

PUBLIC LAW BOARD NO. 7660
AWARD NO. 179

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES 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. Davis, by letter dated March 6, 2019, in connection with allegations that he violated Rules 1.6: Conduct - Dishonest and the part that reads ‘... 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.’ (Employes’ Exhibit ‘A-1’), was excessive, arbitrary, disparate, imposed without affording the Claimant due process, without the Carrier having met its burden of proof and in violation of the Agreement (System File M-1948U-501/1721255 UPS).
2. As a consequence of the violation referred to in Part (1) above, Claimant J. Davis shall now have his dismissal:

‘... expunged from his personal record. Claimant 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 to be reimbursed for all losses related to personal property that he has not 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 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 14 years and worked as a Switch Tie Gang Foreman on Consolidated System Gang 7378 during the time period in issue. Claimant received a Notice of Investigation dated January 30, 2019, advising him that he was charged with dishonesty by claiming and receiving per diem payments to which he was not entitled between October 1 and December 19, 2018. The Investigation was held on February 14, 2019, and Claimant was served with a Notice of Discipline Assessed dated March 6, 2019, finding him guilty of the charges in violation of Rules 1.6 Conduct - Dishonest. He was dismissed from service based on the nature and seriousness of the violation. This claim protests such action.

The record reveals that Claimant acted as Project Coordinator for the North California Service Unit during the relevant time period, and worked mostly alone. His new Manager, Cheney, testified that he came to this territory at the end of November, 2018 and in mid-December he did a review of time records and noticed that Claimant had received daily per diem. He was concerned, asked Claimant to clarify, and contacted Corporate Audit to conduct an investigation. Cheney admitted that when he came to the territory the processes seemed to be lacking. As explained by one of the two timekeepers in the area, he entered the time for 30 different gangs and about 80 employees based on information received from the manager about the location or project an employee was working on. He did not have conversations with employees about their time, and only spoke with Claimant once a month or less. The timekeeper stated that he enters the hours and location and clicks on a button and the computer automatically generates how much to pay and whether per diem is included. It is the ARASA supervisor that approves the time roll.

The Corporate Auditor involved with Claimant's interview on January 10, 2019, testified that he asked Claimant specifically if he had been working in Bakersfield during this time period and Claimant confirmed that he was not. Claimant noted that when he was called into the telephonic interview with Cheney, he was told its purpose was to discuss projects, and he was surprised to find out that he was being questioned by an Auditor. During the interview, the Auditor had numerous documents in front of him, but Claimant and Cheney could not see any documents. The summary of the interview, and attached exhibits, review Claimant's phone and computer records as well as his gas purchases, for the purpose of proving that he was not working where his time records indicated, and that many times he appeared to be working from home and not entitled to per diem payments. While the Auditor stated that it is the employee's responsibility to authenticate the accuracy of his pay, he was unaware that form 660s, used by employees to get a breakdown of their

pay, were no longer given to employees on this territory, and noted that an employee can make use of computer information to double check his time records. The Auditor refused to answer questions on the status or identify of other investigations that were being conducted on this territory concerning timekeeping practices, although the Organization had specific knowledge of similar investigations of other employees and management, and the process by which the manager was directing that certain work locations be entered into the time records so that projects could be charged to specific work orders.

Claimant admitted, both to the Auditors and at the investigation, that he was not working in Bakersfield during this time, but explained that he had no knowledge that his location was being entered as such. Claimant testified that he gets paid twice a month by direct deposit, he does not review his pay or receive pay stubs, that someone else takes care of his finances, and that he had no idea if he got paid more per diem than he was allowed. He admitted never keeping accurate records of his time or per diem, since he did not submit either, but indicated to the Auditor that he would do a better job of that going forward. Claimant testified that he was not trained, and was unaware of how, to access his pay information for verification on the computer, noting that he would only speak to the timekeeper about his time when there was overtime that had to be reported. Claimant indicated that on most gangs the Foreman reports the time, but on this territory it was felt that with so many different groups they could monitor the time and budget better by having only two timekeepers responsible for entry of time. Claimant testified that he was not intentionally dishonest and did not try to deceive anyone, as he was unaware of what was being reported concerning his location.

The Carrier contends that Claimant's investigation was timely held from the date when Cheney received full knowledge of the findings of the Auditors on January 17, 2019.

It argues that the dishonesty charges against Claimant were proven by substantial evidence, as he admitted not working in Bakersfield as noted in his time records resulting in payment of per diem to which he may not have been entitled, and the records revealed those payments totaled over \$5,000.00 for 48 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 the Carrier violated Rule 48(A) by not holding the investigation within the required 30 days from when Cheney had knowledge of the allegations, which, at the latest, was January 10, 2019. It contends 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, it was management that controlled the time records and altered locations to permit allocation of work to certain work orders, which resulted in the automatic payment of per diem through the computer program, and management removed the mechanism whereby employees could discover their pay allocation to verify its accuracy. 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 \$5,000.00 in per diem payments to which he may not have been 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. The timekeeper made clear that the work locations submitted on employees' pay came from the manager, and that the computer automatically generated a per diem amount based upon that location.

As noted by the Board in Award No. 178, 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 reason for the discrepancy concerning per diem payments to Claimant was discovered. It appears that this scheme included not making available to employees the forms necessary to check on the accuracy of pay for accountability purposes. While Claimant admitted not keeping records of his time or making efforts to check the accuracy of his pay, which may well have exacerbated the situation, the Carrier has failed to prove that Claimant's receipt of per diem was the result of his dishonesty, since there is an absence of any intent to deceive on his part. When questioned, Claimant was forthright about the fact that he was not working in Bakersfield during the relevant time period. See, e.g. PLB 7660, Cases 11, 32 & 33. Claimant's failure to take responsibility for assuring that his time was accurate (which he claimed he was unaware of), although inappropriate, does not rise to the level of dishonesty.

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 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

Margo R. Newman
Neutral Chairperson

Chris Bogenreif

Christopher Bogenreif
Carrier Member

John Schlismann

John Schlismann
Employee Member

Dated: March 31, 2022

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