

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. 190

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

1. The Carrier's discipline (dismissal) of Mr. A. Hendricks, by letter dated September 8, 2020, for an alleged violation of Rules 1.6: Conduct–Dishonest; SSI Item 10-I: Union Pacific Railroad Policies – Statement of Policy on Ethics and Business Conduct; The How Matters Policy and additionally 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 UP211KM20D/1745840 MPR).
2. As a consequence of the violation referred to in Part 1 above, the Organization requests that Claimant A. Hendricks:

‘...be allowed to return to work with all vacation and seniority rights unimpaired, that the charge and discipline, issued per letter of September 8, 2020 from AVP Track Renewal & Construction, Jason Rea, resultant investigation held August 19, 2020, 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, account the Carrier violated Rule 22 of our Agreement.

* * *

The Claimant shall be made whole for all financial loses (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. The 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. The Claimant is 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. Hendricks 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 has been employed by the Carrier for nearly twenty-one years. He was notified of his dismissal by letter dated September 8, 2020, stating,

“Between the dates of June 30th and August 4th, while employed as a Ballast Regulator 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.

The Claimant was assigned to Gang 9140 in a ballast regulator operator position. His shift was noon to 22:00. He had nearly 21 years of service at the time of his dismissal.

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 EIC Kellerman, the EIC for Gang 9140, to find out where they were. Kellerman explained that the gang left early after working late relocating earlier in the work period. The Claimant admitted that he and the other members of the Gang left early on that day.

Manager Thorne investigated further. Thorne testified that, based on his review of records, he believed that there were other days the Claimant had not worked his full shift, and days on which the Claimant went to work early but had not worked the complete shift. Thorne testified that documentary evidence in the record, including truck usage and track authorization time, supports this conclusion.

The Claimant testified that he believed that trading overtime for straight time was an accepted practice in this area as the Manager did not want overtime. He further testified that he followed the direction of Kellerman and assumed that Kellerman and Thorne were in contact. The Claimant testified at the hearing that he never put his own hours into the payroll system; this was done by Kellerman or another Gang member. Documents from the Carrier system support that it was not Claimant who entered his work hours.

On July 15, Thorne was on site with Gang 9140 and learned from the Claimant that he had been driving a company truck back and forth to his lodgings more than an hour away. Claimant testified that he had been given permission to take the truck to his lodgings at the end of his shift to keep it safe from vandalism and was just continuing the practice. On July 15, Thorne explained to the Claimant that he could not take the truck to Ava because it was too far away and that there could be liability issues. The Claimant did not take the truck to Ava again after receiving that instruction from Thorne. Thorne also permitted the crew to leave early, without loss of pay on that day, because they did not have track authority and would not have it by the end of the shift. Thorne said that they needed his approval for these matters.

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.

With regard to the merits, the Carrier argues that the Manager testified clearly that there was not a practice of trading overtime for straight time hours at this location. There is no policy allowing the EIC to make these decisions. Employees are required to work the time for which they are being paid. In addition, every employee is required to review their own pay records for accuracy. The claim should be denied.

The Organization argues that the charges are not sufficiently precise, vaguely charging dishonest conduct over the course of 36 days. The Organization argues that it requested more detailed information about the conduct that was alleged to have violated the rules, but that it was not provided before the hearing.

The Organization argues that the Carrier must show by clear and convincing evidence that the Claimant was acting in a way that was intentionally dishonest and stealing from the Carrier. The Organization argues that the evidence shows that there was a practice at this location of trading overtime pay for straight time hours.

The Organization argues further that the track authority documents introduced by the Carrier do not necessarily demonstrate that the employees were not working when they did not have track authority. The same is true for the vehicle information.

The Organization argues that the Claimant was told by EIC Kellerman when to come to work and when to leave. The Claimant did not put in his own time records and he believed that Kellerman's actions were authorized by Management, either explicitly or implicitly. The Claimant actually received less pay than he was due, because he worked certain hours outside of his schedule, for which he was not paid overtime. The crew came in early to obtain track authority, vying among other crews also trying to obtain track authority. The Manager wanted the work done, without overtime pay. The Organization argues that the Claimant has 21 years with the Carrier, and that the penalty was excessive.

This Board concludes that the Organization's procedural arguments are not sufficient to require sustaining the claim. Turning to the merits, the Board concludes that generally, employees are expected to work the hours that they are scheduled and to make sure 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, there is not 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. His open and honest interaction with Manager Thorne when he was told not to drive the Carrier's vehicle to his lodging more than an hour away from the worksite – as well as Thorne's failure to discipline him at that time -- supports this conclusion. In addition, Manager Thorne permitted the crew to leave early on that day, while approving a full 10-hour day's pay for them.

Furthermore, the Claimant 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. He was following the direction of the EIC.

The Claimant has worked for the Carrier for over 20 years and there is no evidence that he has ever engaged in dishonest conduct. The Board concludes that each employee must ensure that his payroll records are accurate. However, there is not substantial evidence on this record that he engaged in deliberate dishonesty, or accepted pay for hours not worked, so as to merit a dismissal under GCOR Rule 1.6. The Claimant shall be reinstated and made whole for his losses resulting from his dismissal and his dismissal shall be reduced to a "Conference" level.

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