

PUBLIC LAW BOARD NO. 7660  
AWARD NO. 178

BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYES DIVISION - IBT RAIL CONFERENCE

PARTIES  
TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) imposed upon Mr. J. Gorman, by letter dated April 18, 2019, in connection with allegations that he violated Rules 1.6: Conduct - Dishonest; 1.13, Reporting and Complying with Instructions; and Rule 1.6 Conduct 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. Indifference to duty or to the performance of duty will not be tolerated, was excessive, arbitrary, disparate; without affording the Claimant due process; without the Carrier having met its burden of proof and in violation of the Agreement (System File MK-1948U-603/1721693 UPS).
2. As a consequence of the violation referred to in Part (1) above, Claimant J. Gorman shall ‘...be immediately reinstated to service and compensated for all wages lost, straight time and overtime, beginning with the day he was removed from service and ending with his reinstatement to service excluding all outside wage earnings. 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. Claimant be reimbursed for all losses related to personal property that he has not which may be 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.’ (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, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant has been employed by the Carrier for 11 years and worked as a Fuel Truck Driver on Consolidated System Gang 7115 during the time period in issue. Claimant received a Notice of Investigation dated March 11, 2019, advising him that he was charged with dishonesty by claiming and receiving per diem payments to which he was not entitled between August and December, 2018. The Investigation was held on April 4, 2019, and Claimant was served with a Notice of Discipline Assessed dated April 18, 2019, finding him guilty of the charges in violation of Rules 1.6 Conduct - Dishonest, and 1.13 Reporting and Complying with Instructions. He was issued a dismissal based on the nature and seriousness of the violation. This claim protests such action.

The record reveals that when Claimant worked on System Gang 7115 during the last half of 2018, he parked his truck and reported to work at Roseville, CA, which was

less than 50 miles from his home in Citrus Heights, CA. Claimant explained that he understood that he was not entitled to per diem, never filled out a mileage form to claim it, and was unaware that he was receiving it, as his checks were directly deposited into various accounts which were used to pay his bills automatically and he did not receive pay stubs. He stated that on other gangs he worked, he would put in mileage forms for per diem and receive a form 660 which set out a breakdown of his pay, but on this gang there were no mileage forms or 660s given to any employees, and no real way to know what was approved by the supervisor and submitted by the timekeeper to generate your pay. Claimant turned in his time to his Foreman, and was unaware of what occurred thereafter.

Claimant testified that a few weeks before he was interviewed by an Auditor on March 1, 2019, and well after he had left Gang 7115, he heard rumors that a number of people were getting per diem that were not entitled to it, and he began to look into his situation. He stated that he was interviewed by telephone and asked questions, and he acknowledged that he was not entitled to per diem since he worked too close to home, and was unaware he had been receiving it until recently. The Senior Corporate Auditor, who testified by telephone and was not present in the audit call with the Claimant, stated that the records reveal that Claimant received \$110.82 per day on various dates during August through December, 2018, totaling \$8,200.00 in per diem payments to which he was not entitled. He testified that Claimant indicated that he first noticed an increase in his pay checks in August, 2018 but did not report it to management, but Claimant denied making such statement, explaining that he only learned a few weeks before the interview and that he did not receive pay checks. There is no dispute that Claimant received these payments and that he was not entitled to them. Claimant admitted as much to the auditor and never tried to hide this fact once it was discovered.

The Auditor refused to answer questions about the broader investigation of the

Roseville Service Unit management and timekeeping practices for the 20 gangs working under that supervisor. From the record it appears, and Claimant confirms, that the supervisor was inputting a different headquarters than where he actually reported - Yuba City - into the timesheets before they were submitted by the timekeeper, so that time could be charged to certain work orders for budgeting purposes. Since Claimant's residence was over 50 miles from Yuba City, the computer automatically generated per diem payments and included them into his pay. Claimant repeated that he was unaware of this fact during the time he worked on this gang, since he never saw the time records that were approved and submitted. The Organization statements at the investigation that as a result of the larger audit of the service unit, the supervisor was demoted/terminated and other changes in management occurred, was not refuted by either Carrier witness, neither of whom had direct knowledge of Claimant's case.

The Carrier contends that Claimant received a fair and impartial hearing and that the dishonesty charges against him were proven by substantial evidence, as he admitted receiving per diem to which he was not entitled, and the records revealed those payments totaled \$8,200.00 for 74 work days. It asserts that the egregious nature of the conduct supports the penalty, noting that Rule 1.6 indicates that dishonesty is a valid basis for immediate dismissal, and such penalty has been routinely upheld.

The Organization initially argues that Claimant was denied his due process right to a fair and impartial hearing, since the Hearing Officer permitted telephonic testimony from the auditor, who refused to testify about the broader investigation occurring regarding the misallocation of personnel to various work orders on the Roseville Service Unit. It maintains that the Carrier failed to meet its burden of proving that Claimant was dishonest, since no intent to defraud was shown as Claimant never submitted his own time and it was found to be Claimant's supervisor who misallocated funds and received discipline. Finally,

the Organization contends that no basis for discipline was established, and that the penalty of dismissal was arbitrary and unwarranted.

On the basis of the entire record, the Board concludes that, although the evidence reveals that Claimant received \$8,200.00 in per diem payments to which he was not entitled, the Carrier failed to meet its burden of proving that what occurred was the result of any dishonesty on Claimant's part. Claimant was not responsible for the submission or approval of his timekeeping records, and had no knowledge of what those records contained at the time. It was not until the broader investigation revealed a scheme by the supervisor to allocate funds to particular projects by changing the headquarters entered into the time records for work performed by various gangs, that the cause for the per diem payments to Claimant were discovered. It appears that this scheme included not making available to employees the forms necessary to claim mileage and per diem as well as check on the accuracy of pay for accountability purposes. The Carrier has not only failed to prove that Claimant's receipt of per diem was the result of his dishonesty, but the intent to deceive is absent, since Claimant was forthright about what he knew when interviewed by the Auditors. See, e.g. PLB 7660, Cases 11, 32 & 33. Claimant's failure to come forward to management about his receipt of per diem when discovered, although inappropriate, does not rise to the level of dishonesty.

Although the claim for a make whole remedy is granted, including reinstatement and back pay at Claimant's regular straight time wage rate, less interim earnings, the additional monetary claim for overtime and other enumerated benefits/losses is found to be inappropriate. Claimant shall be returned to work at a MAPS level 1 status.

AWARD:

The claim is sustained in accordance with the Findings. The Carrier is ordered to make the Award effective on or before 30 days following the date of the Award.

*Margo R Newman*

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Margo R. Newman  
Neutral Chairperson

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*Chris Bogenreif*  
Christopher Bogenreif  
Carrier Member

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*John Schlismann*  
John Schlismann  
Employee Member

Dated: March 31, 2022

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