

PUBLIC LAW BOARD NO. 7660
AWARD NO. 36

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. Carrier’s discipline (dismissal) of Mr. R. Powers in connection with charges that beginning March 24, 2014 while employed as a water service mechanic he was dishonest when he allegedly changed his pay code to a higher pay code from the rate of pay that he was assigned, performed non-UPRR work related activities while on company time, used a company vehicle to run to unauthorized locations, and left work to go home early was without just and sufficient cause and in violation of the Agreement (System File T-1445S-704/1614000 SPW).

2. As a consequence of the violation referred to in Part 1 above, Claimant R. Powers must have the Level 5 discipline removed for his personal record and be reinstated to service. Claimant must be compensated for any and all wages lost including straight time and overtime beginning with the day he was removed from service and ending with his reinstatement to service. Claimant must be compensated for any and all losses related to fringe benefits that can result from dismissal from service such as health, dental and vision for him and his dependents. Claimant must also be compensated for vacation benefits, personal leave benefits and all other benefits not specifically enumerated herein that are collectively bargained for him as an employee of Union Pacific Rail-

road and a member of the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters. Claimant must also be reimbursed for all losses related to personal property that he sustained as a result of this dismissal such as, but not limited to home, automobile, land and other personal items.”

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 17 year employee, was working as a Water Service Mechanic (WSM) on Gang 8089. A Notice of Investigation dated June 18, 2014 was issued on charges of changing his pay code to a higher rate than he was assigned, performing non-UPRR work related activities while on Company time, using a Company vehicle to run to unauthorized locations, and leaving work early to go home. A joint investigation was held with Claimant and another employee on July 9, 2014. The July 24, 2014 Notice of Discipline found Claimant guilty of the charges in violation of Rule 1.6 Conduct (4) Dishonest, Rule 1.13 Reporting and Complying with Instructions, and Rule 1.19 Care of Property, and assessed him a Level 5 dismissal. The instant appeal resulted.

The charges were the result of a report of a surveillance investigation conducted on Claimant from May 21-29, 2014 by Investigator Iguchi, who did not testify at the hearing. It was provided to the Director of Bridge Maintenance, Western Division, by Carrier's Law Department, for action. The report summarized that on May 22, 2014, Claimant arrived at work at 5:50 a.m., left at 9:30 a.m. and drove in the Company truck to a residence (of his children's mother) where he loaded 2 bicycles in the back of the truck and took them to his residence and dropped them off, returning to work at 10:55 a.m. It

states that Claimant left work at 11:30 a.m. returning to his residence, where the truck remained until surveillance was discontinued at 4:15 p.m. Time records reveal that Claimant put in for 10 hours of pay on that day.

The surveillance log of May 28, 2014 states that Claimant was found at work at 5:50 a.m., departed with a passenger (later identified as Welder Ritter, who was the other employee that was the subject of the joint investigation) at 7:46 a.m. and drove to his residence where he remained from 7:55 to 8:22 a.m., when he returned to work at 8:30 a.m. They departed at 9:00, stopped at Discount Motorcycle Parts between 9:08 and 9:26, drove to the Springfield DMV, where he remained for 5 minutes, returning later for half an hour between 1:02 and 1:32 p.m., went to his residence from 1:58 to 2:23 p.m., drove to Harbor Freight, and returned home for a short while. They returned to work at 3:15, and Claimant left work at 5:01 p.m. Time records reveal that Claimant put in for 11 hours of pay on that day.

The surveillance log of May 29, 2014 states that Claimant arrived at work at 5:40 a.m. (which he testified was the normal time to arrive), left with Ritter at 8:40, and drove to a restaurant where they remained (with another person) until 9:30 a.m. He stopped for fuel on the way to a rural area by Oakridge (where he was assigned to work), and returned to work at 3:25 p.m. Claimant left work at 4:05 p.m. alone, stopped at a restaurant for a pizza, and drove home at 4:38 p.m. Time records reveal that Claimant put in for 10 hours of pay on May 29.

