

PUBLIC LAW BOARD NO. 7633

Parties to Dispute:

Brotherhood of Maintenance of Way Employees)

Division – IBT Rail Conference)

and)

Union Pacific Railroad Company (former)

Missouri Pacific Railroad Company))

Award No. 187

Statement of Claim: Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. A. McHaffie, by letter dated September 2, 2020, for the alleged June 28, 2020 violation of Rules 1.6: Conduct–Dishonest; Item 10-I: Union Pacific Railroad Policies – Statement of Policy on Ethics and Business Conduct –Critical and Rule 1.6 Conduct–which stipulates any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated was exceedingly harsh, imposed without the Carrier having met its burden of proof and in violation of the Agreement (System File UP210KM20D /1744723 MPR).
2. As a consequence of the violation referred to in Part 1 above, the Organization requests that Claimant A. McHaffie:

‘***be allowed to return to work on the position he was assigned to at the time of his removal from service with all seniority rights restored.

Thereby, we again request the Claimant shall be made whole for all financial loses (sic) as a result of the Carrier's violation of Rule 22, including compensation for the straight time for each regular workday lost and holiday pay for each holiday lost. This is to be paid at the rate of position assigned to the Claimant at the time of removal of service. This amount is not to be reduced by earnings from alternate employment, obtained by the Claimant while wrongfully removed from service. This should also include any general lump sum payment or retroactive general wage increase provided in any applicable agreement that becomes effective while Claimant was out of service. Any overtime needs to be included for the lost

overtime opportunities for any position the Claimant could have held during the time he was removed from service, or on overtime paid to any junior employee for work the Claimant could have bid on and performed had he not been removed from service. Any health, dental and vision care insurance premiums, deductibles, and copays that he would not have paid had he not been unjustly removed from service.

In short, we herein make the demand that the Claimant be made “whole” for any and all losses related to his dismissal from service.

It is hereby stated that Mr. McHaffie be fully exonerated, and all notations of the dismissal be removed from all Carrier records.’ (Employees’ Exhibit ‘A-2’).”

Findings

Public Law Board No. 7633, upon the whole record and all the evidence, finds the parties involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934; the Board has jurisdiction of the dispute herein; and the parties were given due notice of hearing and participated.

Claimant was serving as a Relief Operator on the Jackson Tamper. He had nine years of service with the Carrier. The Claimant was dismissed via letter dated September 2, 2020, stating,

“On 06/28/2020, while employed as a M/O (Ats) Tamper, you were dishonest when you falsely claimed payroll hours in excess of what you actually worked in an attempt to gain additional payroll. This allowed you to receive pay that you were otherwise not entitled to. This is a violation of the following rule(s) and/or policy:

1.6: Conduct – Dishonest

Item 10-I: Union Pacific Railroad Policies - Statement of Policy on Ethics and Business Conduct – Critical”

The Organization appealed the discipline and the Carrier denied the appeal. The parties were otherwise unable to resolve the dispute and this matter is now pending before the Board for a final and binding resolution.

On August 4, 2020, Manager Thorne went to meet with members of Gang 9140 at about 3:00 in the afternoon. He could not locate the crew and contacted the Employee in Charge, for Gang 9140, EIC Kellerman. Kellerman explained that the gang left early August after twice working late relocating to a different worksite earlier during the payroll period. The Claimant admitted in his evidence that he and the other members of the Gang left early on August 4.

Thorne investigated, reviewing documentary evidence such as truck usage and track authorization. Thorne agreed that, according to the documents he reviewed in this matter, the Claimant worked 2 hours of overtime on July 31st and 2 hours on August 3rd. The payroll was put in by EIC Kellerman and no overtime claim was entered. The Claimant worked four overtime

hours over these two days, for which he was not paid, which equates to 6 straight time hours. On August 4, the Claimant worked about 4.3 hours but his payroll was entered by Kellerman as a normal 10-hour shift. Based on this evidence Thorne agreed that, with the offset of OT hours and the short shift straight time hours, McHaffie did not gain any additional monies over what he was entitled to.

On August 4, the Claimant testified that as usual, he followed the direction of Kellerman, and the instruction was to come in early to try to get ahead of the tie gang. The Claimant had only worked on the Gang 9140 for eight days when he was removed from service. He was new and said he did whatever the EIC told him to do. He testified that he did not deal with Manager Thorne and that the EIC is considered the boss on this Gang 9140, and on the tie gang where he often worked.

The Claimant did not enter his hours of work into the payroll. He was not able to review his payroll because he was new and worked so few days before being taken out of service. The Claimant testified that he was not near a depot during this period and his phone was unable to access the payroll records.

The Claimant testified that Kellerman told the gang they were trading out overtime for straight time. The Claimant testified that on other gangs, EIC's change starting and stopping times. According to the Claimant, the times of the starting and stopping of shifts are not set in stone, and the EICs tell the gang when and where to report to work and when to stop work. The Claimant was not concerned about leaving early because, in his experience, adjustments to shifts happen all the time. When the work is done and there is nothing else to do, the men are sent home. It was his view that the focus is getting the job done, and if that required overtime, they worked overtime hours, and if the job was done early, they were sent home. In his understanding, there was a practice of trading working late some days on overtime and then being released early if the job was done on other days, which he said he had seen on other gangs as well.

Manager Thorne testified that it was not the practice on his gangs to trade overtime for straight time hours during his time there. He said that all overtime had to be authorized by him.

