

Public Law Board No. 7633

PARTIES) **Brotherhood of Maintenance of Way Employees Division**
) **IBT Rail Conference-**
TO)
) **and**
DISPUTE)
)
) **Union Pacific Railroad Company (former Missouri Pacific**
) **Railroad Company)**

Board Members:

Jeanne M. Vonhof, Chairman and Neutral Member
Chris Bogenreif, Carrier Member
John Schlismann, Employee Member

STATEMENT OF CLAIM: “Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) of Mr. G. Robinson, by letter dated July 27, 2021, for an alleged violation of Rule 1.6: Conduct – Dishonest; Rule 1.13: Reporting and Complying with Instructions; Item 10-I: Union Pacific Railroad Policies – Statement of Policy on Ethics and Business and Conduct – Critical; 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 UP206KM21D/1763054 MPR).
2. As a consequence of the violation referred to in Part 1 above, the Claimant G. Robinson shall now be returned to work and:

‘... shall be made whole for all financial loses 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 each Claimant was removed from

service and ending with each Claimants (sic) retirement date. This amount is not to be reduced by earnings from alternate employment, obtained by each 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 each Claimant was out of service. Any overtime needs to be included for the lost overtime opportunities for any position each Claimant could have held during the time he was removed from service, or on overtime paid to any junior employee for work each Claimant could have bid on and performed had he not been removed from service. Each Claimant shall 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 Employes Division of the International Brotherhood of Teamsters. Each 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 each Claimant be made "whole" for any and all losses related to his dismissal from service.

It is hereby stated that Mr. Barbarick and Mr. Robinson be fully exonerated, and all notations of the dismissal be removed from all Carrier records.' (Employees' Exhibit 'A-2')."

Findings of the Board

The Board upon consideration of the entire record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended and that the Board has jurisdiction over this dispute.

The Claimant, Glenn Robinson, has worked for the Carrier since 1993. He was provided with notice that he was being investigated to determine his responsibility for allegedly leaving work prior to the end of his shift and falsifying payroll by claiming pay for time not worked on May 27, June 3 and June 7, 2021, while employed as a backhoe operator on the Jefferson City Subdivision. The investigation was held on July 8, 2021, and, via letter dated July 27, 2021, the Claimant was dismissed. The Carrier concluded from the evidence provided at the investigation that the Claimant was dishonest in his time reporting in violation of Rule 1.6 – Conduct – Dishonest; 1.13 Reporting and Complying with Instructions; and Item 10-I Union Pacific Railroad Policies – Statement of Policy on Ethics and Business and Conduct – Critical. Based on these violations and the violation of additional language in 1.6, the Carrier dismissed the Claimant from service.

The Claimant was working a shift from 0600 to 1430 or 1500 hours during this period. He was working with Foreman Vaughn Barbarick in an assigned Company vehicle. On May 27, 2021, Carrier Manager Lucas R. Eaton witnessed a live video feed at 1339 hours depicting Claimant and Barbarick entering Robinson's personal vehicle at the Jefferson City depot where they began the workday. Manager Ron Jaure returned to Jefferson City at 1417, and Eaton asked him to check for the Claimant and Barbarick. Jaure reported that their assigned Company truck was tied up at the headquarters location, and that neither employee was present. In addition, Robinson's personal vehicle was gone, which he had parked at the depot that morning. Jaure remained at the depot until after the end of the shift and reported that the Claimant and Barbarick did not return.

On June 2, 2021 Manager Eaton was reviewing payroll for his work group, and noticed that Claimant had claimed a full eight hours' pay for May 27, 2021. The Manager did not approve Claimant's payroll due to the discrepancy between the video footage and what Claimant had entered. However, the system automatically processed the payroll that the Claimant had submitted and he was paid for eight hours' work.