The investigation revealed that Claimant had received a WS Foreman (WSF) position posted after a retirement in September, 2013, but the position was abolished the same day, and Claimant bid on, and received, a WSM position. He was told by his Manager that he would be able to get the WSF job when he had more experience. Claimant testified that he was qualified for such position, but his Manager disagreed, stating that he

never told Claimant to take the higher rate of pay for the WSF position. When it was discovered on March 24, 2014 that Claimant was still putting in his time under the WSF pay grade, Carrier's timekeeping department changed the default setting on his pay documents to a WSM. After that date, Claimant had to manually go in and change the setting to continue to submit his pay grade as a WSF. He testified that he did so because he was performing all the duties of a WSF, and was entitled to the higher rate under Rule 27, Filling Higher or Lower-Rated Positions. Claimant's time had to be approved by his Manager, who testified that he did not see the job title/code when he went into the computer to approve the time, prior to it being submitted to Finance. The pay records submitted show both the position and position description, as well as the hours submitted. Claimant's pay requests and compensation were never disallowed by Carrier under Rule 40.

Ritter testified that he was assigned to ride with Claimant on May 28 & 29, 2014, and he was just following the directions of Claimant, who was the EIC. He could not recall specifically where they went on each of those dates, independent of what was written in the log. Claimant admitted that some of the stops he made were of a personal nature (motorcycle shop, bikes) and that the restaurant meeting was a safety step-down held with an Organization representative. He noted that it was normal for employees to make stops on their route, and that others have never been charged before. Claimant opined that the reason for the surveillance, and the eventual charges and discipline were to undermine the FEMA and Whistleblower lawsuits he filed against Carrier resulting from a 2007 injury. Claimant noted that Carrier had attempted to terminate him through the use of surveillance in 2008, but he was returned to work and made whole in PLB 7258, Award 32.

Carrier argues that there is substantial evidence that Claimant was performing non-work related duties in a Company vehicle on May 22, 28 and 29, 2104, paid himself for a full day's wage and never reduced his time to account for that period, and continued to

pay himself as a WSF after the position was abolished and he bid to a WSM job, all of which support the charge of dishonesty. It asserts that the termination penalty is appropriate as Rule 1.6 (4) is a Level 5 offense under its UPGRADE policy, and the Board often upholds discharge for that serious offense, citing Public Law Board 7660, Award 26; Special Board of Adjustment 279, Awards 1027 and 1033. Carrier contends that the fact that Ritter was given a leniency reinstatement is irrelevant, since his actions as a passenger in Claimant's vehicle while he was under Claimant's direction, did not amount to the same level of wrongdoing.

The Organization first argues that the discipline should be overturned on the basis that Claimant was denied a fair and impartial investigation under Rule 45 when Carrier held a joint hearing with Ritter, despite its numerous objections to proceeding in that fashion due to the difference in charges between them. The Organization contends that Carrier did not meet its burden of proving that Claimant was guilty of the cited Rules, noting that there was no dishonesty or fraud in Claimant putting in for the WSF rate of pay, which he was entitled to under Rule 27, since he continued to perform the same duties after the position was abolished. It points out that Claimant had his time entries approved by two levels of management, and neither questioned his entries or challenged them under the procedure set forth in Rule 40 for disallowing time after it has been submitted for payment, thereby condoning his practice of submitting for higher level pay for the work he was performing, to which he believed he was entitled.

The Organization maintains that the investigation revealed that it is common for employees to do some personal errands in their Company vehicle if it is on the way to the work site, and some of the trips it took issue with were explained by Claimant to have reasonable business purposes - DMV, tool store and meeting with his Union representative. It asserts that Carrier never specifically addressed Claimant's leaving early, and he explained that he had permission to leave early if he came to work early or worked

through lunch. The Organization insists that in the absence of any proven intent to deceive, the charge of dishonesty cannot be upheld, relying on Public Law Board 7660, Award 11.

