

PUBLIC LAW BOARD NO. 7633

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
DIVISION – IBT RAIL CONFERENCE)
)
and)
)
UNION PACIFIC RAILROAD COMPANY (FORMER)
MISSOURI PACIFIC RAILROAD COMPANY))

STATEMENT OF CLAIM

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) of Mr. S. Viator, by letter dated June 21, 2023, for an alleged violation of Rule 1.6: Conduct – Dishonest; and additionally, Rule 1.6 Conduct which stipulates that 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 and 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 UP515KL23/1790545 MPR).
2. As a consequence of the violation referred to in Part 1 above, Claimant S. Viator shall now have these charges removed from his personal record and:

“*** be paid and compensated for any and all time at the Claimant’s respective straight time rate of pay, and all overtime to be paid at his respective overtime rate of pay that the gang he was assigned to was afforded and the employee performing the claimant’s work had he not been unjustly and excessively disciplined. Also, to include any and all holidays and all lost time to be credited to Railroad Retirement, hospitalization to included physician office visits etc. dental, prescriptions and vision beginning on May 10, 2023 through and including on a continuous basis until this matter is settled. Also, to include any and all expenses the Claimant may have acquired to include meals, lodging. And mileage at the negotiated rate of 64.5 cents “a mile from Mr. Viators place of residence for his attendance at this Formal

Investigation on June 06, 2023 account of the Carrier unjustly and excessively charged and disciplined the Claimant without sufficient supportive evidence and not affording him a Fair and Impartial Investigation, forcing him in a worse position, Causing him a loss of work opportunity loss of wages and causing him financial hardship.

* * *

The Organization request that in such time in which Mr. Viator be re-instated to service that he would not be subjected to any additional probation under the Union Pacific MAPS Policy Specifically Rule 3.7 Arbitration decision in which the carrier can revert employee status to a second triggering/training event with a 36-month retention period.

As a remedy for this violation, the suspension should be set aside, and the claimant shall be made whole for all financial and benefit losses because of the violation. Any benefit lost including vacation and health insurance benefits shall be restored. Restitution for financial losses because of the violation shall include all straight time pay, overtime pay, and loss of holiday pay for time Mr. Viator was held out of service and that Mr. Viator be returned to service.

* * *

In short, we herein make the demand that Mr. Viator be made “whole” for all losses related to his suspension from service. (Employees’ Exhibit ‘A-2’).”

FINDINGS

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction of the dispute herein, and that the parties to said dispute were given due notice of hearing in the matter and participated therein.

Stephen A. Viator (the Claimant), at the time of his dismissal, held the job of Work Equipment Mechanic with 22 years of service with the Carrier. By letter dated May 10, 2023, he was requested to report for a hearing on May 16, 2023, to develop the facts and determine his responsibility, if any, in connection with the following charge:

On 04/02/2023, at the location of 13.3 miles SE Pryor Creek, OK, at approximately 06:00 hours, while employed as a Work Equip Mech, you allegedly failed to return to Fort Worth to perform your duties as a work equipment mechanic by staying in the Pryor Creek, OK area. As well as allegedly claiming pay without any reason of being there and then returning to Fort Worth, Texas on 4/3/23. This is a possible violation of the following rule(s) and/or policy:

1.6: Conduct - Dishonest

The May 10 letter added, “Under the MAPS Policy, this violation is a Dismissal event. Based upon your current status, if you are found to be in violation of this alleged charge, Dismissal may result.” After a postponement, the hearing was held on June 6, 2023.

The Charging Officer, whose position is that of Manager of Maintenance of Way Equipment Operations, testified as follows in response to questions by the hearing officer. He supervises or works with the Claimant. After reviewing all facts from an inquiry he conducted he concluded that Claimant and a coworker were dishonest by falsifying nightly reports and entering payroll to receive compensation for April 2, 2023, while not performing any job-related duties as Work Equipment Mechanics. Both employees remained at an unknown location 13.3 miles southeast of Pryor, Oklahoma, and used a Union Pacific vehicle several times that day for unauthorized personal business. Their actions constituted lying, cheating, theft, and deception in violation of Rule 1.6: Conduct – Dishonest.

