

PUBLIC LAW BOARD NO. 7660

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION - IBT**

and

**UNION PACIFIC RAILROAD COMPANY
[FORMER CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY]**

**Case No: 67
Award No: 67**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's dismissal of Claimant D. Clough, by letter dated March 31, 2016, for alleged violation of General Code of Operating Rules (GCOR) Rule 1.6: Conduct - Dishonest in connection with allegations that he dishonestly paid himself per diem wages he was not entitled to between January 4, 2016 and March 3, 2016 was without just and sufficient cause, unwarranted and in violation of the Agreement (System File B-1619C-201/1657120 CNW).
2. As a consequence of the violation referred to in Part 1 above, the Carrier shall return Claimant D. Clough to service with all rights and benefits unimpaired and compensate him as outlined in our letter dated April 14, 2016"

FINDINGS:

This Board derives its authority from the provisions of the Railway Labor Act, as amended, together with the terms and conditions of the Agreement by and between the Brotherhood of Maintenance Employees Division – IBT (hereinafter referred to as the “Organization”) and the Union Pacific Railroad Company (hereinafter referred to as the “Carrier”). Upon the whole record, a hearing, and all evidence as developed on the property, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the hearing thereon. The Claimant was ably represented by the Organization.

The Claimant, Dennis Clough, has been employed by the Carrier for approximately

11 years and held the position of Semi Truck Driver when he was charged with violating Rule 1.6, Conduct (Dishonest) when he allegedly submitted false reports of his work locations in order to improperly collect per diem allowances.

On March 7, 2016, the Claimant was notified in writing by the Carrier to report for a hearing and investigation, which was held on March 24, 2016, regarding the aforementioned charges. On March 31, 2016, the Claimant was notified that the Carrier found him guilty of the charges and that he was dismissed from service. The record indicates that the Carrier denied subsequent appeals by the Organization and held an appeal conference on September 1, 2016. The matter was not resolved and the Carrier rendered its final decision on September 23, 2016. The Organization rejected the Carrier's decision and moved to have the matter adjudicated before this Board.

The Carrier maintains that the Board should not address the merits of the claim since the Organization committed a procedural error when it did not properly respond to the initial decision to discipline the Claimant. It alleges that the Organization failed to send its written rejection to the Superintendent of Transportation Services Erik Erickson, who issued the Notification of Discipline Assessed as required by Rule 21(B). The Carrier asserts that the rule requires "the matter shall be considered closed" by the Board since the Organization's reply was not sent to Erickson. The Carrier further contends that the Organization's claim of a procedural error is baseless and should be denied.

With regard to the merits, the Carrier claims that it has established with substantial evidence that the Claimant violated Rule 1.6 and was dishonest when he admitted to including per diem allowances in all his payroll entries regardless of his work location and falsely reporting his work locations as being more than 50 miles from his home in order to qualify for the additional payments. The Carrier asserts that the Claimant knew that he was not entitled to the per diem allowances and admitted that he submitted such requests every day.

The Carrier maintains that by doing so, the Claimant violated the April 25, 2012, Local/National Agreement referred to as the "per diem rule". It argues that the Claimant's

own testimony, as well as the testimony of the Manager of Track Projects, Ronald Cooper and the documentary evidence supports its conclusion that the Claimant improperly received per diem allowances as determined by the Audit Department report in the record. The Carrier also relies on statements made to the auditors by the Claimant's Supervisor Paul Wilson who believed that the Claimant had improperly received per diem allowances and that the two of them had a discussion about the subject.

The Carrier contends that the penalty imposed is appropriate where charges of dishonesty involving overt instances of theft have been proven. It cites numerous awards by various boards of adjudication where dismissal for dishonesty has been upheld.

The Organization alleges that the Carrier committed numerous procedural errors, which requires the Board to dismiss the charges and sustain its claim. It maintains that the Carrier unilaterally postponed the hearing and investigation, originally scheduled for March 10, 2016 to March 24, 2016, in violation of Rule 19.

The Organization argues that the Claimant was subjected to a disciplinary investigation when he was questioned by the Carrier's Audit Department without advance written notice and without proper representation. It claims that the Carrier entered that testimony as evidence during the March 24, 2016 hearing, which prejudiced the Claimant's ability to obtain a fair and impartial investigation. The Organization further alleges that the Carrier failed to provide pertinent witnesses for the investigation and that the hearing officer and charging officer were seen the previous day discussing the charges.

