft of time and attempted theft of money, warranted the Level 5 discipline assessed Claimant of dismissal from service even for this first time offense.

AWARD

Claim Denied


George Edward Larney
Neutral Member & Chairman


B. W. Hanquist
Carrier Member


T. W. Kreke
Employee Member

Chicago, Illinois

Date 10/25/10