The Claimant’s driver log for April 2 [the Charging Officer’s testimony continued] shows that he was on duty, not driving, for 12 hours, at a location 13.3 miles southeast of Pryor Creek, Oklahoma, on April 2nd. The Claimant’s log for April 3, 2023, shows that both employees started their day at 0600 hours and went off duty at 18:00 hours, or 6:00 p.m., in River Oaks, Texas, which would be the Fort Worth shop. On March 31 they could not work due to bad weather and had a DOT day or paid rest day. The daily report for April 1 shows that they completed preventive maintenance on several hydraulic machines. There is no mention of travel on April 1 in their daily report. Their daily report for April 2 says travel back to Fort Worth from Hermann, Missouri. He would guess that it is a seven hours’ drive but does not know.

The Coworker’s Learning History [the Charging Officer’s testimony proceeded] shows that the Coworker passed the test on the content of *The How Matters for Agreement Professionals*. That documents lists as one of the “violations that require action,” “Falsification of records.” In the case of the Claimant and his Coworker, their nightly reports did not reflect their nightly work. For example, where their travel logs showed that they had traveled on a particular day, their nightly reports did not show this. They were deceptive, dishonest. Another example: *The How Matters* policy prohibits “Unethical actions that have a financial impact on a department or service unit.” The Claimant and the Coworker received a full day’s wages for April 2, 2023, on which they did not perform any work. They also used a company vehicle for personal use on April 2.

The Claimant’s manager, an Equipment Manager II, testified as follows in response to questions from the hearing officer. His investigation showed that a DOT day was taken on March 31st, and on

April 2nd another DOT was taken. But the log records stated that they were in Pryor Creek the whole time on April 2, so it couldn't be a DOT day. On May 1 he became aware that something may have occurred on April 2, and he began looking into it. He looked into it for a few days because he wanted to make sure, and on May 8, he presented the matter to the Charging Manager. On May 8, in the morning, he questioned the Claimant and the Coworker. Their story was a lot of back and forth and, in the end, they said that they were in Pryor Creek and did not want to come back to Fort Worth because they were afraid that he would put them to work at the shop. Asked whether both employees told him that, he said that the Claimant said that.

The Coworker, in response to questions from the hearing officer, testified as follows., He has been employed by Union Pacific for 19½ years. On April 2nd they did paperwork in Pryor Creek, Oklahoma. He also did some driving that day. He does not recall when he ended the day, but it was maybe 5:00 or 6:00 o'clock. He takes exception to a lot of the testimony before his own. A lot of it is not true. Based on the testimony and evidence that have been presented against him, he does not believe that he violated Rule 1.6: Conduct – Dishonest. On April 2, 2023, his time record shows that he was in Hermann, Missouri. He is the timekeeper on gang 1931. His driver's log for March 31, 2023, shows that they did not drive the truck for the entire day. His time record for April 1, 2023, shows that he was on duty from around 7:00 a.m. to 7:00 p.m. His log record for April 2nd shows that he was on duty from 7:00 a.m. to 7:00 p.m. and in Pryor Creek the whole day. His payroll record said that he was in Hermann, Missouri, on April 2, where there was work to be done. "I think that's a mistake there. Apparently, it's a plain mistake."

The reason for driving tie truck five times on April 2, in Pryor Creek, Oklahoma [the Coworker's testimony continued] is that they had some work to do there. He (the Coworker) cleaned the truck while the Claimant worked on paperwork because they didn't have any phone service, "no connections, no nothing." The Claimant transferred all of the filters and stuff off the little pieces of cheat sheets onto a ledger while he went out and cleaned the truck. The back of the truck was soaking wet from the storm they had. He cleaned all of that up, and they left. They went to the dumpster and dumped what they cleaned up in the trash. From the dumpster they went to a store to buy something to eat. There was nothing to eat there, so they went to a little market about ten minutes down the road and got something to eat. They took the food to their cabin. The Claimant suggested that they go look at a dam about a block from the cabin because of all of the rain that they had. They drove down to the dam, looked at the water on it, turned around, and came back to the cabin. He did not report to his boss that he was on a DOT day on April 2nd. In Pryor they stayed at the Claimant's cabin.

