

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 7048

BNSF RAILWAY

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 7048 Case No. 20
NMB Case No. 106
Carrier File No. 14-08-0188
Organization File No. 160-13D2-086.CLM
Claimant: Brian L. Bruce

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing April 24, 2008 when Claimant, B.L. Bruce (6532774), was assessed a Level S Thirty (30) Day Record Suspension and a one year probation period for alleged violation of Maintenance of Way Operating Rules 1.6 and 1.13; for dishonesty and falsification of pay and failure to following instructions. The Claimant was paying himself for phone calls, showing them as work; and
2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate the Claimant with all seniority, vacation, all rights unimpaired and pay for all wage loss commencing April 24, 2008, continuing forward and/or otherwise made whole.

This claim was discussed in conference between the parties.

NATURE OF THE CASE

The Claimant, Brian L. Bruce was issued a Level S Thirty Day Record Suspension with one year probation for violating Maintenance of Way Operating Rules 1.6 – Conduct and 1.113 – Reporting and Complying with Instructions because he allegedly falsified payroll records between April 25 and June 24, 2008. More particularly, the Claimant, who was a Foreman, was charged with having billed the Carrier on multiple occasions for overtime payments to which he was not entitled. The basis for the Claimant's overtime billing was predicated on the Claimant's conclusion that participating in telephone conversations outside his regular working hours, regardless of the duration of the calls, qualified as being called into perform a service or work, thus triggering the minimum payment of two hours and forty minutes at time and one-half, provided pursuant to Appendix 23, Article IV, Item (a), which provides in relevant part that:

Employees called to perform service not continuous with the normal work period will be allowed a minimum of four (4) hours for two hours forty minutes (2'40"), time and one-half will be allowed on the minute basis.

The Claimant also submitted payment documents for overtime call outs based on his performance of work before or after his shift that the Carrier characterized as unauthorized overtime, as work that should have been billed as contiguous overtime rather than a four hour

minimum call out premium call, or as multiple billing for work within the same two hour and forty minute interval.

The Carrier construed the Claimant's application for and receipt of substantial funds for participating in such telephone calls or for unauthorized work outside his regular shift hours as an abuse of the Carrier's payroll system and as falsification of Carrier documents, whereupon the Carrier imposed a Level S Thirty Day Record Suspension with one year probation in lieu of a more stringent disciplinary penalty. The Carrier's Policy for Employee Performance Accountability provides that:

An employee involved in a serious incident will be given a thirty-day record suspension and may be offered training to help correct the behavior that gave rise to this discipline

The Claimant contends that the Roadmaster who supervises his work directed him to perform tasks requiring that he provide a service to his employer and that this engagement with his duties satisfied the definition of "service" contemplated by Article V of the Track Supervisors Agreement of January 1, 1974.

The Organization contends that the Claimant was harassed, threatened and intimidated by local Carrier officials at the investigative hearing. More particularly, the Organization alleges that the Chairman of the investigation refused to permit the Claimant to enter a recorded

conversation or to call witnesses on his behalf. The Organization further contends that the Carrier improperly recouped more than \$3000.00 dating back to April 24, 2008, which interval exceeded the sixty-day time limit during which the Carrier may be entitled to reclaim compensation that was improperly paid.

The parties were unable to resolve their dispute within the grievance procedure, and the matter was submitted for adjudication to Public Law Board 7048.

FINDINGS AND DECISION

Public Law Board No. 7048 (the Board) finds that the parties herein are Carrier and Employee Organization within the meaning of the Railway Labor Act, as amended. Further, the Board has jurisdiction over the parties and subject matter involved.

The contractual provision that governs the instant case was intended by the parties to pay a minimum overtime premium to employees who were called out in order to perform work or render a service to the Carrier for its benefit after the employee had left their regular place of work at the conclusion of their normal work hours. Regular overtime is available, when properly authorized, for Track

Supervisors who come in early or remain on duty after their shifts to perform work at the behest of their superiors. The evidentiary record does not support a conclusion that the parties mutually intended that even short telephone calls placed to a Track Supervisor outside of work hours would trigger an obligation to pay four hours' wages, a sum slightly over one hundred dollars, for each such instance. Thus, the Claimant's repeated practice of billing the Carrier for such instances was patently inappropriate and contrary to the directive issued by his supervisor that only authorized overtime was to be billed.