On June 3, 2021, at approximately 1336, Manager Eaton, who was not working in Jefferson City that day, again viewed a live video feed of the Jefferson City facility and witnessed Mr. Robinson and Mr. Barbarick enter Robinson's vehicle and leave the depot prior to end of their shift. Again, on June 7, 2021, at approximately 1339, Manager Eaton viewed a live video feed of Jefferson City and witnessed the Claimant and Barbarick get into Robinson's personal vehicle and leave before their shift was over. Payroll was reviewed on June 16, 2021, at which time it was found that Mr. Robinson had entered eight hours per day for June 3 and June 7, even though he was observed leaving prior to the end of the shift on both days. Manager Eaton provided the Claimant the opportunity to correct his time on June 16, 2021, by handing him his gang time reports, and Claimant advised him that the times entered were correct.

Manager Eaton testified that he had instructed both men on February 16, 2021 that they were to remain at work until the end of their shift, after finding them entering a personal vehicle

to leave work at 1347, before the end of their shift at 1430. He said that he reminded them again on May 4. He said that they were expected to begin and end their shift at the Jefferson City Depot each day.

When questioned by the Organization about why he did not act immediately on May 27, Manager Eaton testified that he questioned whether the incident on May 27, 2021, was simply an accident and said that he and his Director wanted to give the employees the chance to correct their time on their own. Under further questioning by the Organization, Manager Eaton testified that he was not trying to set the employees up for failure. He testified that he wanted to provide the Claimant with another opportunity to do the right thing, and so provided Claimant with the opportunity to correct entries on his gang time report. Eaton said he was following the Company's MAPS Policy by contacting a department head when he became aware of the gang time report discrepancies.

The Claimant and Mr. Barbarick testified during the investigation that after Barbarick, as Foreman, submitted their time for each of the three days, they continued to work, using Robinson's personal vehicle to travel to the worksites. On May 27 Robinson said that after Barbarick performed his end of shift duties at 1330, they were sitting around and then Barbarick asked him about a tag on a switch they had worked on earlier in the day and Robinson said that they better check the tag. They said that they got in Robinson's personal vehicle and traveled to the east side of the yard and removed an out-of-service tag on a switch which they had forgotten to remove. Robinson acknowledged that they probably finished up at about 1405, and that they were scheduled to end the shift at 1500 that day.

Additionally, Mr. Robinson testified that on June 3, they took his personal vehicle to put tools away in a building or shed about a block away from the depot. He said that it took them almost an hour because they had to restack some bars. On June 7 he said that they took his personal vehicle to remove a lock from a derail. He stated that he and Barbarick did not complete these tasks until 1430 on both of the June dates. They testified that they did not need any tools or PPE from their Company truck to perform these duties.

Robinson testified that they completed these tasks in his personal vehicle because it was easier to use his vehicle than the Company vehicle. He said that to use the Company vehicle they would have had to take it out of the depot and through the red zone. Robinson and Barbarick acknowledged that they did not inform any supervisor that they were going to use Robinson's personal vehicle to perform duties during the end of their workday; nor did they seek permission to do so. Both Robinson and Barbarick stated that they did not know they needed to seek permission to use a personal vehicle for these tasks.

The Organization argues that the Carrier failed to comply with Rule 22 and made fatal procedural errors in this case. Under Rule 22 (a) "each" employee is entitled to his own investigation, the Organization argues. Therefore, the Carrier committed a serious error here by combining the investigations of Mr. Robinson and Mr. Barbarick into one investigation.

When two employees participate jointly in the incidents giving rise to an investigation, a single investigation regarding the conduct of both employees has been conducted in the past and may provide a fair investigation. In this case, both employees participated fully in the three incidents, each leaving at the same time before the end of their shift in the same personal vehicle. Each Claimant received notice of the investigation and each Claimant was given a chance to fully participate at the investigation, including the opportunity to be represented by two representatives from the Organization; to ask questions of witnesses; and to make a statement at the investigation. Because each Claimant was granted a full and fair opportunity to present evidence and arguments in support of their claim, the Board cannot conclude that holding the investigation of both employees jointly compromised their rights under Rule 22 (a). The rule does not specifically call for separate investigations in such cases, and “each” Claimant here was provided with a full and fair investigation. Furthermore, the failure of the Hearing Officer to admit evidence that Mr. Eaton had conducted separate investigations in the past for two other employees involved in the same incident does not alter the Board’s conclusion on this issue, as the question before the Board in this claim is whether the procedure was fatally flawed as it was conducted for this Claimant.