Kellerman testified that he is the timekeeper and reports the time. He also testified that he was told multiple times by his Manager that the gang was not to have any overtime. Therefore, they have been trading overtime for straight time as a practice. He made the decisions on start and stop times in order to get the jobs done. Coming in early helped them work around other gangs vying for track time.

The Carrier argues that the Organization's arguments regarding procedural matters are not a basis for sustaining the claim. If documents are not produced before the hearing, the hearing may be recessed, if necessary to handle document issues. On the merits, the Carrier argues that there is substantial proof that the Claimant violated the Rule 1.6 and the Carrier's ethics policy. He knew that he was not entitled to collect pay for work not performed. Claiming compensation for time not worked is deception. An EIC may not give employees the authorization to change schedules without approval from a manager. The Manager here denied that there was a practice of trading overtime hours for straight time. Although he was fine with the crew leaving a short time early on one day, in this case he found them leaving more than six hours early.

The Organization contends that the Claimant was denied his contractual right to a fair and impartial hearing under Rule 22. The Organization argues that the charges against the Claimant were vague in that they specified a date range of June 28 to August 4, 2020, but he did not begin working on Gang 9140 until July 24 and the only real date in question is August 4, 2020. In addition, charges based upon Item 10-I have been found to be impermissibly vague.

The Organization contends further that the Carrier preconceived that the Claimant was guilty when it sent the letter of investigation and removed the Claimant from service on August 11, 2020. Manager Thorne never discussed the incidents here with the Claimant prior to removing him from service. The Organization further contends that the Carrier failed to provide the Organization with evidence prior to the investigation, which was especially important in this case because the Organization was deprived of the opportunity to clarify the Carrier's otherwise vague and improper charge.

On the merits, the Organization argues that in cases charging an employee with dishonesty, there is a high standard of proof required, and that the Carrier must show by clear and convincing evidence that Claimant McHaffie was acting in a way that was intentionally dishonest and stealing from the Carrier. In similar cases, arbitration boards have held that the Carrier must prove that the employee intended to defraud the Carrier or "game the system." The Claimant did not make the decisions regarding when to start and end the workday. They were made by the EIC Foreman. In addition, documents regarding track authority, truck running times and other production records do not necessarily demonstrate working time, as the crew has other responsibilities not reflected in these records.

In addition, the Organization argues that there is substantial evidence that there is a long-standing practice of trading overtime hours for straight time hours. The records are very clear that the Claimant, who only worked on this gang for eight days, worked at least four hours' overtime for which he was not paid overtime pay. Therefore, the evidence showing that he took six hours off at the straight time rate show that he did not claim or collect any pay in excess of what he was due for the hours worked. In addition, there is a practice of releasing crews when there is no longer track authority available. The Carrier has failed to meet its burden of proof and, even if there were proof of a violation, the penalty is harsh and excessive.

The Carrier argues that the charges are sufficiently precise. The documents relied upon by the Carrier demonstrate that the Claimant was claiming pay for hours not worked. The Organization's other procedural claims are not valid. The Claimant received a fair hearing.

This Board concludes that the Organization's procedural arguments are not sufficiently compelling to sustain the claim on this basis. Turning to the merits, the Board concludes that generally, employees are expected to ensure that they are paid only for the hours they work. The Carrier argues reasonably that each employee bears responsibility for the accurate reporting of their hours and pay records.

However, the Carrier has not established by substantial evidence that the Claimant participated in this pay procedure with the clear intent of defrauding the Carrier, or that dismissal

would be appropriate under Rule 1.6. The Claimant only worked on Gang 9140 for eight (8) days and followed the directions of EIC Foreman Kellerman regarding the practices at this location. In the absence of Manager Thorne, Kellerman routinely determined when the crew started work; the location at which they worked; where they tied up at night; and when they left work. The Claimant was directed by Kellerman to start early or work late on certain days, outside of his scheduled work hours, and then to leave early on other days, trading overtime pay for a reduction in straight time hours. The Claimant never entered any production records or time records for himself or anyone else on the crew.

The Claimant has worked for the Carrier for over nine (9) years and there is no evidence that he has ever engaged in dishonest conduct. The Carrier has charged the Claimant with falsely claiming pay for hours not worked. The Claimant believed that there was a practice of trading overtime hours for straight time, as he testified he had seen on other gangs, and as directed by the EIC in the short time he worked there. Therefore, there is not substantial evidence that he had the requisite intent to defraud the Carrier by accepting pay for time not worked.

The Board concludes that the Claimant did not engage in dishonesty so as to merit a dismissal under GCOR Rule 1.6. Such a penalty would be harsh and excessive for an employee who only worked on this Gang for eight days and was following the instructions of the EIC Foreman. However, employees must be very careful in ensuring that their hours are reported accurately and paid properly. Therefore, Claimant's dismissal shall be reduced to a "Conference" in the MAPS system, and he shall be reinstated and made whole for all losses resulting from his dismissal.

AWARD

Claim is sustained according to the Findings. The Claimant shall be reinstated with full seniority and made whole for all losses resulting from his dismissal. The dismissal shall be reduced to a "Conference" under the Carrier's disciplinary system. The Carrier is directed to comply with this Award within 30 days of the date that any two members of the Board affix their signature to the Award.

Signature 

Jeanne M. Vonhof
Neutral Member



John Schlismann
Employee Member
Date: November 22, 2023



Chris Bogenreif
Carrier Member
Date: 11/27/2023