

PUBLIC LAW BOARD NO. 7660
CASE NO. 28

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES

PARTIES

TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY
[former Southern Pacific Transportation Company (Western Lines)]

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s dismissal of Claimant D. Smith by letter dated July 31, 2014, for alleged violation of General Code of Operating Rules (GCOR) Rule 1.6 Conduct (4) Dishonest in connection with allegations that he dishonestly reported time worked on June 9, 2014 was without just and sufficient cause, unwarranted and in violation of the Agreement (System File RC-1445S-601/1612340 SPW).
2. As a consequence of the violation referred to in Part 1 above, the Carrier shall now reinstate Claimant D. Smith to his former position with seniority and all other rights restored, clear the matter from his disciplinary record and be made whole for net wages and benefits lost.”

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, a Crane Operator with less than 2 years of service, was issued a Notice of Investigation (NOI) dated July 5, 2014 on charges that he failed to accurately report his time for June 9, 2014. The July 22, 2014 Investigation resulted in a July 31, 2014 Notice of Discipline, finding Claimant guilty of the charge in violation of Rule 1.6 Conduct (4) Dishonest, a Level 5 offense. Claimant was permanently dismissed from service. The instant appeal resulted.

There is no dispute that Claimant was assigned to Gang 3171 headquartered in Montello, NE, and that the gang worked four 10 hour days between Tuesday and Friday. For two months prior to the incident in question, Claimant was assigned to work as a Speed Swing Operator with a gang out of Wells, NE who worked four ten hour days between Monday and Thursday. The Wells gang was abolished on Thursday, June 5. Manager of Track Maintenance Bone testified that when he gave out the abolishment papers he recalled specifically telling Claimant that he needed to report to his own gang in Montello the following week from Tuesday to Friday. Gang 3171 Foreman Spencer testified that while Claimant was in Wells, he requested that he call in to report his hours so that he could submit the payroll at the end of the half. Spencer stated that he spoke with Claimant on June 5 about his plans for Friday, since Claimant had already worked 40 hours but Gang 3171 had not; Claimant went home for the weekend.

Bone was on vacation during the week of June 9, 2014, and in his absence, the Monday, June 9, morning 5:30 a.m. conference call to all work crews was conducted by ARASA Track Supervisor Packard who did a roll call and then listed work assignments. There is no dispute that when he commented that Montello was off, Claimant said “no, I’m here.” Packard told all participants in the conference call to report to Alazon to follow a Detector Car. Track Supervisor Hiller pointed out that it was Claimant’s day off and he did not know why he was there. Claimant did not show up at Alazon. Hiller attempted to reach him on the two phone numbers he had for Claimant starting at 6:30

a.m., as well as in the Montello tool house, and, during the course of his pick ups visited Montello, Wendover and Wells. Neither Hiller nor any other Carrier employee ever saw, or spoke to, Claimant after the conference call that day.

Claimant testified that he drove the 1 1/2 hours from his home to Montello on June 9, participated in the 5:30 a.m. conference call, and that he was not given any particular assignment that day. No one else from his gang was present and the company vehicles were parked outside. He stated that he drove around in his personal car (as he is not licensed to drive the company truck) getting more acquainted with the territory, and sat in the Montello tool house, waiting to see if someone would pick him up. Claimant eventually admitted that he performed no work on June 9, 2014, and testified that it was not unusual for him to sit in the same place all day and do no work, and he figured this was one of those days. Claimant explained that he does not bring his cell phone to work because he is not supposed to use it on the job, and that work communications are made by radio in the truck. He admitted that he did not normally work alone.

Foreman Spencer entered time for his gang (including Claimant) for the first half of June, stating that he verified the time entered on June 15, since corrections had to be made by June 17. He put in no time for June 9 for either himself or Claimant, noting that Claimant had not requested him to put time in for June 9. When Packard went in to approve the time on June 17, he noticed that Claimant had made an entry on June 16 putting in 10 hours straight time for himself for June 9. He inquired whether anyone had seen or spoken to Claimant that day, and was informed that, other than his participation in the conference call, no one ever saw or heard from him that day. Spencer said it was highly unusual for Claimant to put in his own time, rather than asking him to make any necessary corrections. None of the Managers asked Claimant for an explanation prior to the Investigation.