On April 1 [the Coworker's testimony proceeded] they completed their maintenance work on the machines in Hermann, Missouri. It was a full day's job. They had only ten or 12 minutes to get back to the motel before they ran out of time. He cannot remember what time he left Hermann, Missouri on April 1. The hearing officer asked the Coworker if he was aware that his payroll report showed that he was in one location (presumably Hermann, Missouri) and did no driving on April 1. The Claimant stated that he could not recall all of the details of his activities on April 1. The hearing officer asked the Coworker, "[D]o you understand why the Charging Manager, when you tell him you're in one location, but . . . all your records indicate that you're in another location, do you

understand how that can be seen as dishonest to him?” He answered, “Sure.” Asked whether he understood how his managers “could see this as deception,” he stated, “Yep.”

The Claimant testified as follows in response to questions from the hearing officer. He has been employed by Union Pacific for 22 years. On April 2nd his assignment was Work Equipment Mechanic. On April 2nd he started his day in Pryor Creek, Oklahoma, and went off duty that day at Pryor Creek, Oklahoma. He understands the rules or policy violation with which he has been charged. He does not take exception to the testimony presented at the hearing. He understands where the company is coming from in charging him with dishonesty. He understands where the Charging Officer is coming from with his charge of dishonesty.

In answers to questions from an Organization representative, the Claimant stated as follows. Pryor Creek, Oklahoma, is on his route to return home. He was never told, in relation to receiving his per diem, that he had to use a hotel room for his lodging. On April 2nd in Pryor Creek, Oklahoma, he went through his little pieces of cardboard on which he would write down all the information on the machines they had done on consolidated the information on a notepad. The Coworker went out and was cleaning up the truck. When that was done, they went down to the dumpster. They went to the store to see if they could get something to eat. The store didn’t have anything so they went elsewhere as the Claimant said. In Hermann, their group of four mechanics serviced almost 60 machines. After completing their work on the machines, he and the Claimant started their travel home. They made a layover in Pryor Creek, which is pretty close to the halfway mark back to Fort Worth.

In response to questioning from a second Organization representative, the Claimant was asked what his instructions were after he finished his work. He answered, “We didn’t really have – you know, we get done, be back in Fort Worth Monday.” Asked about the instructions to the other two crew members, he stated that they went home from Hermann. Asked what sort of debris they had in their truck, he testified that they had boxes, trash, and paper. The back of their truck leaked so badly during the storm, he explained, that the boxes they “pretty much melted to nothing.” It was, he stated, “just a big pile of mush.” In addition, he testified, they had trash bags full of stuff from doing their work.

In response to additional questions from the hearing officer, the Claimant testified as follows. He worked on equipment on April 1, and on that same day he was already en route back to Pryor Creek. He stated in a text message on Saturday, April 1, that he would be traveling back on Sunday, April 2nd. He is the timekeeper for his gang. It was pointed out to the Claimant that his time record stated that he was in Hermann, Missouri, from 3-29 to 4-2. The hearing officer then asked him, “But you weren’t in Hermann, Missouri?” He answered, “We do that all the time though. . . . It’s pretty much SOP. Yo go down to Rosenberg, you work all week in Rosenberg. Well, you still put Rosenberg. . . .” The Claimant testified that he was never told that he was not supposed to do that. “[I]t’s like we’re working in Hermann,” he stated, “so we put Hermann.”

The hearing officer asked the Claimant if it was not right, as the Coworker’s direct manager testified, that he told the manager that he didn’t want to go back because he knew that they would put him right back to work on the third. He answered, yes, “[a]nd the thing is . . . that the other two fellas

went home. Why aren't they sitting here with us?" He added, "[T]hey went home, so we thought, hell, they're going home, what's the rush for us to go back to Fort Worth?"

