

PUBLIC LAW BOARD NO. 7660  
CASE NO. 11

BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYEES

PARTIES  
TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s dismissal of Claimant W. Hill by letter dated June 7, 2013, in connection with allegations that he dishonestly reported time in violation of Rule 1.6 was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File D-1348U-312/1587469 UPS).
2. As a consequence of the violation referred to in Part 1 above, the Carrier shall now remove any mention of the discipline from Claimant W. Hill’s personal record, fully reinstate him with all vacation, insurance and retirement benefits, along with compensation for all straight and overtime work opportunities missed as a result of the inappropriate discipline.”

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, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant was a Track Inspector on Gang 5564 in the North Platte, Nebraska Service Unit (NPSU). At the time of his dismissal for dishonesty in reporting his time

from February 12-25, 2013 in violation of Rule 1.6 (4) on June 7, 2013, he had 15 years of service. Claimant's direct superiors were Manager of Track Projects (MTP) G. Peterson and Director of Track Maintenance (DTM) D. Miller. His office administration duties included timekeeping and covering the time reporting system (TEP), overseeing the Track Maintenance Planner (TMP), NPSU material coordinator, budgeting, responding to derailments, generating tamper and other production reports, and other duties as assigned. Claimant often worked from 4:30-5:00 a.m., lining up product and work for his fleet of trucks to procure and move materials between job sites throughout the work day, fielded calls from his semi-drivers into the evening hours, and participated in 6:20 a.m. conference calls on Monday, Wednesday and Friday each week.

There is no dispute that Claimant and Miller went on vacation to Miller's place in Florida between February 12 and 25, 2013 to attend NASCAR races. Miller testified that it was a non-working vacation, although acknowledging that Claimant worked on the computer and phone when they were away. Claimant stated that, since there was no one who could replace him, he told Peterson as well as the drivers that he would continue working and take care of everything while he was away on his trip, which he did. He testified that he was on the computer and phone ordering supplies, assigning work, reviewing reports and participating in conference calls during his time in Florida. Claimant noted that he came to the office on February 12 from 5 A.M. to noon prior to his 3 P.M. flight and was on the phone on multiple calls during the lay over in Dallas. He explained that he also worked on an ARI project involving creating Excel spread sheets from computer generated data concerning the specifics of each truck and trailer, their maintenance and field logs, in order to highlight the status of all NPSU vehicles, was required to assure that payroll was done correctly (with time charged to appropriate work orders) and completed by the evening of February 19, and that the TMP was accurate prior to the conference calls each morning. Drivers confirmed that they were in communication with Claimant while he was away in Florida for their daily work orders and to send him their time.

Claimant submitted his time with others in the NPSU, claiming a total of 88 straight time and 7 overtime hours during the period between February 12 and 25, 2013. While D. Miller stated that he was unaware that Claimant was going to charge for the time when he was in Florida, G. Peterson confirmed that he approved Claimant's timekeeping because he was working, had completed a big project while he was away and was convinced that he earned his money, opining that he should have charged more. As a result of an anonymous letter on behalf of NP Engineering Unit employees, dated April 8, 2013, indicating that Claimant had submitted time for a period when he was on vacation in Florida, and enclosing Claimant's relevant time sheets and Facebook posts, Corporate Audit conducted an interview of Claimant on May 6, 2013 concerning his submitting time for the period he was on vacation in Florida in February. During the interview it presented documents showing the discrepancy between the total time Claimant was on his cell phone in calls it was labeled as "work-related," and generated emails (not including those received) as well as Facebook photos of him at the races. Claimant answered questions on what he was doing during that period, noting that the documents presented did not include time spent on his computer logged into Same Time or other than Company websites, generating reports, compiling Excel spread sheets, or Lotus notes not represented in email. In the Audit interview, Claimant stated that he worked all of the hours he submitted in time records, despite attending 3 or 4 races and Busch Gardens.

D. Miller testified that he was unaware that Claimant had submitted time for the Florida trip until it was brought to his attention in the May Audit interview, but took responsibility for not making it clearer or bringing up the subject to Claimant during that time, acknowledging that Claimant had his laptop and did perform work while they were away. As a result of the Audit interview and the May 20, 2013 Investigation, Claimant was issued a Level 5 dismissal for Dishonesty in violation of Rule 1.6 (4) on June 7, 2013.

