

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. 188

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

1. The Carrier's discipline (dismissal) of Mr. T. Kellerman, by letter dated September 8, 2020, for an alleged violation of Rules 1.6: Conduct–Dishonest; Item 10-I: Union Pacific Railroad Policies (Statement of Policy on Ethics and Business Conduct); The How Matters Policy and additionally 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 UP1000BF20/1744764 MPR).
2. As a consequence of the violation referred to in Part 1 above, the Organization requests that Claimant T. Kellerman:

‘***be made whole, return to work with all vacation and seniority rights unimpaired, that the charge and discipline issued in connection with these charges be removed from his personal record, that he be made whole for all time lost due to discipline issued in connection with these charges, and that he be reimbursed for any additional expenses, including those requested in the August 19, 2020 hearing, incurred that would have normally been covered by Carrier benefits. This is in account the Carrier violated Rule 22, of our Agreement.

* * *

“The claimant shall be made whole for all financial losses (sic) as a result of the alleged violation, including compensation for all wages lost, straight time and overtime, to be paid at the rate of position assigned at the time of removal of service, beginning with the day he was removed from service and ending with his retirement date. 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 became 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. Claimant be compensated for any and all losses related to the loss of fringe benefits that can result from dismissal from service, i.e., Health benefits for himself and his dependents, Dental benefits for himself and his dependents, Vision benefits for himself and his dependents, Vacation benefits, Personal Leave benefits and all other benefits not specifically enumerated herein that are collectively bargained for him as an employee of the Union Pacific Railroad and a member of the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters. Claimant to be reimbursed for all losses related to personal property that he has now which may be taken from him and his family because his income has been taken from him. Such losses can be his house, his car, his land and any other personal items that may be garnished from him for lack of income related to this dismissal.

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. Kellerman be fully exonerated, and all notations of the dismissal be removed from all Carrier records.’ (Employee’s 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.

The Claimant had nearly 12 years of service with the Carrier at the time of his dismissal. On September 9, 2020 he received a letter of dismissal, stating,

“Between the dates of June 30th and August 4th, while employed as a Tamper Operator, 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 possible violation of the following rule(s) and/or policy:

1.6: Conduct – Dishonest

SSI Item 10-I: Union Pacific Railroad Policies (Statement of Policy on Ethics and Business Conduct)The How Matters Policy”

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 find the crew and contacted EIC Kellerman to find out their location. Kellerman explained that the gang left early after working late relocating earlier in the work period; that they traded OT worked earlier for straight time off.

Kellerman testified that he is the timekeeper and reports the time for Gang 9140. He testified that he was told multiple times by Manager Thorne that the gang was not to have any overtime. Therefore, in Kellerman’s experience, 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, without charging overtime.

According to Kellerman, when he explained to Thorne that the Gang had left early on August 4, trading straight time off for overtime, Thorne did not say anything to him indicating that this was a problem, or admonish him in any way. Kellerman asked Thorne if Thorne wanted him to call “the boys back in?” Thorne said “no, just go home.” Kellerman explained the reasons for the two days of two hours of overtime each – both related to relocating the gang. He explained that the reason he chose to start early on August 4 was that he spoke with the foremen on the tie gangs and they told him that if he wanted to get around them, he was going to have to make an early start. Kellerman chose to do so, he said, for the benefit of the Carrier and in order not to waste the gang’s time.

Manager Thorne testified that it was not the practice on this gang to trade overtime and straight time hours, although he said he was aware of the practice. Kellerman testified that he talks to Thorne usually about once per “pay half.” Kellerman explained that he also works with other managers because he supports crossing gangs and tie gangs. Manager Thorne testified that Kellerman could reach out to Thorne if he needed a decision on something. He said that he expected Kellerman to reach out to him if he were changing start times, for example.

The Carrier argues that there is substantial proof that the Claimant violated the Rule 1.6 and the Carrier’s ethics policy. He admitted to collecting pay for hours he did not work. He knew that he was not entitled to collect pay for work not performed. Claiming compensation for time not worked is deception. The Manager here denied that there was a practice of trading overtime hours for straight time. The claim should be denied.