It is the position of the Carrier that the Claimant violated Rule 1.6: Conduct – Dishonest, a dismissal-level offense under the MAPS Policy, by claiming 12 hours' pay for work he admittedly did not perform on April 2, 2023. GPS and electronic logging devices logs, the Carrier asserts, show that the Claimant drove to Pryor Creek, Oklahoma, on April 1, 2023, and remained there on April 2, 2023, using the company vehicle for personal errands. The Carrier asserts that the Claimant was expected to return to Fort Worth, Texas, for work on April 2, 2023, from an out-of-state assignment, but, instead, remained in Pryor Creek, Oklahoma, without authorization. In his testimony, the Carrier asserts, the Claimant admits driving the company vehicle for non-work-related reasons. He also acknowledges, the Carrier states, that he may have made a mistake in his time reporting and understands how it could be seen as dishonest. The electronic logging device, the Carrier notes, specifically prompts the individual logging out to enter their end of shift time.

The Claimant, the Carrier argues, admitted being in Pryor Creek on April 2, when he was supposed to be in Fort Worth, Texas, and claiming pay for service not performed that day. He also admitted errors in reporting, the Carrier asserts, and expressed regret. It was dishonest, the Carrier contends, to claim pay for work-related travel from Hermann, Missouri, on April 2, when the logs and GPS data show that Claimant was in Pryor Creek, Oklahoma, on that date. The Claimant, the Carrier asserts, certified his own time entries as the designated timekeeper, directly contradicting the Organization's claim that he was not responsible for the payroll submission. In addition, the Carrier argues, text messages exchanged with a colleague further undermine the credibility of the Claimant's travel claims, as they suggest a planned travel day that never occurred. Claimant's knowing claim for time and per diem that he did not work, the Carrier contends, violated Rule 1.6: Conduct – Dishonest and warranted the discipline of dismissal, and it should not be disturbed by the Board.

The Organization first makes the procedural argument that the hearing was not timely convened and that Claimant was denied a fair and impartial hearing because the Carrier predetermined the Claimant's guilt and improperly expanded the charge against the Claimant. On the merits, the Organization contends that the Carrier has not met its burden of proof. The evidence, the Organization asserts, shows that the Claimant had no intent to lie, steal, or deceive the Carrier and did not believe that it would be a problem to take his time heading back to Fort Worth. The discipline imposed, the Organization contends, was arbitrary, disparate, and excessive. This is especially true in the present case, the Organization maintains, where no evidence of prior discipline is noted in the record. Simply taking one's time at a halfway point between two work locations, as was the case here, the Organization argues, while inefficient, does not rise to the level of intentional dishonesty.

Arbitration boards have consistently held, the Organization argues, that proof of dishonesty, because of the stigma attached to such conduct, requires a higher standard of proof, such as clear and convincing evidence. Although it is not in dispute that Claimant was instructed to report to the Missouri location for the assignment and to return from there to headquarters in Fort Worth, Texas, the Organization contends, there is unrefuted testimony in the record that there was no clear indication of

the specifics on return travel. In fact the other two work equipment mechanics in the gang, the Organization asserts, went home at the conclusion of the assignment. The first of the seven tests of just cause, the Organization argues, requires that there be communication to an employee beforehand that particular conduct may lead to dismissal in order to be able to dismiss the employee for such conduct. In the instant case, the Organization asserts, there can be no doubt that neither the Claimant nor his Coworker comprehended a possible disciplinary consequence of dismissal for taking their time traveling back to Fort Worth in the circumstances of the present case.

The Organization asserts that here the Carrier contends that the Claimant was intentionally dishonest. The evidence, by contrast, the Organization argues, shows that there was no such intention. Both the Claimant and the Coworker, the Organization notes, clearly testified that they had no intention to be dishonest. In addition, the Organization asserts, “Claimant’s actions on April 2, 2023, were aligned with routine procedures necessary for his role, such as ensuring the work truck was clean and documenting his work properly. A review of the record,” the Organization continues, “makes it clear that at no time did Claimant intend to be dishonest in the discharge of his duties.”

