PUBLIC LAW BOARD NO. 7633

Case No.: 39/Award No. 39
System File No.:UP307LF13/1595275 MPR
Claimant: R. Hickles

UNION PACIFIC RAILWAY COMPANY)
(Former Missouri Pacific Railroad)
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION)

Organization's Statement of Claim:

1. The Carrier's dismissal of Claimant R. Hickles, by letter dated October 15, 2013, in connection with allegations that he violated the UPRR Drug and Alcohol Policy and General Code of Operating Rule (GCOR), Rule 1.5, was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File UP307LF13/1595272 MPR).

2. As a consequence of the violation referred to in Part 1 above, the Carrier shall now return Claimant R. Hickles to service immediately and grant all other relief as contemplated under Rule 22(f).

Facts:

By a revised letter dated August 19, 2013, the Claimant was directed to attend an August 28, 2013 "investigation and hearing on charges that you allegedly tested positive for a prohibited substance (Alcohol) in a UPRR Random test. The test was administered to you in accordance with UPRR Drug and Alcohol Policy on August 12, 2013 at Corsicana, Texas, while you were working as a Restricted Tamper Operator." The letter further indicated that a proven violation would place the Claimant in violation of Rule 1.5 and subject him to Level 5 discipline under the Upgrade Policy. The Claimant was also informed that he was being withheld from service pending the results of the investigation. The investigation was postponed by mutual agreement until September 25, 2013.

Carrier Position:

The Carrier has shown with more than the required substantial evidence that the Claimant, returned to work after testing positive for cocaine in 2006, violated Rule 1.5 and the Drug and Alcohol Policy when he had Breath Alcohol Test (BAT) results of .075

and .070 respectively at 0505 and 0522 hours on August 12, 2013. Dr. Hayes' letter refutes the Organization's contention that the Claimant's Gastroesophageal Reflux caused him to reflux the Nyquil he was taking for flu-like symptoms. The absence of the odor of alcohol on the Claimant's breath or any signs of impairment do not negate the positive BAT results.

In light of the evidence of the Claimant's violation, the Board cannot overturn the permanent dismissal imposed by the Carrier. The safety of employees and the public must be paramount and the Claimant had been given a second chance. The case presents no procedural or due process defects. The Claimant received a fair and impartial hearing. The BAT was conducted in accordance with Department of Transportations (DOT) criteria and administered by a qualified technician.

Organization Position:

The Carrier has not proven the charges as there is no evidence that the Claimant consumed alcohol after reporting for duty or that he showed signs of impairment. Test results, obviously flawed, are insufficient to show proof of guilt absent any indications of impairment during the approximately 90 minutes between the time the Claimant reported for work and the administration of the test. The false positive BAT results are explained by the Claimant's use of Nyquil for cold and flu-like symptoms, possible elevated body temperature that can raise blood alcohol content readings, GERD, that can also raise readings and the fact that at the time the Claimant was out of his prescription medicine for GERD. Consequently that condition was not being controlled.

The Carrier did not comply with its own Drug and Alcohol Policy because the Claimant was not given breath and urine testing as were others tested that day. The Carrier failed to ensure that the BAT was done correctly or that follow-up testing was provided. The Claimant did not receive a fair and impartial hearing because the Carrier relied on evidence not provided at the investigation—that being a letter supposedly drafted by the individual who conducted the tests but who did not testify at the investigation.

Findings:

Rule 22(e) states in relevant part, "A decision based upon evidence presented at the investigation will be rendered in writing." The Board's responsibility is to determine whether the Carrier has provided substantial evidence at the investigation to prove the allegation and thus justify the imposition of discipline, Level 5 (permanent dismissal) in this case. The Board emphasizes "at the hearing" because the Carrier's submission includes two post-investigation documents: an undated but pre-December 30, 2013 document from Bill Kinard, who administered the BAT but did not testify, and a December 30, 2013 letter from Arthur C. Hayes, M.D. to Melissa Liberatore, RN, MRO-A of University Services, Philadelphia, PA. Both documents support the validity of the BAT results, but neither was available for consideration when the decision to impose permanent dismissal for a violation of Rule 1.5 was made.

