PUBLIC LAW BOARD NO. 7660
AWARD NO. 38

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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. J. Rivera in connection with charges that while employed as a Flange Oil Maintainer he was dishonest on July 25, 2014 when he failed to stay on duty working a full eight (8) hour shift and posted on Facebook while at home where he paid himself eight (8) hours was without just and sufficient cause and in violation of the Agreement (System File A-1448U-203/1614942 UPS).

2. As a consequence of the violations referred to in Part 1 above, Claimant J. Rivera must be returned to service with rights and benefits unimpaired, all lost compensation and all other relief contained in the Organization's letter of claim dated October 15, 2014 (Employes' 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, a 21 year employee, was working as a Flange Oil Maintainer on Gang 4923. A Notice of Investigation dated August 5, 2014 was issued on charges of failing to stay on duty and work a full 8 hour shift, being at his apartment before the end of his shift and posting on Facebook showing he was home packing his apartment or playing golf during working hours, when he paid himself for 8 hours of work. Claimant was removed from service pending investigation. An investigation was held on August 22, 2014. The September 11, 2014 Notice of Discipline finds Claimant guilty of the charges in violation of Rule 1.6 Conduct (4) Dishonest, and assesses him a Level 5 dismissal. The instant appeal resulted.

In the investigation, Claimant admitted that he posted numerous photos and comments to his Facebook page while he was on Company time, and sometimes in his Company vehicle. He denied playing golf when he posted the pictures of the golf course, stating that he was at a nearby worksite. He also denied being at the baseball game when he posted the picture of such, stating that he lies to everyone on social media when he post pictures with comments about his actions. The Organization submitted a Facebook post indicating that Claimant was in New York at a time while he was in the investigation, pointing out that what is posted may not be accurate about time and location. Claimant did admit taking a photo of a road sign from his truck while he was driving on the interstate, and admitted that it was an unsafe act. He stated that, without knowing when he posted each of the items, he could not say that he abused the Social Media Policy, which permits limited personal use as long it does not detract from safety, productivity or work performance, claiming that he could have done so from his truck while cooling down or on break.

The record of the investigation reveals that Claimant was involved with a near miss incident in March, 2014, when he almost got hit by a train, and he was placed in the SAP Program, where the safety of his actions were being monitored. His Supervisor testified that at that time Claimant was instructed to report to Council Bluffs Building 5 at the beginning of his shift at 8:00 a.m. so he could attend safety job briefings, as well as at the end

of his shift at 4:30 p.m. Claimant's position was considered an on line gang of one, and, at one point, his Supervisor required him to give him a phone job briefing at the conclusion of his shift, a practice that only lasted a few weeks. Claimant's Supervisor and Manager stated that they had ongoing concerns about his ability to keep up with his business on a small territory, and being out of compliance. His Facebook posting was brought to their attention by other employees and a non-employee.

Claimant's Supervisor recalled the specifics of three incidents between July 8 and 11 where Claimant was not where he said he would be at the appointed time, stating that he and his Manager had concerns with his whereabouts. The Supervisor agreed that he signed an eye form that Claimant presented him with on July 9, and received a late email on Sunday night that Claimant was going to an eye exam on Monday, July 14. The Supervisor denied Claimant's assertion that he told him to go ahead and pay himself for the time spent on the eye exam, noting that Claimant submitted pay for the 8 hours that day despite not reporting to work until after 10 a.m.

Claimant's Manager testified that he saw a Facebook post from Claimant at 2:43 p.m. on Friday, July 25, showing a packed box, with a comment "all packed." He drove to Claimant's apartment complex and saw the Company truck parked outside at 3:45 p.m. When he phoned Claimant, he admitted that he was at home, saying that he was doing paperwork and that he had permission from his Supervisor to leave early. Claimant's Supervisor was on vacation at the time, informed the Manager that he did not give Claimant permission to leave early on Friday, but admitted at the hearing that he had agreed that Claimant could leave 1/2 hour early if he worked through lunch, but that this did not impact the requirement that he report to Council Bluffs Building 5 at the beginning and end of his work day. Claimant submitted his time as working 8 hours on July 25 (as well as all other days). There was testimony from Claimant, as well as his Manager, about the meaning of Appendix L (5) with respect to when working time started for an employee who is given a Company truck to take home, and whether the time driving to the worksite or starting point

was to be calculated as part of paid working time. Claimant apparently was under the impression that it was.