With regard to the merits, the Organization asserts that the Carrier did not meet its burden of proof that the Claimant was dishonest. It maintains that the Claimant believed he was entitled to the per diem allowances and had always received it when he added it to his payroll entry. As such, argues the Organization, he did not submit his request for such payments dishonestly. The Organization cites a litany of arbitral authority in support of its contention that a mistake or misunderstanding does not equate to theft and dishonesty. Further, the Organization argues that should the Board find that the Carrier did meet its burden of proof, there is ample precedent that dismissal for the charges rendered here as

excessive.

The Board first addresses the procedural errors claimed by the parties and finds that none are fatal flaws that prevent us from addressing the merits of the claim. The Organization's claim that the postponement of the March 10, 2016 violated Rule 19(A) is misguided. The rule, in pertinent part reads, "The investigation shall be postponed for good and sufficient reasons on request of either party." The rule does not require mutual agreement to the postponement, but instead that it is based on some rational purpose. The record indicates there was some confusion regarding the Organization's receipt of the notice of the investigation. The Carrier's witnesses credibly testified that they believed the hearing was postponed. The record establishes that there was "good and sufficient" cause for the postponement.

The Organization's claim that the Carrier's officials engaged in *ex parte* discussions, which deprived the Claimant of a proper investigation, is rejected. There is insufficient evidence to prove that the Carrier official's discussion the previous night was improper and deprived the Claimant of a fair and impartial hearing. Serious allegations of procedural misconduct must be bolstered with more than mere assertions.

The Organization's assertion that the Carrier failed to produce material witnesses which constitutes procedural error is unfounded. The record indicates that the Carrier offered to make Supervisor Paul Wilson available by telephone or in person when the Organization made its request. The Organization did not pursue the matter and continued with the investigation to its conclusion without Wilson.

The Organization's contention that the investigation by the Audit Department violated the Agreement is baseless. Nothing in the record prevents the Carrier from questioning employees during an internal investigation prior to the issuance of disciplinary charges. Once the Carrier decided to issue charges, the hearing and investigation, as governed by the Agreement, provides the Claimant with due process and the ability to dispute the evidence and confront witnesses. The Board does not find that any of the other procedural defects raised by the Organization require dismissal of the charges.

In discipline cases, as the one before the Board here, the burden of proof is upon the Carrier to prove its case with substantial evidence and, where it does establish such evidence, that the penalty imposed is not an abuse of discretion. Upon review of all the evidence adduced during the on-property investigation, the Board here finds that the record does not support the Carrier's findings that the Claimant was dishonest when he improperly received per diem allowances as referenced in the charges and therefore did not violate Rule 1.6.

The record does not contain sufficient evidence that the Claimant acted knowingly and with intent to engage in a theft of the per diem allowance. It is well established that to prove that the Claimant engaged in a dishonest act, the Carrier must provide substantial evidence that he intentionally engaged in a deliberate and willful manner to receive compensation knowing he was not entitled to the allowance. This Board in Award Nos. 32 and 33 held that to prove dishonesty, the Claimant's pernicious intent must be proven. In Special Board of Adjustment No. 180, Award No. 1161 the discipline was overturned where, "The Carrier has nowhere demonstrated that Claimant deliberately tried to 'cheat' it out of additional overtime pay. To the contrary, the evidence of record indicates that Claimant entered the additional time on the good-faith belief that such practice was condoned by Carrier."

Here, the documentary evidence and the witnesses' testimony do not support the conclusion that Claimant knew that he was improperly receiving the per diem allowance. The transcript of the Audit Department investigation confirms that Claimant received the allowance contrary to the "per diem rule" in the Local/National Agreement. However, the record does not contain any evidence that the Claimant knew or should have known of the "per diem rule" before the Organization's representative informed him of the rule. The Claimant's testimony that he changed how he made payroll entries for the per diem allowance once his union representative informed him of the proper rule is unchallenged.

The Board finds that the allegation that the Claimant was dishonest by inputting the wrong location in his report when compared to the findings of the Audit report must be rejected. The record confirms that the charge addressed the Claimant's per diem allowance

only. Manager Cooper acknowledges as much when he testifies “The only charge is as the notice states.”