A recap of the evidence available when the dismissal decision was made follows: an August 29, 2013 note from Dr. John Hetlinger stating that the Claimant had been diagnosed with GERD, "which has been shown to falsify breath ETOH testing" (Carrier's Exhibit A), articles stating that acid reflux, Nyquil and elevated body temperature may falsely elevate BAT results, Track Supervisor Mills' testimony that he was trained to detect signs of intoxication and that he did not observe the Claimant using alcohol on the job and did not smell alcohol on Claimant's breath or observe other signs of the influence of alcohol, and the positive results of the BAT. And, there was the Claimant's testimony about his GERD condition, his use of Nyquil for flu-like symptoms and his lack of prescription medication for GERD. Furthermore, the Organization's contention that of the five tested that morning, the Claimant was the only one who provided breathalyzer results but whose urine was not collected and tested, was neither denied nor explained by the Carrier. Because of the various possibilities that the BAT results were falsely inflated this is viewed as a particularly critical shortcoming.

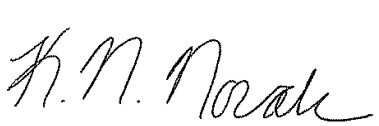
The Organization has asserted that had there been a urinalysis there would have been no discipline and no hearing. The Board notes that had the Claimant's urine been analyzed, there may have been no investigation because confirmation of the BAT results would have made obvious the justification for permanent dismissal. While the Board cannot say with absolute assurance that the BAT results were invalid, it can say that based on the evidence properly considered in accordance with Rule 22(e) and the absence of a blood draw, the Carrier has not provided substantial evidence of a violation of Rule 1.5.

Award:

Claim sustained.

Order:

The Board, having considered the dispute identified above, orders the following, to be affected within thirty (30) days of the date the award becomes final. The Claimant is to be reinstated in accordance with Rule 22(f). Upon reinstatement, he is to be evaluated by the Carrier's EAP and comply with any treatment plan that is found necessary.



Andrew Mulford, Organization Member

Katherine N. Novak, Carrier Member

I. B. Helburn, Neutral Referee

Austin, Texas
December 16, 2015

PUBLIC LAW BOARD NO. 7633
Interpretation of Award 39

Case No.: 85
System File No.: UP307LF13/1595275 (Int)
Claimant: R. Hickles

UNION PACIFIC RAILWAY COMPANY)
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION)

Facts:

By letter dated October 15, 2013, the Carrier dismissed Claimant Hickles, working then as a tamper operator, for alleged violation of the Carrier's Drug and Alcohol Policy and GCOR Rule 1.5. The resulting claim requested that the Claimant be returned "to service immediately" and be granted "all other relief as contemplated under Rule 22(f)" of the agreement between the parties. The claim was progressed on the property without resolution and advanced to arbitration. In Award No. 39, dated December 16, 2015, a majority of the Board sustained the claim and ordered that the Claimant "be reinstated in accordance with Rule 22(f)." Following additional on-property correspondence between the parties, it became clear that each party has a different interpretation of Rule 22(f), which is set forth below.

> If the charges against the employee are not sustained, the record of the employee will be cleared and if suspended or dismissed, the employee will be returned to his former position and reimbursed for any net loss of compensation incurred in connection therewith.

Specifically, the Organization asserts that the Claimant's reimbursement should include pay at the appropriate rate for overtime lost because of the dismissal, while the Carrier contends that overtime payments are not contemplated by Rule 22(f). These conflicting views of the intent of Rule 22(f) have been properly returned to this Board for an interpretation. The dispute was heard on February 8, 2018.

Organization Position:

With regard to overtime, the Organization notes that answers from four experienced Organization officials to a series of relevant questions show that "net loss" should include the payment of lost overtime. Special Board of Adjustment (SBA) No. 279, an on-property Board, in the interpretation of Award 281 and in Awards 400 and 445, establishes the inclusion of lost overtime as part of reimbursement. The neutral chair of the current Board, in eleven (11) recent

NRAB Third Division Awards and an interpretation of Public Law Board No. 7564, Award 11, all involving BNSF Railway Company and the Organization, ruled that "lost compensation" includes overtime hours at overtime pay.