The Carrier argues that Claimant was provided a fair and impartial hearing, and that it met its burden of proving that he was guilty of dishonesty by his eventual admission that he performed no work on June 9 but entered 10 hours of straight time on his pay sheet after it had been verified by his Foreman. It notes that, by Claimant's own admission, he chose not to call anyone after the conference call to clarify his work orders, and did not report where directed. The Carrier asserts that Claimant's testimony was incredible in many ways, and points to a written statement from the Hearing Officer at the Investigation concerning the fact that the supervisors were more credible in their accounts of what occurred and Claimant had no concept of responsibility. Since Claimant was admittedly dishonest in his submission of time for hours he knew he performed no service, the Carrier affirms that issuing a Level 5 dismissal was in conformity with its UPGRADE policy and should be upheld by the Board.

The Organization contends that there is no evidence to support the dishonesty charge, since it is admitted that Claimant was present at Montello and participated in the 5:30 a.m. conference call on June 9, and there is no proof that he did not stay in his work area through the balance of his work day, for which he was entitled to compensation. It notes that if Claimant was being dishonest, he could have put in for 10 hours overtime since Monday was not part of his regular schedule. The Organization maintains that, at best, there was some miscommunication concerning Claimant's assignment on June 9, which is understandable since he just came off another gang with a Monday through Thursday work week. It questions why Claimant would get up at 3:00 a.m. to drive 1 1/2 hours to Montello if he did not legitimately believe he was supposed to be working on June 9. The Organization asserts that what Claimant actually did on June 9 is irrelevant to the issue of whether he dishonestly submitted for pay for a day he was at work. It requests that Claimant be returned to work and made whole.

On the basis of the entire record, the Board concludes that the Carrier met its burden of proving that Claimant violated Rule 1.6 Conduct (4) Dishonest when he intentionally submitted 10 hours on his payroll sheet for June 9, 2014 knowing that, aside from participating in the conference call at 5:30 a.m., he performed no other compensable service on that day. First, Claimant's submission of his own time, when his Foreman is the one who routinely does this, and the absence of any effort on his part to communicate a mistake or desired change in his time sheet to his Foreman prior to submission for approval on June 17, lends credence to the deliberate nature of Claimant's actions rather than a misunderstanding or mistake. He waited until after the pay sheet had been verified by his Foreman (June 16) to make the change by inserting 10 additional hours for June 9.

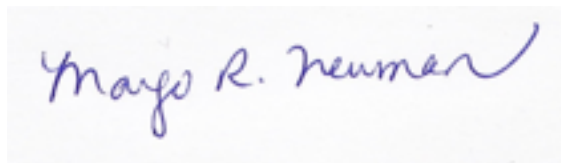
Second, Claimant's testimony at the Investigation was inconsistent, ever-changing, and his admitted actions were outside the bounds of reasonableness. To say that he felt he was entitled to 10 hours pay for June 9 when he sat around and performed no actual service because it is not uncommon for the gang to do nothing during a workday strains credulity. If there was a miscommunication as the Organization contends, Claimant had the responsibility to call for direction or to report to the location directed in the conference call. He not only did neither, but tried to excuse his inaction by explaining that he had no access to a cell phone and did not believe that the direction for all to report to Alazon included him, since it is unusual to have everyone on the call going to the same location. Claimant stated that he took the conference call on the phone in the Montello tool shop, but had no explanation why he could not have used that phone to clarify the supervisor's direction. He also initially claimed that the abolishment notice of the week before was never given to him (although it was to the rest of his gang) but that somehow he knew to report back to the Headquarters of Gang 3171, rather than Wells where he had been working. A review of the Investigation transcript reveals that Claimant was given every opportunity to explain his actions and any apparent conflicting evidence, and that

he kept finding additional excuses until he was forced to admit that he performed no service on June 9.

The Board can find no support for the Organization's claim that the submission of 10 hours for June 9 was a simple mistake as a result of a miscommunication. Rather, we are convinced that the Carrier has proven dishonesty by Claimant, which, especially when considered in the context of his disturbing cavalier attitude about his job responsibilities, support the Level 5 dismissal that was issued in compliance with the Carrier's UPGRADE policy. Accordingly, the claim is denied.

AWARD:

The claim is denied.



Margo R. Newman
Neutral Chairperson

Dated: _____



K. N. Novak
Carrier Member



Andrew Mulford
Employee Member