According to the Organization, the Reviewing Officer also discussed the violations charged against the Claimant with the Charging Officer, and therefore, could not later review the charges in an unbiased manner. The Board does not conclude that the actions of the Reviewing Officer in this case demonstrate bias in his review of the charges. The rule violations charged against the Claimant are the violations usually charged for such misconduct, the claiming of pay for time not worked. Furthermore, for the reasons set forth below, the Board concludes that there was substantial evidence to substantiate the charges.

The Organization also argues that the Carrier fatally tainted the procedure by entering the Claimant’s disciplinary record at the investigation. The Carrier may not consider the Claimant’s past disciplinary record in order to decide whether the Claimant is guilty of conduct violating the Carrier’s rules in the case before the Hearing Officer. However, there is no evidence here that Management relied on the Claimant’s past record of unrelated offense to determine the Claimant’s guilt in this case. For the reasons set forth below, the Board concludes that there was substantial evidence to substantiate the charges. The Board concludes that there are no procedural issues that call for granting this claim on that basis.

On this record the Board concludes that the Carrier has demonstrated that there was substantial evidence supporting the violations. The evidence, including video evidence, demonstrates that Robinson and Barbarick returned to the depot about 50 minutes before the end of their shift on three occasions. They acknowledged that before the end of the shift on each of the three days Barbarick entered records claiming they had worked a full shift. They were then seen leaving the depot in Robinson’s personal vehicle, on each of the three dates. They had attempted to do so in February as well and were admonished not to leave early. On the May and June dates, they did not return to the depot at the end of their shift, as directed.

Robinson and Barbarick acknowledged there was nothing wrong with the Company vehicle on any of these three days. They provided no convincing reason why they would work most of the day in a reliable Company vehicle and then change to a personal vehicle to continue work for about an hour at the end of their shift on each of these three days, without access to the tools or PPE in the Company vehicle. They mentioned certain tasks they allegedly performed on these dates, but provided no documentation or other evidence to substantiate these claims. In addition, Robinson clearly admitted that on May 27 they ended their work and left nearly 55 minutes before the end of the shift.

On this record the Carrier has presented substantial evidence that the Claimant claimed pay for which he did not perform service for the Carrier on three occasions in the span of a month. Claiming pay for hours not worked is a serious violation of Rule 1.6 Conduct – Dishonest. In addition, Claimant violated Rule 1.13 Reporting and Complying with Instructions when he failed to follow directions to work the entire shift and end his work day at the depot. This conduct also violates the Company's ethics policy, as well as the portion of Rule 1.6 which states that hostility, misconduct and willful disregard which affects the interests of the Company provides grounds for dismissal.

According to the Organization, the Claimant would not have risked his long tenure with the Company to intentionally defraud the Company, and therefore, there is not sufficient evidence of intent here. However, the Board concludes that there is substantial evidence that the Claimant knowingly put in payroll claims for time he did not work. Employees know that they cannot claim pay for time not worked, and that to do so will be regarded as intentional fraud. Claimant was warned in February not to leave work early when he was found engaging in the same misconduct. The Company must rely upon its employees to provide accurate timekeeping, especially in locations where supervisors and managers are not present at all times. Honesty and trust are fundamental to the employment relationship. The Claimant has broken that trust with his repeated misconduct in this case, leaving early on three occasions after being warned not to do so. Under these circumstances, the Board concludes that the penalty of dismissal is not arbitrary or excessive.

Award

Claim denied.



Jeanne M. Vonhof
Neutral Board Member



John Schlismann
Employee Member



Chris Bogenreif
Carrier Member

Dated: July 11, 2024