The evidentiary record in the instant case established persuasively that the Claimant knew, or reasonably should have known, that he was not entitled to such compensation. Even if these actions were viewed in a light most favorable to the Claimant, the Claimant was not entitled to the level of additional compensation he received, especially for instances where he billed multiple separate calls during the initial two hour forty minute overtime interval or where he manipulated his arrival at work early to earn a four hour premium rather than completing the duties during his shift or billing the PARS system for contiguous overtime for the time before or after his regular shift hours that he actually spent working for the Carrier's benefit. For example, the Claimant came in early to order supplies (Tr. 36) and considered this work as a valid basis for two hours forty minutes pay at time and a half, notwithstanding that

he could have, and should have, accomplished this work during his regularly scheduled shift hours. The Claimant also billed a call out paying two hours forty minutes overtime for a conversation about his duties with his supervisor that was completed during an elevator ride at a Hampton Inn where he and his supervisor were staying (Tr. 136). These payments are clearly unjustified under the collective bargaining agreement governing Track Supervisors.

To hold otherwise would entitle all Track Supervisors to extensive additional monetary compensation whenever issues arose under their jurisdiction that required subordinates to pose questions to them outside their customary work hours, regardless of whether the supervisors should have been able to anticipate these questions and address them thoroughly during regular working hours or whether the Track Supervisor actually responded in person to the site of the situation requiring after hours intervention.

The record is devoid of persuasive evidence that the parties who negotiated the Track Supervisors Collective Bargaining Agreement in 1974 and subsequent addenda mutually intended that this level of overtime compensation be paid routinely in the circumstances that the Claimant paid himself in the instant case. For example, the Claimant submitted PARS entries for three call outs in the same two hour forty

minute period on June 6, 2008 (Tr.37). Even if the Claimant's theory were correct in every other regard, his attempt to be paid for multiple call outs in the same two hour forty minute period violated the collective bargaining agreement and justified the imposition of discipline.

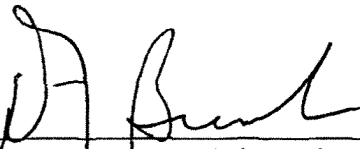
The Claimant repeatedly submitted PARS entries for call out premium when at most he was eligible to receive continuous overtime. There is substantial credible evidence in the record that many instances in which overtime was paid occurred without the Claimant properly securing the unambiguous approval of his supervisor before coming in early or staying late. Moreover, the Claimant was unable to recall who, if anyone, had authorized his overtime work. Thus, the Carrier's imposition of relatively modest corrective discipline that is consistent with the penalty described in PEPA for a single instance of misconduct must be sustained.

The Organization contends that the Carrier is limited to a sixty day interval to decline payroll payments. Assuming the Organization is correct regarding the contractual interval for redressing inadvertent payroll computation errors, there is no similar limitation on the Carrier's ability to seek restitution of monies intentionally obtained improperly by a bargaining unit employee, as in the instant case.

By imposing a record suspension that did not deprive the Claimant of monetary compensation, rather than an actual suspension, or even dismissing the Claimant for dishonesty, the Carrier demonstrated restraint and treated the infraction as a basis for corrective discipline, rather than an excuse for imposing punitive sanctions. The additional one year probation period was warranted by the particular facts of the instant case, especially the multiple instances of manifest disregard for the directive of his supervisor not to work overtime that had not been authorized by the supervisor, to assure the Carrier that the claimant ceased and desisted from the practice of billing the Carrier for telephone calls received after the end of his regular shift.

Therefore, based on the evidence submitted, the Carrier did not violate the Agreement commencing April 24, 2008 when Claimant, B.L. Bruce, was assessed a Level S Thirty (30) Day Record Suspension and a one year probation period for alleged violation of Maintenance of Way Operating Rules 1.6 and 1.13; for dishonesty and falsification of pay and failure to following instructions. The instant claim is hereby denied.

We so find.



Daniel F. Brent, Impartial Chair

Dated: 6-21-10

(☒) I concur. () I dissent.

Glenn W. Caughron
Glenn W. Caughron, Carrier Member

Dated: 7/13/10

() I concur. () I dissent.

David D. Tanner
David Tanner, Organization Member

Dated: 6/28/10