The Organization also notes that if this Board finds in the Carrier's favor on the question of overtime, "it would be manifestly unjust for the Carrier to be permitted to reduce an employe's (sic) backpay calculation to merely lost straight time hours while tabulating their outside earnings using all hours worked."

Carrier Position:

The Carrier believes that Rule 22(f) is "vague and ambiguous" and must be deciphered by reference to "historical practice and arbitration precedent." The practice must be "predominate" but not "absolutely uniform." Claimant Hickles was reimbursed consistent with the long-standing practice on the property. SBA 279 Award 445 involved a dismissal claim in which overtime was requested as part of reimbursement, but only straight time was paid, according to the Carrier. PLB 6402 Award 10 concerned a dismissal claim sustained by the Board. The Organization requested compensation "for all wage loss suffered." The Claimant was asked to provide evidence of outside earnings, if any. That award and accompanying exhibits are silent with regard to reimbursement for lost overtime.

PLB 6402 Award 59 also confronted a dismissal claim requesting compensation "for all wage loss suffered." The claim was sustained, the Claimant's outside earnings were requested, overtime was not mentioned in the award or the instructions to the Claimant that followed. PLB 6402 Award 152 involved a claim "for all time lost" following a dismissal. The claim was sustained and the Carrier was ordered to reimburse the Claimant with "full back pay at the straight time rate of pay. . . ." PLB 6402 Award 168 concerned another dismissal claim, with the Organization requesting a remedy in accordance with Rule 21(f) of the Agreement." The claim was sustained and the Carrier was ordered to reinstate the Claimant "with full back pay at the straight time rate. . ." The Claimant was asked to supply evidence of any outside earnings he had received. The Carrier concludes, based on the above-noted awards, that it "has consistently and continuously calculated '**net loss of compensation incurred**' as only straight time hours of the position previously held by an employee less all reportable outside earnings."

Additional support for the Carrier's position is offered in the statements of two officers directly involved as members of an SBA or a PLB and two statements from Carrier officials involved with reimbursement determinations. All note that such determinations have not included lost overtime, characterized as speculative. Moreover, the Carrier points to three awards not involving the same parties. PLB 5579 Award 1 supports the deduction of outside earnings from make-whole pay. PLB 2439 Award 17 rejected the request to include overtime pay, characterizing overtime as speculative. NRAB Third Division Award 40852 also rejected inclusion of overtime in make-whole pay, again noting, at least in that case, performance of overtime was speculative. Finally, the Carrier proffers evidence showing that after Claimant Hickles was dismissed, his position expired and was never filled, rendering the calculation of overtime impossible. Its own evidence aside, the Carrier insists that the Organization has failed to meet its burden of proof. Improper calculations have not been shown. Statements from

Organization officers are from those not involved directly in the payment of sustained awards and, in one instance, the statement is inaccurate.

Findings:

It is important at the outset to note that this dispute is not about the deduction of outside earnings when make-whole pay is computed. The Organization has not asserted that the Carrier has no right to deduct outside straight time hourly earnings from make-whole compensation that is due to Claimants who have been dismissed or suspended and thereafter reinstated, had their records wiped clean of the discipline or had the original discipline replaced with lesser discipline. The Organization does assert that if the Carrier is allowed to exclude on-property missed overtime hours from make-whole compensation, the Carrier should not be allowed to deduct outside overtime earnings from make-whole pay. The Board does not extend this limited contention to the general question of consideration of straight-time outside earnings.

The primary consideration before this Board is whether "wage loss" as used in Rule 22(f) includes loss of on-property overtime hours. The Carrier correctly asserts that "wage loss" is an ambiguous phrase that can include and exclude on-property overtime hours that bring a premium hourly rate of pay. There are awards in the industry that exclude overtime hours, often characterized as speculative (see Third Division Award 40852 and PLB 2439 Award 17) and there are awards, including several authored by the neutral chair of this Board, that include missed overtime hours as part of make-whole pay in cases where dismissal and suspension claims have been fully or partially sustained. The Board believes that the interpretation of Rule 22(f) must be based on the on-property experience of the parties to this dispute. It is the on-property experience that illuminates the intent behind the contractual language.