Further, the Claimant was not afforded the opportunity to cross examine any Carrier official who relied on the “Telematics” data used to determine his work location. The Audit Department’s report read into the record is given little weight where it is not supported with testimony by its authors whose findings were used to discipline the Claimant. The Audit Department’s investigation does not supplant or constitute the fair and impartial hearing guaranteed to the Claimant by the Agreement. The Claimant is entitled to confront his accusers. The officials who used the “Telematics” data were in the Carrier’s control and direction and could have been made available to support their findings. Cooper’s testimony does not provide enough information to prove that the Claimant submitted incorrect work locations even if the charges did include such an allegation. There is no substantial evidence in the record that sufficiently challenges the Claimant’s veracity where he explains why the work locations he reported differ from the ones noted by the Audit Department report.

Based on the forgoing, the Board’s review of the merits is based on whether the Claimant was dishonest when he received the per diem allowances for the period addressed in the charges. The testimony by Cooper does not prove that the Claimant knew he was improperly submitting for the allowance. He alleges that the Claimant asked him if he could change his location in order to put in for the per diem allowance. The Claimant testified that the conversation with Cooper occurred after he was informed by the Organization of the correct application of the “per diem rule”. The testimony of the two witnesses indicates that the conversation was about prospective per diem allowances and is not evidence that the Claimant had been dishonesty previously.

The testimony by Wilson during the Audit Department’s investigation contributed to the Carrier’s conclusion that the Claimant had knowingly received the allowance improperly. The Carrier submitted the transcript interviews conducted by the Audit Department into the record addressed here. However, without Wilson’s testimony, his statements to the auditors cannot suffice as substantial evidence of the Claimant’s guilt. The record indicates that Wilson, as an employee, was in the Carrier’s control and could have

been presented to support his statements to the auditors. The Claimant was deprived of the opportunity to question Wilson about their conversations regarding the per diem allowance and his conclusion that the Claimant had improperly received the payments. While the Board did not find it a procedural error in not presenting Wilson as a witness, the evidentiary weight of his statements to the auditors is minimal and alone insufficient to prove the allegations being asserted by the Carrier.

There is nothing in the record to sufficiently impugn the Claimant's testimony that he believed he was entitled to the per diem allowance and that he had been doing so whenever he was assigned to the interdivisional gang. His understanding of the "50 mile rule" was not correct. The on-property record establishes that the Local/National Agreement was addressed and the Board finds that there basis to ignore it as containing the applicable rule. However, the Carrier has not established that the Claimant knew it was incorrect or that he was dishonest when he received the allowance. The Claimant was never confronted with the "per diem rule" contained in the Local/National Agreement during the investigation. The Carrier did not establish that the Claimant knew of that rule, compared to Rule 49 of the Agreement and therefore did not establish that he knew his interpretation of the rule was incorrect. The Claimant testified that he had always received the per diem allowance based on his understanding of the rule contained in the Agreement and that Wilson and Cooper approved his payroll entries. He also testifies that other foremen inputted the per diem allowance the same way for him when he was not performing his own timekeeping function. Nothing in the record sufficiently casts doubt on the veracity of the Claimant's testimony and therefore, the Carrier's credibility determinations must be viewed as arbitrary and capricious.

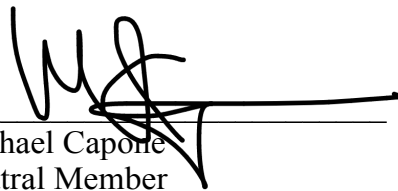
The record does not establish that the Claimant was dishonest but does indicate that he was misinformed and operated in error. There is insufficient evidence to prove that the Claimant knew or should have known that he was improperly receiving the per diem allowance on the dates charged by the Carrier.

In summary, we have reviewed and carefully weighed all the arguments and evidence in the record and have found that it is not necessary to address each facet in these Findings.

We find that the Carrier has not established with substantial evidence that the Claimant violated Rule 1.6 and that he was dishonest. The Claimant shall be reinstated and his seniority and benefits unimpaired. However, we find that the Claimant should not be unjustly enriched by his error and as such, he must reimburse the Carrier for those payments made in violation of the “per diem rule” during the period identified by the Carrier in its charges. The Claimant shall be made whole and compensated as such minus the improper payments calculation.

AWARD

Claim sustained in part, denied in part.



Michael Capone
Neutral Member

Dated: May 14, 2018



Alyssa K. Borden
Carrier Member

Dated: 05/16/18



Andrew M. Mulford
Labor Member

Dated: 5/16/18