

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: 88
Award No: 88**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. A. Rutherford 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-203/1670331 CNW).
2. As a consequence of the violation referred to in Part 1 above, Claimant A. Rutherford 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, Austin Rutherford, has been employed by the Carrier since April 16, 2014 and held the position of Assistant 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 arguments and issues raised by the Carrier and the Organization in this matter are for the most part the same as those addressed in our Award No. 87 pertaining to the Foreman Steven Penberthy. The one distinction is the allegation that the Claimant arrived late for work on July 27, 2016 and was paid for a full day's work. One hearing and investigation for both the Claimant and Penberthy was held on August 4, 2016. The evidence adduced was the same for both employees. The Claimant testified on his own behalf.

The Carrier maintains, as it did with Penberthy, that it has established substantial evidence that the Claimant falsely reported his time worked on various dates in July 2016. It alleges that the Claimant, together with Foreman Penberthy, was instructed to install ties on July 27, 2016 and he reported that he and his work group installed four ties and surfaced thirty feet of track. The Carrier maintains that the Claimant and the gang did not install ties or surface any track on July 27, 2016. It alleges that the Claimant reported 15 minutes late for work and was at his assignment for only 41 minutes and left work 29 minutes early. The Carrier contends that it also discovered that the Claimant and his work group spent several days in residential areas, not providing any service and receiving compensation for such time.

The Carrier asserts the Claimant admitted to being late on July 27 and could not adequately explain the time he spent off the Carrier's property nor did he deny that the

allegations of being off company property while on duty. 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 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 Foreman Steven Penberthy, who were 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 explained that he was not always with Penberthy and he was not familiar with the areas they were driving through. Further, it alleges that the Telematics system was not operating properly and therefore cannot not 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. It also contends that the Claimant was 15 minutes late due to being stopped at a railroad crossing which added to his two hour commute. The Organization avers that the Claimant was not dishonest when questioned and there is nothing in the record that proves he is guilty of the charges.

Our findings regarding the Organization's claim of procedural errors in Award No. 87 are applicable here as well. We find no fatal flaws that prevent us from addressing the merits of the claim. Nothing in the Agreement prohibits the Carrier from holding a disciplinary hearing for more than one employee. Here, the charges and evidence presented pertained to both employees who were assigned to the same work and were together 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.

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.

Our findings in Award No. 87, based on the same 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 he was assigned to do on July 27, 2016. Further, the Claimant reported late for work on July 27 and received pay for time not worked. The Organization's valiant argument that the Claimant has a long commute and was delayed at a railroad crossing does not suffice to justify that the Claimant considered it acceptable to receive pay for time not worked. His belief that such conduct was normal, albeit incorrect, underscores his willingness to receive pay for time not worked throughout the day on July 27 as well as other dates as confirmed by the record.

The Board does not find it necessary to repeat its analysis of the entire record that we describe in Award No. 87. Our findings there are directly applicable to the matter addressed here. The Claimant's testimony does not provide any basis to discount the substantial evidence established that he is guilty of the charges.

There are no grounds to decide that the Carrier was biased toward the Claimant in its assessment of the evidence and testimony. Its credibility determinations of witnesses are not to be disturbed absent evidence that its conclusions are arbitrary. 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. The Claimant testimony confirms he received compensation for time he did not perform work assigned to him.

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 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 or prejudiced 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