On the surface, the evidence indicates both the inclusion and exclusion of overtime when considering make-whole pay, but the ultimate interpretation rests on this Board digging below the surface of the on-property evidence. In October 1987, SBA 279 Award 281 interpreted "hours lost" to include overtime at the straight-time rate, with no explanation for use of the straight-time rate rather than a time-and-a-half rate. In November 1989, SBA 279 Award 400 sustained a claim resulting from a thirty (30) day suspension, ordering that the Claimant "be made whole for any wage loss suffered, including any overtime. . . ." In August 1991, SBA 279 Award 445 sustained a dismissal claim and ordered make-whole pay for "this claim, as made." The claim requested pay for work days missed, "including holidays and any overtime that would have accrued. . ." but for the dismissal. The three awards and the interpretation were authored by neutral chair Arthur L. Van Wart.

The next award in evidence is PLB 6402 Award 10, authored by neutral chair Martin Malin over ten (10) years later in May 2002. That award sustained a dismissal claim and awarded compensation "for all wage loss suffered." That award did not mention overtime; thus the Board cannot conclude with certainty, based only on the award itself, whether overtime hours were included or excluded. PLB 6402 Award 43, authored in July 2005 by Referee Malin, also set aside a dismissal and again awarded compensation "for all wage loss suffered," with no mention of overtime.

Over five years later in November 2010, PLB 6402 Award 152 authored by neutral chair William R. Miller fully sustained a dismissal claim and awarded "full back pay at the straight time rate of pay." The most recent on-property award in evidence, issued in April 2012, PLB 6402 Award 168, again authored by Referee Miller, was said to involve Rule 21(f).[1] The Board set aside a dismissal, reinstated the Claimant and awarded "full back pay at the straight time rate of pay."

The awards themselves are not absolutely definitive, but the more recent awards, those issued in the approximately ten (10) years between 2002 and 2012, lean toward an interpretation that "net loss" does not include on-property overtime hours. That interpretation gains support when documents in evidence are considered.

Questionnaires regarding Rule 22(f) were answered by three Organization Vice Chairmen, none directly involved with Claimant Hickles' claim. In summary, each of the three indicated his belief that "net loss" included overtime hours worked by the Claimant's gang while he was in a dismissed status. A statement by the Organization's Vice President South, a former General Chairman of the Southern Pacific Atlantic Federation, who has worked with the MOPAC collective bargaining agreement for eighteen (18) years, concluded that Rule 22(f) "does not state exclude overtime from the net compensation." The Board does not question the sincerely held beliefs noted above, but notes that the beliefs are not accompanied by reference to supporting awards or other documentation.

The record includes several statements from current or former Carrier executives. A May 11, 2017 statement from D. A. Ring, retired since 2011 as a General Director of Labor Relations, noted his service as the Carrier member of SBA 279 beginning in 1988 and PLB 6402 beginning in 2003. Mr. Ring wrote that he would authorize "calculation and payment of the board award for lost earning (sic)" but that such authorization never included overtime or double time payments, nor did he recall the Organization disputing payments that excluded overtime hours. It is possible that Mr. Ring's statement is accurate as written, but it omits part of the story. He is shown as the Carrier member of SBA 279 Awards 400 and 445, 1989 and 1991 respectively, both including overtime hours in the award of make-whole pay.

A July 24, 2014 statement from John McVay, Senior Manager, Payroll Services, includes the following: "Overtime is not scheduled, expected, implied, automatically assigned or mandatory in day-to-day operations, and has <u>always</u> been considered speculative in nature, and is not considered in the final calculated award amount" (Referee's emphasis). While Mr. McVay's statement may accurately describe more recent payment history, SBA Awards 400 and 445 attest to the inappropriate use of "always."