Carrier argues that there is substantial evidence in the record to support the charge of dishonesty in Claimant reporting his time while he was on vacation in Florida between February 12 and 25, 2013. It notes that the reports generated by the Audit Department show a minimal amount of work performed as compared with the hours of straight and overtime submitted by Claimant for that period. Carrier asserts that the serious nature of the offense supports the penalty of dismissal, which has been upheld as appropriate for dishonesty, citing Public Law Board No. 5666, Award 73; Public Law Board No. 5719, Award 33; Special Board of Adjustment 924, Award 243. Finally, Carrier contends that Claimant was afforded all of his due process rights, and there were no procedural defects in this case.

The Organization initially contends that Carrier failed to comply with the due process rights of the Agreement and substantively denied Claimant a fair and impartial hearing in violation of Rule 48. It asserts that the charge was untimely, since management was aware that Claimant was in Florida in February and approved his time for that period on March 4, 2013, yet failed to charge him until May 10, 2013, outside the 30 day time limit. The Organization also maintains that Carrier improperly prejudged Claimant, actively withheld evidence and prevented the Organization and Claimant access to evidence to mount a defense, and failed to call relevant witnesses.

With respect to the merits, the Organization argues that Carrier failed to meet its burden of proving that Claimant was guilty of dishonesty, a charge requiring a higher standard of proof including an intent to deceive. It notes that Claimant explained the work he performed while in Florida and that his Manager and drivers were told he would be working while he was gone, and they confirmed that he did all of his normal functions to keep them running while he was away. The Organization asserts that the selected documents relied upon by the Audit Department to come to its conclusion that Claimant put in for more hours than he worked do not reflect a bulk of the work he performed that were admittedly not represented in the phone logs and email records presented, and that

Claimant did present additional documents, where available to him, to supplement his testimony.

A careful review of the record convinces the Board that Carrier has not met its burden of proving that Claimant was guilty of dishonesty in this case. Initially we note that, although the Notice of Discipline states that knowledge of the charge was reported to the appropriate Company Officer on May 6, Claimant's supervisor, MTP Peterson, knew Claimant was in Florida between February 12 and 25, 2013 and approved his submission of time for that period by no later than March 10. Rule 48 requires the formal hearing to be held "within thirty (30) calendar days from the date of the occurrence to be investigated or from the date the Company has knowledge of the occurrence to be investigated." It appears that Carrier relies upon the result of the May 6 Audit interview as the date from which it had knowledge of the occurrence - his reporting of time between February 12 and 25 when he was on vacation in Florida. However, even discounting G. Peterson's approval in March, Carrier received an anonymous letter dated April 8 setting forth the specifics of the charge and attaching copies of Claimant's time sheets and photos of him attending races. Claimant was not interviewed by the Audit Department until May 6 (there was no explanation for this delay), was charged on May 10, and the hearing was not held until May 20, 2013. For purposes of this case, however, we are willing to accept Carrier's position that it was not aware of the specifics of the charge until it learned of the Audit Department interview results.

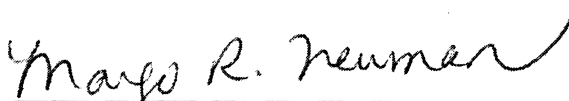
Without finding a violation of Rule 48 in this case, the Board is still of the opinion that there is no substantial evidence that Claimant's time submitted was not for work performed for the Carrier while he was in Florida between February 12 and 25, 2013. Peterson knew that Claimant was going to Florida and intended to continue to work, and never instructed him not to do so or to submit his time as vacation. The Organization was able to show that the evidence relied upon by the Audit Department and by Carrier in sustaining the charge of dishonesty was incomplete as far as the work actually performed

by Claimant during the relevant time. Even though Miller was unaware that Claimant did not intend to take this time as vacation or that he considered it to be a working vacation, he acknowledged that Claimant did perform work and blamed himself completely for not being clearer about the situation with Claimant. No expenses were submitted by Claimant.

The evidence relied upon by Carrier does not meet the required standard to prove the charge of dishonesty, which was the basis for the dismissal. Everyone knew Claimant was going to Florida with Miller for 2 weeks during February, and he intended to keep working and did so while he was gone. These facts do not reveal an intent to deceive on Claimant's part. Carrier was not able to establish, with any certainty, that the hours submitted by Claimant were intentionally inflated or not accounted for by the work performed. Thus, the dismissal must be set aside, the discipline removed from Claimant's record, and he should be reinstated to service without loss of pay or benefits.

AWARD:

The claim is sustained.



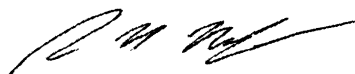
Margo R. Newman  
Neutral Chairperson

Dated: 1/15/2016



K. N. Novak  
Carrier Member

Dated: 1/15/2016



Andrew Mulford  
Employee Member

Dated: 1/15/2016