The Organization contends that serious procedural errors were made in this case, denying the Claimant his contractual right to a fair and impartial hearing under Rule 22. The Organization

argues first that the charges against the Claimant were vague in that they specified a date range of June 30 to August 4, 2020. The Carrier's burden is to show that the Claimant violated the rules on each of those days and has not done so. 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. 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 this action deprived the Organization 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. In cases similar to this case, arbitration boards have held that the Carrier must prove that the employee intended to defraud the Carrier or "game the system." 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.

The Organization argues that there is substantial evidence that Manager Thorne has very little contact with the Claimant's gang and there is a long-standing practice of trading overtime hours for straight time hours. The records are very clear that the Claimant worked at least four hours' overtime for which he was not paid overtime in the days preceding August 4, 2020. Therefore, the evidence showing that he took six hours at the straight time rate on August 4 does not demonstrate that he claimed or collected any pay in excess of what he was due for the overtime hours already worked. Interactions with Manager Thorne on July 15 support the existence of the practice of trading hours, as well as his reactions on August 4. 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 Organization's arguments regarding procedural matters are not a basis for sustaining the claim. There is no requirement to produce documents before the hearing, which may be recessed, if necessary to address document issues on the merits.

The Board concludes that the Organization's procedural claims are not sufficiently strong to merit sustaining the claim. On the merits, the Organization relies primarily upon its argument that there was a practice of trading overtime hours for straight time hours, and therefore, the Claimant reasonably believed he had the authority to schedule his crew as he did on the dates in question. The evidence shows that Thorne was only present onsite on perhaps one day out of two weeks and though he talked to the Claimant as needed, he left the day-to-day operation of the Gang to the Claimant. The Claimant has been working under Manager Thorne for a period of about five years and said that he understood that Manager Thorne did not want employees to charge overtime. In his testimony, Manager Thorne supported this understanding of his view of charging overtime.

The Claimant stated further that he was able to accomplish that goal, and work around schedule conflicts with other gangs over track authority, by having his crew come in before their scheduled start time, on overtime, and then leave early to make up for the overtime. The record

shows that they also worked late, when they were changing locations. Claimant testified that “It’s something we have done before.” Other employees also testified about the existence of trading overtime pay for straight time hours off, on this and other gangs.

In addition, there is evidence that Thorne permitted employees to leave over an hour early on July 15, 2020, and allowed them to charge for their full 10 hours of work, because there was no more track time available on that the shift. When Thorne asked about the whereabouts of the crew on August 4, 2020 the Claimant readily told him that they had left early because they had worked overtime the previous several days. He did not try to hide what they were doing and reported that Thorne did not act surprised; did not tell the Claimant that that practice was prohibited or admonish him; and did not require the crew to return, although the Grievant offered to have them come back to work.

The Carrier bears the burden of proof in a dismissal action. In a case involving a charge of dishonesty, this is a substantial burden, because of the potential long-term effect on an employee’s career of a dishonesty charge. On this record the Carrier has not shown, by substantial evidence, that the Claimant was deliberately trying to defraud the Company so that his dismissal is appropriate under Rule 1.6. The evidence demonstrates that he was using scheduling changes in order to permit his gang to complete their work efficiently, around two major obstacles, the unavailability of overtime and the problem of obtaining track time. There is not evidence on this record that the Claimant was trying to “game the system,” or collect money for hours not worked. The Organization established that four (4) hours of overtime had been performed by the crew just a few days before August 4, which offset the six hours on August 4, if there was a policy of trading.

There is significant evidence that the Claimant believed that he had the authority to schedule the crew as he did, and trade overtime for straight time hours, based on doing it in the past. Nevertheless, employees have a responsibility to take great care in ensuring that they are paid accurately. The Claimant has an enhanced responsibility as an EIC for recording not only his hours but the hours of the entire crew. In addition, he sets their schedules. Under these circumstances, the Carrier has not met its burden to demonstrate that Claimant’s conduct rose to the level of deliberate dishonesty. However, his actions in this case were negligent, in not checking more closely with his Manager over his scheduling method. Therefore, the Claimant shall be reinstated, with full seniority and backpay, and his dismissal will be reduced to a MAPS 1 level, with a 12-month retention period for the discipline.

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 MAPS 1 under the Carrier's disciplinary system, with a twelve month retention period. 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