An August 18, 2015 statement was provided by Brant Hanquest, General Director of Labor Relations, with "over 18 years of direct experience working with BMWED collective bargaining agreements . . ." Mr. Hanquest wrote that the Carrier "has <u>never</u> interpreted the rule [22(f)] to include overtime nor have we paid overtime when calculating net wage loss in identical situations" (Referee's emphasis). Mr. Hanquest's experience encompasses a period that begins in 1997 or earlier. While overtime may not have been calculated in his experience, the

[1] Rule 21(f) became Rule 22(f) but the language remains unchanged.

statement does not serve to rewrite the history attached to the SBA 279 interpretation and awards 400 and 445.

Further noted is Director of Labor Relations K. N. Novak's August 16, 2016 response to General Chair Dennis Albers' request for an accounting of the payment to Claimant Hickles. Director Novak referred to her inclusion as the Carrier member on PLB 6402 since 2011 and PLB 7633 since 2013 and stated that during these years "net loss' payments have included only straight time hours.

Finally, there is a response from R. Michael Lustgraaf, Senior Supervisor, Payroll Services, to Director Novak's request that he provide a statement of the "historical practice of paying Board Awards under the MOP agreement." Supervisor Lustgraaf, recalling that he assumed his current responsibilities most likely in July 2004, wrote a detailed response stating that when calculating lost time he includes straight time and holidays but excludes overtime because it is speculative and "no determination can be made that overtime would have been available or offered . . . during the lost wage period."

A review of the record establishes without room for disagreement that at least prior to 2000, SBA 279 awarded lost overtime hours as part of compensation for net loss. There is no evidence that these awards were challenged or modified. The review also supports a conclusion that overtime has not been a part of net loss compensation awarded by PLB 6402 when either Referee Malin or Referee Miller have been the neutral chairs. Despite the very troublesome fact that the awards in evidence provide no insight into the removal of lost overtime from net loss compensation, the above-noted conclusion must stand. The record does not contain evidence that the Organization contested payments devoid of missed overtime by writing dissenting opinions or between the Van Wart interpretation and that rendered herein asking for a third interpretation. Whatever the reason that accounts for the absence of the Organization's opposition to the "no overtime" awards, there is a significant period of at least ten (10) years, probably more, where the practice has been for net loss compensation to include straight time but not overtime. This consistent interpretation of Rule 22(f) cannot be ignored by reaching back almost 20 years. The practice since 2002 stands as the best evidence of the parties' intent.

That Claimant Hickles' position expired and was never filled after his dismissal has played no role in this interpretation. He has been paid for missed straight time hours and the Carrier has not contended that no compensation was due because the Claimant would have been furloughed had he not been dismissed. Therefore, it is reasonable to assume that Claimant Hickles could have used his seniority to encumber a new position had he not been dismissed. Hypothetically, had this been the case, and had net loss been interpreted to include lost overtime, a determination could have been made premised on the overtime offered the new gang and the Claimant's historical pattern of accepting overtime.

The limited dispute over outside earnings concerns overtime, which the Carrier counts to offset pay for net loss and the Organization says should be omitted from net loss calculations because lost overtime hours for the Carrier are not part of the computation. The Organization's position is rejected. Even if hypothetical lost overtime hours were computed and included by considering overtime worked by the Claimant's gang and the Claimant's history of accepting or

rejecting overtime, there is still an element of speculation involved. When a dismissed or suspended Claimant works and is paid for overtime as part of outside employment, there is no speculation about what might have been earned and paid. Assuming that an award requires make-whole pay for all or part of a disciplinary period, the intent in almost every case is to place the Claimant in the position vis-à-vis straight time earnings that he or she would have been in had that period of time been discipline free. Therefore, outside overtime earnings, when and if they occur, are properly used to offset payments for net loss.

Award:

As noted above, the interpretation is that Rule 22(f) does not include consideration of missed overtime hours.

Order:

The above-noted interpretation requires that no award be made in the Claimant's favor.

Andrew Mulford, Organization Member
WRITTEN DISSENT TO FOLLOW

Katherine N. Novak, Carrier Member

I. B. Helburn, Neutral Referee

Austin, Texas
March 5, 2018