

**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: 87  
Award No: 87**

**STATEMENT OF CLAIM:**

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. S. Penberthy by letter dated August 12, 2016 for alleged violation of Rule 1.6: Conduct - Dishonest and Rule 1.13: Reporting and Complying with Instructions was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File B-1619C-202/1670330 CNW).
2. As a consequence of the violation referred to in Part 1 above, Claimant S. Penberthy 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 August 4th, 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, Steven Penberthy, has been employed by the Carrier since May 12, 1992 and held the position of Foreman when he was charged with improperly reporting compensated time for July 1, 8, 15, 22, and 27, 2016. On August 1, 2016, the Carrier issued a notice directing the Claimant to report for a hearing and investigation, which was held on August 4, 2016. On August 12, 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 December 23, 2016. An appeal conference was held on April 5, 2017 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 - including the Claimant's - constitutes substantial evidence that the Claimant falsely reported his time worked on various dates in July 2016. It alleges that after the Claimant was instructed to install ties on July 27, 2016, he reported that he and his gang installed four ties and surfaced 30 feet of track. The Carrier maintains that the Claimant and the gang did not install ties or surface any track. It alleges that the Claimant was at the work site for only 41 minutes and left work 29 minutes early. The Carrier also contends that the Claimant and his work group spent several days in residential areas engaging in non-work activities and received compensation for such time. It concludes that such conduct is dishonest and a theft of service, which led to his dismissal.

The Carrier asserts that the Claimant admitted to conducting personal business while on duty and could not adequately explain the time he spent off the Carrier's property. It maintains that the Claimant submitted a production report on July 27, 2016 indicating they completed the assigned work when none was actually performed. The Carrier also contends that the record shows the Claimant returning to his depot and unloading items into his personal vehicle. The Carrier argues that dismissal for such egregious conduct is appropriate and that dishonesty has been consistently upheld as proper grounds for such a penalty.

The Organization maintains that the Carrier did not provide the Claimant with a fair

and impartial investigation. It alleges that the Claimant was denied due process and a proper hearing when the Carrier held one hearing and investigation for both him and the Assistant Foreman Austin Rutherford, who was served with the same charges.

The Organization claims it made several requests for documents and other information needed to prepare a proper defense. It alleges that failure to provide it with advance access to the evidence to be presented skews the process in favor of the Carrier and therefore, unjustly prejudiced the Claimant's ability to address the charges.

The Organization argues that the Carrier's use of the Telematics GPS system as a disciplinary tool was improper. It maintains that the Carrier had previously agreed to not use the Telematics to discipline employees but, instead, to monitor unsafe driving habits.

The Organization asserts that the Carrier has not met its burden of proof that the Claimant was dishonest. Instead, it argues the Claimant was able to explain his movements and how they related to his job function. Further, it alleges that the Telematics system was not operating properly and therefore cannot be relied upon as an accurate gauge of the Claimant's activities. The Organization maintains that the Claimant could not complete his assigned task on July 27, 2016 since the equipment broke down causing him to repair defects at a different location.

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. Nothing in the Agreement prohibits the Carrier from holding a concurrent hearing and investigation for more than one employee. Here, the charges and evidence presented pertained to both employees who were assigned to the same work and vehicle on the dates listed in the charges. The hearing and investigation provided both employees the ability to produce and cross-examine witnesses, as well as review and present evidence. We find that the Claimant was not prejudiced or denied a fair hearing.

There is nothing in the record that prohibits the Carrier from using technological tools, like Telematics, to track its vehicles when used by employees. Without a written

agreement or an established past practice that limits the Carrier, it has the discretion to use GPS devices to monitor its vehicle use. Where the use of such devices lead to disciplinary charges, the resulting impact to an employee is addressed through the applicable procedures of the Agreement intended to insure a fair and impartial investigation.

The Organization's claim that the Carrier committed a procedural error when it did not share documents or witness lists prior to the investigation must also fail. There is no express language in the Agreement that requires the Carrier to provide the Organization with advance documentation or a witness list. The purpose of the hearing and investigation is for each party to hear and review all relevant evidence that pertains to the dispute. During the investigation either party can request additional information or witnesses. Absent any contract language requiring the production of documents or witness lists prior to the investigation, the Carrier is not obligated to provide the Organization with information that is otherwise intended to be presented during the investigation.

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 completing the assigned work on July 27, 2016 and that he received compensation for several dates in July 2016, when he engaged in activity unrelated to the Carrier's business.

The documentary evidence and the testimony of the Manager of Track Maintenance David Deurloo and Department of Transportation Compliance Analyst Casey Williams sufficiently establishes that the Claimant did not install the ties and surface track as assigned on July 27, 2016. Deurloo concluded that the Claimant - who testified he could not complete his assignment due to a broken hydraulic - could have replaced the hose and completed the assigned task. However, based on the Carrier's Telematics GPS tracking system and the testimony provided by Deurloo and the Claimant, the gang left the work site and traveled to several different locations unrelated to the Carrier's interests.

The record also confirms that on the other dates listed in the charges the Claimant engaged in activity unrelated to his job for several hours of the workday. The Organization's claim that the Telematics information was inaccurate and unreliable was convincingly addressed by Williams who explained the distinction between identifying specifications used by the Telematics report when compared to the "MapQuest" report. The reports and related testimony sufficiently establish that the Claimant engaged in unrelated work activities. The evidence reveals that many hours of the Claimant's workday were spent away from the Carrier's tracks and property. Instead, he traveled through residential areas and stopped at locations where he was not performing any work as required by his assignments and noted in his production reports.

The Claimant confirms that he did not perform the work he was assigned on July 27, 2016, which he reported as completed on his production report. He also acknowledges he drove the Carrier's truck for long periods of time through residential areas nowhere near the Carrier's property. The Claimant could not adequately explain many of his movements during his tour of duty on the days listed in the charges.

The Claimant makes several unsupported assertions by claiming that for many of the times when he stopped his truck at locations unrelated to the Carrier's business he was on the telephone performing his job function. The record indicates that these occasions involved hours where the engine was off and hours with the engine idling in one location. There is no evidence that those instances were related to a work assignment. The Claimant's affirmative defense that he was performing a job related function is not supported with any credible or reliable testimony or documentation when compared to the substantial evidence in the record that supports the Carrier's charges.

There are no grounds to decide that the Carrier was biased toward the Claimant in its assessment of the evidence and testimony provided. Its credibility determinations of the testimony are not to be disturbed absent evidence that the Carrier's conclusions are arbitrary or capricious. A review of the documentary evidence and testimony does not provide a basis to ignore the Carrier's assessment of the testimony. 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. Moreover, the Claimant's testimony confirms he received compensation for time not worked.

Legions of tribunal boards in the industry have found that acts of dishonesty are serious infractions where dismissals have been consistently upheld, irrespective of the previous disciplinary record or length of service. See National Railroad Adjustment Board Third Division Award No. 22119, Public Law Board ("PLB") No. 7053, Award No. 48, and PLB No. 6392, Award No. 27. It is well established in the industry that leniency is reserved to the Carrier where there is no abuse of discretion. The record does not contain any evidence that the Carrier was biased in dismissing the Claimant. The Board has no basis to alter the Carrier's decision.

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.

**AWARD**

Claim denied.



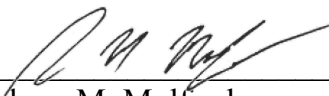
Michael Capone  
Neutral Member

Dated: May 14, 2018



Alyssa K. Borden  
Carrier Member

Dated: 05/16/18



Andrew M. Mulford  
Labor Member

Dated: 5/16/18