The Organization contends that the discipline imposed by the Carrier was arbitrary and unwarranted and must be overturned. A Board’s ability to review and overturn or reduce discipline imposed by a carrier, it asserts, has been widely reviewed and affirmed by this Board, citing Awards 14, 25, 26, 27, and 176 of PLB No. 7633. It argues that the Claimant’s dismissal was excessive and disproportionate discipline in light of his 22 years of service with the Carrier and the absence of any evidence in the record that he has received prior discipline. The Organization requests the Board to overturn Claimant’s dismissal and award its requested remedy.

In his closing statement, the Claimant stated that he can see where his manager was coming from on the charges. He continued, “I honestly didn’t intend it to be like that. We had finished our work. The other two fellas went home, so we went to my family’s place, cleaned out the truck, and put together all the paperwork that needed to be put together. And it wasn’t anything intentional, mischievous, or anything like that. I’m really, truly sorry that this. . . had to come to this . . . and I’m almost 61 years old. . . . I’d like to finish my career. . . .”

The Coworker, in his closing statement, noted that he was 62 years old. In eight months, he stated, he was going to call it quits. There was no fraud, he asserted. It “never crossed our mind that what we was doing was wrong,” he declared. Since the other two members of their crew went home, he stated, “we thought that. . well, these guys is gonna go home. We’re not going home, we’re just gonna take our own dear time to get back to Fort Worth. We never thought that we was gonna be picked apart like that. And that’s what happened, we – we just took our own dear time. . . .”

The Board notes, first, that the charge consists of two allegations. The first allegation is that the Claimant did not head back from Pryor Creek to Fort Worth, Texas, at 6:00 a.m. on April 2, 2023. The second allegation is that he improperly claimed pay for April 2, 2023. Had the Claimant and his Coworker left Pryor Creek at 6:00 a.m., they would, in the normal course, have arrived at their headquarters in Fort Worth no later than noon on the same day. This would have permitted them to

work in their shop for several hours that day. That is consistent with the explanation given to the Claimant's direct manager when he questioned them about why they remained in Pryor Creek on April 2 instead of returning to Fort Worth, namely, that they were afraid that he would put them to work in the shop if they came back on April 2. (Tr. 52).

In questioning the Claimant, the hearing officer mistakenly misquoted the Claimant's direct manager as testifying that the Claimant said that he didn't want to go back because he (the Claimant) knew that the manager would put him right back to work on the third. See the following question of the Claimant by the hearing officer and the Claimant's answer:

Q And (your direct manager) had said that you all told him that you didn't want to go back because you knew they'd put you right back to work on the third.

A. Well, yeah. (Tr. 78).

The direct manager's actual testimony on the point, however, was as follows:

Q [By hearing officer] And did you ever question the two charged, because they were on the payroll between the date of this occurrence and did you say May 6th, 7th, or something like that?

A Questioned them on May 8th, the morning-

Q On-

A -of the eighth.

Q On May 8th and-

A Correct.

Q -what was their story?

A It was a lot of back and forth for a little while, and then at the end, they were in Pryor Creek and did not want to come back to Fort Worth because they were afraid that I would put them to work at the shop. (Tr. 52)

The direct manager never mentions April 3rd. The direct manager was questioning the Claimant and his Coworker about the date of the incident, which was April 2, not April 3. What the Claimant told the direct manager was that he and his Coworker did not want to come back on April 2nd because they were afraid he would put them to work in the shop that day, April 2, not April 3, which was the next day on which they, in fact, did come back to Fort Worth and were put back to work in the shop.

