

**PUBLIC LAW BOARD NO. 7660**

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

**and**

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

**Case No: 84  
Award No: 84**

**STATEMENT OF CLAIM:**

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's termination of Mr. J. Rogers, by letter dated October 21, 2016, for alleged violation of Rule 1.6: Conduct - Dishonest was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File RI-1619C-801/1675687 CNW).

2. As a consequence of the Carrier's violation referred to in Part 1 above, Claimant J. Rogers shall ' ... be made whole by compensating him for all wage and benefit loss suffered by him for his employment termination, any and all expenses incurred or lost as a result of Round trip Travel not paid for to the scheduled Hearing on October 13, 2016, and the alleged charge(s) be expunged from his personal record. Claimant must also be made whole for any, and all loss of retirement month credit and any other loss." \_

**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, Jeremiah Rogers, has been employed by the Carrier since June 12, 2006 and held the position of Foreman Class 2 when he was charged with improperly reporting compensated time despite not performing work or service between September 17 and 18, 2016. On October 5, 2016, the Carrier issued a notice directing the Claimant to report for a hearing and investigation, which was held on October 10 and 13, 2016. On October 21, 2016, the Claimant was notified that the Carrier found him guilty of the charges and he was dismissed from service. The record indicates that the Carrier denied subsequent appeals by the Organization and rendered its final decision on March 1, 2017. An appeal conference was held on March 22, 2016 whereupon the matter was not resolved. The Organization rejected the Carrier's decision and moved to have the matter adjudicated before this Board.

The Carrier argues that the documentary evidence and witness testimony presented during the investigation is substantial evidence that the Claimant falsely reported his time worked from September 17 through to September 18, 2016. It alleges that the Claimant was to report to a crossing location where a vehicle hit occurred in Touhy. The Carrier contends that the Claimant spent only a few minutes at the Touhy crossing and instead spent most of his time at a different location in Estes, which is not Carrier property. It asserts that the Claimant made a payroll entry for five hours of overtime as compensated service. The Carrier avers that the Claimant is responsible for submitting the accurate number of hours worked. It maintains that the Claimant was only at the work location for approximately 13 minutes and spent a little more than three hours away from his home after being called to duty at approximately 12 midnight on September 17 and leaving his residence at 12:31 a.m. on September 18, 2016.

The Carrier asserts that the Claimant had no explanation for the time he spent off the Carrier's property. It maintains that its Telematics GPS tracking system confirms the Claimant was not performing service for the Carrier. Further, it alleges that the Claimant purposefully changed his hours worked in the payroll system after he was informed of being removed from service. The Carrier maintains that it is well established in the industry that dismissal for such egregious acts of dishonesty is an appropriate penalty, which has been consistently upheld by boards of adjudication.

The Organization maintains that the Carrier did not provide the Claimant with a fair and impartial investigation. It alleges that the Carrier violated Rule 19, Discipline, when it unilaterally postponed the scheduled hearing of October 10, 2016. The Organization contends that the Carrier's reason for postponing the hearing was to cure the lack of proper notice to the Claimant. In addition, the Organization argues that the Carrier did not provide witnesses in support of their written statements. It also claims that the Carrier used the Telematics GPS system as a disciplinary tool after insuring the Organization that it would not to be used for such purposes.

The Organization asserts that the Carrier has not met its burden of proof that the Claimant was dishonest. Instead, argues the Organization, the Carrier's manager confirmed that the Claimant was entitled to submit two hours and forty minutes of time since he was contacted by telephone to perform work related service. It argues that the Claimant testified truthfully about how he calculated his time worked on September 17-18, 2016.

We first address the Organization's claim of procedural errors and find that none are fatal flaws that prevent us from addressing the merits of the claim. The hearing and investigation was held within 10 calendar days from when the Carrier became aware of the violation. The Carrier became aware of the allegation on September 30, 2016. The first calendar day " . . . of the date the Carrier has knowledge of the occurrence to be investigated" was October 1 and therefore, the hearing was properly held on October 10, 2016, as required by Rule 19.

