

Public Law Board No. 7048

PARTIES) **Brotherhood of Maintenance of Way Employees Division**
) **ATSFF System Federation**
TO)
) **and**
DISPUTE:)
)
) **BNSF Railway Company**

Board Members

Jeanne M. Vonhof, Chairman and Neutral Member
Michelle McBride, Carrier Member
Jeffery Fry, Employee Member

Statement of Claim:

“We present the following claim on behalf of Alton Fuller (1779800), Seniority date August 25, 2008, 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 March 04, 2022, continuing forward and/or otherwise made whole. All notations of the dismissal should be removed from all Carrier records.”

Findings

Public Law Board No. 7048, 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; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance with the Agreement that established the Board. The Board shall not have jurisdiction of disputes growing out of requests for changes in rates of pay, rules, or working conditions, nor have authority to change existing agreements or to establish new rules. The Board shall have jurisdiction over the disputes assigned to this Board and such other disputes as may be added during the life of the Board by mutual assent of the parties.

The Claimant, Alton Fuller, has worked for the Carrier for 14 years. An investigation was held on February 3, 2022 concerning allegations that the Claimant had falsified overtime for time not worked; had charged the Company for a hotel room on dates when he traveled home; and had exceeded the maximum allowable mileage on a Company vehicle, on multiple dates beginning November 1, 2021. By notice dated March 4, 2022 the Claimant was notified that the Carrier concluded that the testimony and exhibits brought forth during the investigation established that the Claimant was in violation of MWOR 1.6 Conduct, as well as EI 21.4.2 Changing or Cancelling Reservations, EI 15.2 Policies Unique to Engineering Employees and VPR 1.0 Company Policy Corporate Vehicle. The Claimant was dismissed.

The record shows the Claimant using a Company vehicle to travel to his home on multiple dates during the period in question. The Company introduced Engineering Instructions saying that Company vehicles may not be used to travel to and from home, if it is more than 30 miles away from their headquarters or worksite, without approval from the General Director Maintenance. The supervisor testified that he gave the Claimant permission on one occasion in August of 2021 to use a Company vehicle to travel home, but that it was not a continuing authorization.

The record also shows the Claimant claiming overtime on multiple dates during this period. He testified that he was required by Management to report his timekeeping at the end of the day, which required about 45 minutes of daily overtime work, and that he also performed other tasks required by his position on overtime. He said that he only claimed overtime pay for time when he was working for the Company. The record shows that he claimed overtime for work he says he performed in hotel rooms before driving home; while driving home; and after he arrived at home.

The Claimant was also charged with using a hotel room on multiple nights when he went home to sleep. He said that he performed administrative tasks in the hotel rooms, both before and after the shift began, such as doing the timekeeping; ordering materials; ordering equipment; making sure track authorities were removed out of the system; following up with the defect list; and assisting with other gangs. On one night when he went home to sleep and had two hotel rooms charged to the Company, he said he thought he had reserved one for another employee on that date.

The Organization argues that there were serious procedural defects which call for this claim to be sustained. First, according to the Organization, the notice of dismissal was untimely because

it was received by the Claimant more than 30 days after the investigation. Under Rule 13 of the CBA a decision must be rendered within 30 days. Here the decision is dated March 4, 2022, but the Organization argues that he did not receive it until March 7, or two days outside of the 30-day period. Placing the decision into the mail by the deadline date is sufficient to meet the deadline for “rendering the award.” See, NRAB Third Division Aw. 10254. Therefore, this claim will not be sustained on this basis.

The Organization also argues that the Hearing Officer engaged in conduct that was clearly neither fair nor impartial. The Organization contends that the Hearing Officer badgered the Claimant, and permitted the Carrier’s witness to first introduce documents, and to show only later how they were related to the Claimant. The Organization argues further that there was evidence of collusion when the Hearing Officer recalled a witness who introduced additional documents. The Organization also contends that the Hearing Officer’s notes in preparation for the hearing, which were mistakenly attached to the transcript of the hearing when it was sent to the Organization, demonstrate foreknowledge of what documents would be introduced by the Carrier.