In this Board's opinion the evidence does not establish that Claimant stayed over in Pryor Creek on April 2, 2023, in order to get unearned pay, which would have been an intentionally dishonest act deserving of dismissal. The evidence does not show that the Claimant or his Coworker stayed over in Pryor Creek to claim unearned pay. The evidence is more consistent with the Claimant's and his Coworker's own explanation, namely, that they wanted to delay their return to work, rather than they wanted to cheat the company out of unearned pay. In this connection the Board takes note of the Organization's argument that there is unrefuted testimony in the record that there was no clear indication of the specifics on return travel. Supporting this argument is the uncontradicted testimony of the Claimant that they were instructed to be back to work Monday, which would have been April 3, the day on which they actually returned. (Tr. 72) .

Also inconsistent with the contention that the Claimant was intentionally dishonest by claiming pay for work he did not perform on April 2nd is the fact the evidence shows that Claimant expended what appears to have been a substantial amount of time doing tasks that came within the scope of his job classification, namely, transferring various notations that he had made in the course of his duties on little sheets of paper into a ledger and helping his coworker move the boxes, trash, paper, and debris to a dumpster for disposal. Someone who is trying to cheat the company out of a day's pay does not make it a point to perform hours of work on that day that are part of his regular job duties. In the Board's opinion the substantial amount of work performed by Claimant on April 2, 2023, which was part of the regular duties of his job classification, is inconsistent with any allegation that Claimant was intentionally attempting to cheat the Carrier with regard to April 2.

The record nevertheless establishes by substantial evidence that in an effort to avoid returning to work for at least part of April 2, 2023, which would have been possible had they left Pryor Creek at their regular starting time of 6:00 a.m., the Claimant ended up claiming pay for work not performed on that day. This is so because it is highly doubtful that the amount of time spent by the Claimant in transferring notations into a ledger and assisting his coworker in disposing of trash and debris amounted to a full day's work as claimed. To that extent the Claimant's conduct was dishonest. Nevertheless the Claimant's primary motive in submitting his payroll claim for April 2 and his actions regarding his job between the time of the completion of his assignment on April 1 and his return to work mid-shift on April 3 was not to cheat the company but to avoid returning to work promptly after the completion of his assignment on April 1.

In light of the fact that the evidence in the record regarding when Claimant was required to return to work from his Hermann, Missouri, assignment is very ambiguous; that evidence in the record shows that the primary purpose of his actions was to delay his return to work and not to cheat the company out of unearned pay; and the fact that Claimant has 22 years of service with the Carrier and, so far as the record shows, no prior discipline, the Board is of the opinion that dismissal is not proper discipline in this case. See, for example, PLB No. 6302, Award No. 45 (Referee Martin H. Malin) (claimant guilty of dishonesty, but dismissal reduced to reinstatement without compensation based largely on 22 years of service and no record of prior discipline), PLB No. 7633, Award No. 25 (Referee I. B. Helburn) (dismissal for dishonesty reduced to reinstatement without compensation based largely on 9½ years of service with a clean record); PLB No. 7633, Award No. 14 (dismissal for safety

violation reduced to reinstatement without compensation based on claimant's 33 years of service and no more than four prior disciplinary cases during his tenure).

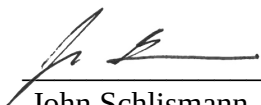
It is the determination of the Board that dismissal is excessive discipline in the circumstances of this case. The Claimant shall be offered reinstatement to his former position without loss of seniority for his time off work but no back pay. The Claimant shall have his health benefits and other benefits restored retroactively. The Carrier is entitled, upon request, to receive reimbursement from the Claimant for the difference between the hours of work and per diem, if any, that the Claimant was paid for April 2, 2023, and the amount of wages and per diem that he actually was entitled to based on the actual hours of work performed by the Claimant involving the duties of his job on that date. Reimbursement may be made by payroll deduction. Since, according to the evidence, Claimant has no active discipline under the MAPS Policy, he shall, upon reinstatement, be placed in MAPS Training 1 status with a retention period of 24 months.

A W A R D

Claim sustained in part. 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.

/s/ Sinclair Kossoff 12/19/2025
Sinclair Kossoff, Neutral Member Date

Chris Bogenreif 1/5/2026
Chris Bogenreif, Carrier Member Date

 1/5/2026
John Schlismann, Organization Member Date