During the October 10, 2016 hearing it was determined that the Claimant had not received the scheduling notice due to providing the Carrier with an incomplete address. The record confirms that on October 6, 2016, the delivery service was delayed due to an incomplete address. Upon becoming aware that the Claimant had not received notice the Carrier made an effort to give him two days to prepare for the investigation as deemed reasonable under Rule 19.

The Carrier's decision to postpone the hearing until October 13 did not violate the Agreement. Rule 19A, 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 the Carrier sought to provide the Claimant reasonable time to prepare for the investigation. The record establishes that there was “good and sufficient” cause for the postponement.

In discipline cases, the burden of proof is upon the Carrier to present 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 finds that the record contains substantial evidence that the Claimant was dishonest when he falsely reported his time worked and subsequently changed his payroll report.

The documentary evidence and the testimony of the Manager of Track Maintenance Michael Corcoran sufficiently establish that the Claimant falsely reported that he worked five hours of overtime. Based on the Carrier’s Telematics GPS tracking system used on its vehicles, the record indicates he left his home at approximately 12:30 a.m. and arrived at reported vehicle incident at 1:00 a.m. Yet, at 1:27 a.m. the Claimant was found to be at a non-work related location between 1:27 a.m. and 2:59 a.m. and was back at his residence at 3:22 a.m. In addition, the evidence conclusively establishes that the Claimant changed his payroll report on October 4, 2016 after he was removed from service pending the investigation.

The Organization’s valiant effort to introduce rules pertaining to meal periods and one hour allowed to report to headquarters are inapplicable to the Claimant’s improper payroll entry for five hours of overtime when he was not actually performing service for the Carrier. Further, there is nothing in the record that prohibits the Carrier from using technological tools to track its vehicles when used by employees. Without a written agreement or an established past practice the Carrier has the discretion to use such GPS devices to monitor its vehicle use. The resulting impact when such devices are used and lead to discipline is addressed through the applicable procedures of the Agreement and established rules that insure a fair and impartial investigation.

There are no grounds to consider the Carrier's assessment of the evidence as biased against the Claimant. Credibility determinations of witnesses who testified during the hearing and investigation are not to be disturbed absent evidence that the Carrier's conclusions are arbitrary. A review of the documentary evidence and testimony does not provide a basis to ignore the Carrier's assessments. It is well established by arbitral precedent that the Board sits in review of the Carrier's findings made on the property and does not make *de novo* findings. Here, there is no basis to replace the Carrier's credibility determinations of the witnesses' testimony with our own. The Claimant is unsure in his testimony of how he calculated the five hours of overtime and could not explain how it took him 14 minutes to drive one block. Further, the Board rejects the Claimant's assertion that he was told by his union representative to change his payroll records. The Claimant knew or should have known that changing his payroll information after being taken out of service was improper.

Legions of boards in the industry have found that acts of dishonesty are serious infractions where dismissal has been consistently upheld, irrespective of the previous disciplinary record or length of service. See Public Law Board ("PLB") No. 6402, Award No. 40, PLB No. 7633, Award No. 35 and PLB No. 6459, Award No. 19. It is well established in the industry that leniency is reserved to the Carrier where there is no abuse of discretion or where the penalty is not excessive. The record does not contain any evidence that the Carrier was biased in dismissing the Claimant.

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 established with substantial evidence that the Claimant was dishonest and violated Rule 1.6.

AWARD

Claim denied.

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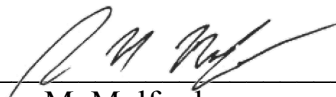
Michael Capone  
Neutral Member

Dated: May 14, 2018

A handwritten signature in blue ink, appearing to be 'Alyssa K. Borden', written over a horizontal line.

Alyssa K. Borden  
Carrier Member

Dated: 05/16/18

A handwritten signature in blue ink, appearing to be 'Andrew M. Mulford', written over a horizontal line.

Andrew M. Mulford  
Labor Member

Dated: 5/16/18