The Board concludes that these objections do not provide substantial evidence that the Hearing Officer was biased or failed to conduct a fair and impartial hearing. The notes the Hearing Officer prepared for the hearing were typical notes a Hearing Officer would prepare for a hearing and the only unusual fact is that they were accidentally attached to the transcript. There is also no convincing evidence of coaching or collusion in the Hearing Officer’s recall of the Carrier’s witness. As for the questioning of the Claimant, the Board cannot conclude, based upon a review of the transcript, that the Hearing Officer badgered the Claimant improperly. He did sometimes have to repeat questions that the Claimant either asked him to repeat or initially did not answer, but that is not out of the ordinary for an investigation, and the record does not show that he badgered the witness. Therefore, based on this record, the Organization has not shown that there were procedural problems that would require that the claim be sustained on these grounds.

The Board concludes that the Carrier has demonstrated by substantial evidence that the Claimant acted dishonestly. The Engineering Instructions state that “craft employees will not use Company vehicles to commute between their home and jobsite/headquarters when the one-way distance is more than 30 miles,” with exceptions to the policy allowed if they are approved by the General Director Maintenance (GDM). The Claimant has not provided convincing evidence that he was given an open-ended authorization to use the Company vehicle as he did, driving back and forth from his home to the worksite day after day, a distance of far more than 30 miles. Claimant’s supervisor testified that he provided authorization for a single instance of such use. Claimant’s co-workers who allegedly viewed the granting of this authorization did not testify or provide their own statements saying they concluded that the authorization was open-ended.

The Organization suggests that employees are not required to know or follow the Engineering Instructions. However, the Claimant testified that he carries them with him, and consults them daily for information to perform his job. Furthermore, employees are expected to know and follow the Carrier’s rules and policies, especially in cases where their actions will result in additional pay or benefits to the employee.

The Claimant claimed continuous overtime on multiple dates for the time he spent driving home in a Company vehicle after the end of his shift, and then also commonly charged overtime for 45 minutes to an hour after he arrived home. He testified that for all of that time he was performing work-related tasks such as completing daily time records required by his supervisor, as well as other tasks described above. However, he also said that he spent much of the time at the hotel performing such tasks, after he returned with the crew to the hotel. He could not recall any specific tasks at any certain time that would have accounted for so much overtime. He was not able to present any other evidence that he was conducting Company business continuously during those hours, especially for the many hours he charged as overtime when he was driving home from the hotel on multiple days. He acknowledged that he could not claim overtime for the time spent simply in driving home.

Finally, the Claimant contends that he did not violate Company policies when he reserved hotel rooms for multiple nights when he returned home to sleep. The Engineering Instructions require employees to cancel a hotel reservation if they are not going to “require a room.” The Carrier contends that hotel rooms are to be used for sleeping when the employee are required to be away from home for Company business. The Claimant contends that he used the hotel rooms during the day to conduct Company business. Even if the Claimant was not permitted to use the hotel rooms in this way, it does not appear that the Claimant benefitted personally or financially from this arrangement. Therefore, while there may be negligence involved from the Claimant using a hotel room only during the day or failing to cancel reservations made in his name, the Board finds that this conduct is not clearly a violation of Rule 1.6 Dishonesty, as there is not substantial proof of “gaming the system” or intending to defraud the Carrier for his personal benefit.

Nevertheless, there is sufficient evidence that the Claimant did engage in dishonest conduct for his own benefit with regard to the use of the Company vehicle and unearned overtime pay on multiple dates. Under the circumstances, the Board cannot conclude that the penalty of dismissal is excessive for such conduct.

AWARD

Claim denied.

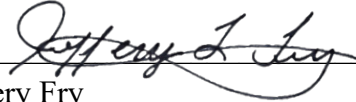
Signature 

Jeanne M. Vonhof
Neutral Member and Chairperson



Michelle D. McBride

Carrier Member



Jeffery Fry

Employee Member

Date of Award August 28, 2024