Claimant was called to his Manager's office for a meeting on Monday, July 28, 2104, where they discussed his inability to stay in compliance and keep up with his work, his Facebook posts while on working time, and unsafe actions in using his phone to take photos while driving. Claimant told the Manager that he was being singled out and mentioned other employees who did things other than work on Company time. He was placed out of service at the time. Claimant testified that he is a very responsible employee, and that if they would have brought the issues of his posting on Facebook to his attention, he would have stopped doing so. His Supervisor confirmed that he believed Claimant was a responsible employee.

Carrier argues that there is substantial evidence that Claimant was guilty of dishonesty when he engaged in non-work related activities during working hours, and submitted for pay as if he had worked all day, as evidenced by his actions on July 25, 2014. It notes that Claimant was not charged with violating the Social Media Policy, but that his taking photos while driving and posting on Facebook had a direct impact on safety as well as productivity. Carrier contends that he stole time by engaging in personal activities during working hours, and leaving early, while continuing to pay himself for an 8 hour work day. 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.

The Organization contends that Carrier did not meet its burden of proving that Claimant was guilty of dishonesty. It maintains that the Facebook posts, by themselves, do not prove that Claimant was not at work or posting during his break, as they do not accurately reflect the location of the person posting or the times of the posting. The Organization points out that Claimant had received permission from his Supervisor to leave early if

he worked through lunch, and Claimant's assertion that he was still doing paperwork from home when his Manager called him at 3:45 p.m. on July 25 is unrebutted. It notes that what Claimant may have done improperly does not amount to dishonesty, absent proof of intent to deceive, and that dismissal is too severe a penalty for the first major offense of a 21 year employee.

On the basis of the entire record, the Board is of the opinion that Carrier has proven that Claimant was guilty of engaging in personal activities on Company time, and paying himself for a full days work on those occasions. The question raised in this case is whether Claimant had a reasonable belief that he was permitted to do what he did, or whether he intended to steal time from Carrier by paying himself for hours he knew, or should have known, were not compensable. The parties are in agreement that, even under Appendix L(5), Carrier is not responsible for paying for the entire time Claimant was in the truck, including time spent going to the reporting location, but only for "all travel time .. performing the duties of the position.." However, at the investigation, it appears that the Manger was similarly confused about when compensated service starts for a Flange Oil Maintainer with a Company truck.

Any such misunderstanding, or contention that Claimant was permitted to leave work a half hour early when he worked through lunch, does not fully explain why he was home at 3:45 p.m. on July 25 (and had posted a picture on Facebook showing that he had been home earlier). It appears from the record that Carrier was aware of Claimant's Facebook posts for a period of time, including his photo of a road sign obviously taken while driving, and chose not to bring to his attention the safety, as well as productivity, implications earlier, despite the fact that he was on the SAP Program and his conduct was being monitored by his Supervisor and Manager. Neither did Claimant receive written warnings that his failure to show up at Council Bluffs Building 5 in the morning, or to keep an accurate account of his whereabouts, were a serious concern and could impact his continued employment. The record makes clear that it was this compilation of conduct, not just

Claimant's submission of pay for 8 hours of work on certain days, that led Carrier to its conclusion that he should be removed from service and receive a Level 5 dismissal.

Under such circumstances, the Board is of the opinion that Carrier's decision to terminate Claimant for dishonesty was excessive. Thus, we direct Carrier to convert the termination to a long term suspension without pay and to offer Claimant reinstatement to service, without loss of seniority or diminishment of future benefits.

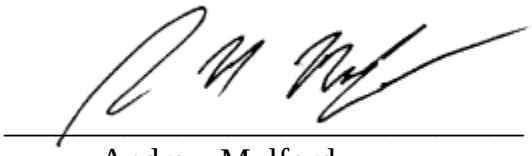
AWARD:

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

Margo R. Newman
Neutral Chairperson

Dated: November 27, 2017

K. N. Novak
Carrier Member



Andrew Mulford
Employee Member