On the basis of the entire record, we initially note that there is no evidence that holding a joint investigation in this case denied Claimant his right to a fair and impartial hearing. The Board is of the opinion that Carrier failed to prove, by substantial evidence, that Claimant's submission of his daily time records under the category of WSF, rather than WSM, after it had changed the default setting on his computer timekeeping record on March 24, 2014, was done with an intent to deceive, or submitted knowing that he was being required to use the WSM rate from that time forward. The record reveals that, even after the WSF position was abolished by Wagner in September, 2013 immediately after it was awarded to Claimant, he continued to submit his time under that code, because he believed that he continued to perform the duties of the job and was entitled to the higher rated pay. When this practice was discovered in a March, 2014 audit, it appears that the only thing done was to change the default setting on the computer for Claimant's rate. There is no evidence that Claimant was spoken to by his Manager and told not to use that rate code, or that Carrier challenged his submission of that pay rate through the method of disallowance outlined in Rule 40, where a reason is to be submitted to the employee.

In the absence of evidence of specific notice to Claimant to discontinue his practice of submitting his time under the WSF rate, the Board is unable to conclude that Claimant's intention was to receive pay for work he did not perform, knowing that he was not entitled to it. Claimant's pay records and use of the WSF code, were known to his Manager and other Carrier officials, who reviewed and approved his pay records on an ongoing basis. The fact that Claimant changed the default code after March 24 in order to enter his pay rate, is insufficient to prove intent to defraud in this case. See, PLB 7660, Award 11.

With respect to the surveillance evidence, and Claimant's admissions that, on occasion on the specific dates, he stopped to do some personal errands on his way to the work site in his Company vehicle, and did not deduct that time from his pay submitted, the Board finds that there is substantial evidence that Claimant violated Rule 1.19, which prohibits personal use of railroad property, since the Organization failed to adequately establish that it was a known and accepted practice to do so. The surveillance log establishes that, even giving Claimant's account credence, on May 22 and 28, 2014, he did not work the number of hours he submitted time for, and that part of his paid time was spent at home or elsewhere, doing errands of a personal nature. Absent evidence of what specific instructions Claimant failed to comply with, Carrier did not establish a violation of Rule 1.13.

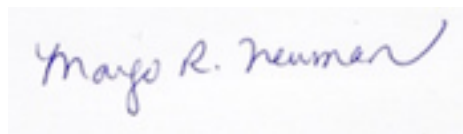
On the basis of all of the evidence, the Board finds that Claimant submitted time for hours he did not work on May 22 and 28, 2014, and that such conduct was dishonest and technically violates Rule 1.6(4). Many hours spent at and around his residence does not fit within any alleged practice of stopping off at restaurants, etc. on the way to the job. Carrier's imposition of a Level 5 termination for a violation of Rule 1.6(4) is well established. While we do not normally overturn such discipline, the Board is of the opinion that, in the specific circumstances of this case, there are mitigating factors that entitle Claimant to one final chance to show that he can be a trustworthy and valuable employee. These include his 17 years of service, the fact that some evidence was presented that it was common for employees to perform personal errands in Company vehicles on the way to the job site without receiving discipline, his passenger on these occasions was permitted to return to work under a leniency reinstatement, and Claimant's submission of pay under the WSF code was found not to constitute dishonesty.

Without addressing the Organization's contention that the surveillance of, and discipline against, Claimant was improperly motivated by his lawsuits pending against Car-

rier, we conclude that the termination should be set aside in this particular case. Thus, we direct Carrier to reinstate Claimant and convert the termination to a long term suspension without pay. Claimant should understand that he is being given a one time opportunity to prove that he can be a rule-abiding and trustworthy employee, and that such a second chance is not typically offered to an employee in his situation.

AWARD:

The claim is sustained, in part, in accordance with the Findings.



Margo R. Newman
Neutral Chairperson

Dated: December 18, 2017



K. N. Novak
Carrier Member



Andrew Mulford
Employee Member