

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

and

NMB Case No. 59
**Claims of C. T. Collins
And J. D. Marquez**
Dismissal: Theft of Time,
Dishonesty

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Request on behalf of Southwest Division Conductor C.T. Collins and Southwest Division Brakeman J.D. Marquez for reinstatement to service with pay for all time lost without deduction of outside earnings, with all seniority rights unimpaired, with all fringe benefits intact.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on June 14, 2007, at Kansas City, Missouri. Claimants were not present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts. The Board makes the following additional findings, which are based on the transcript of an investigatory hearing held in consequence of the events at issue.

Claimant Collins was employed as a Conductor and Claimant Marquez was employed as an Brakeman. They were regularly assigned as part of roadswitcher crew at Glendale, Arizona. The crew's usual routine was to go on duty at 1930 hours, depart after being briefed and attending to paperwork to switch Zone 12 until their work was complete, return to Glendale and wait direction whether to move empties to Mobest, a move which ordinarily took place following the departure of a local train. The crew reported to and worked out of the crew office at Glendale.

The crew worked under the supervision and carried out its assignments at the direction of Trainmaster B. E. Conlin, who oversaw area operations and directed a number of other roadswitcher crews. Conlin worked, in turn, under the supervision of Superintendent of Operations R. G. Strong.

On April 26, 2006, the crew, consisting of Claimants and Engineer F. V. Macias, was called for duty at the usual time of

1930. At approximately 2015, they were briefed at Glendale by Trainmaster Conlin and issued paperwork for their work that evening. Conlin directed the crew to perform their Zone 12 switching work and remain available thereafter to move empty equipment to Mobest. Claimants understood that Conlin would call the crew by cell phone to give them instructions with respect to the movement of empties to Mobest.

The crew departed the terminal on the assigned locomotive, performed its switching assignments and returned to Glendale shortly before 2230. They shut down the locomotive at that time. The crew, which understood it was on stand-by to move empties to Mobest, determined to take an extended lunch and left the Glendale office together, in one of the crew's vehicles, for that purpose.

What happened thereafter is in dispute. Trainmaster Conlin, who was handling several pressing operational situations that evening, testified at the investigatory hearing that he had determined to have a safety briefing with the crew and to inform them at that time that they would not be needed to move the empties to Mobest. The consequence of such an instruction would be that the crew's work would be done and they would tie up at the end of their scheduled shift and be paid for eight hours.

Trainmaster Carlin testified that he went to the Glendale office to conduct his business with the crew at 0030, but the crew was not there and one of their personal vehicles was missing from the lot. He found the locomotive at Glendale, shut down, as were the crew's personal effects, indicating to Carlin that the crew would be returning. Trainmaster Carlin testified that he wrote a message to the crew on the grease board in the office, as he testified he sometimes did, advising the crew that there would be no Mobest move that evening. The message was not dated or signed.

Trainmaster Carlin testified that he returned to the Glendale office at 0130, 0230 and 0415, each time looking for the crew, but that they were not there, although their assigned locomotive remained there, shut down. He never saw the crew that night. Carlin testified that he did not call the crew by cell phone, although he had their numbers, because he wanted to see them in person to give them their instructions and a safety briefing.

Trainmaster Carlin testified that the following morning he reported the crew's absence to Mr. Strong, who determined that the crew's hammerhead report indicated that they had returned to Glendale at 0615 and tied up at 0635. They submitted time claims for a total of 11 hours and five minutes of pay each, including three hours and five minutes of overtime. Claimants had also

claimed a two hour allowance for hanging off a car for more than one mile ("HO claim"), as allowed in the governing Agreement. The crew documented the HO claim by car number, mileposts and time, which was indicated to have occurred between 0500 and 0515. The crew represented that it had management approval for the move on which the HO claim was based.

Mr. Strong directed the Road Foreman of Engines to download and review the event recorder of the crew's assigned locomotive. It revealed that the locomotive had been shut down at 2230 on the 26th and had not moved thereafter.

Superintendent Strong and the RFE interviewed the crew when they reported to duty on the 27th. They interviewed each separately. Strong testified that Claimant [Conductor] told him initially that the crew had pulled empties in Zone 12 between 2230 and midnight, had returned for a two-hour lunch, after which they proceeded to North Alhambra to perform switching, returned to Zone 12 to spot equipment, returned to Glendale and he performed hammerhead work and researched how to document and enter the HO claim before tying up at 0635. Strong then confronted [Conductor] with the download from the locomotive event recorder, and Claimant changed his story, acknowledging that he had lied. He stated that the crew had switched Zone 12 until 2300, returned to Glendale, took a long lunch and "drove around" until 0400, returned and he worked on the hammerhead for two hours and 35 minutes until the crew tied up. Strong and the RFE also interviewed Claimant [Brakeman], who stated that he did not recall times and whatever the Conductor said was correct.

The Carrier held Claimants out of service on the basis that their violations were aggravated.

By a letter dated May 1, 2007, the Carrier notified Claimants to attend an investigation to develop the facts and place responsibility, if any, in connection with possible violation of General Code of Operating Rules rules 1.2.7, 1.4, 1.6, 1.15, and 1.47 concerning alleged fraud and dishonesty in making claims for overtime and hanging off on specified trip tickets covering their service on April 26, 2006.

The investigative hearing was held on May 6, 2006. The hearing addressed both Claimants and Engineer Macias, all of whom were present and testified. The foregoing and following additional facts were ascertained.

At the hearing, Claimants did not specifically deny the Carrier witnesses' descriptions of their statements in the April

27th interviews, but stated that they were led, felt pressured and that the interviews were over before they could request union representation.

Following the hearing and based on evidence adduced therein, the Carrier dismissed Claimants from all service for violation of the cited rules.

The Organization filed a timely claim on Claimants' behalf, which was progressed on the property in the usual manner, but without resolution. The dispute was presented to this Board for resolution.

POSITIONS OF THE PARTIES: The Carrier argues that it met its burden to prove, by substantial credible evidence, that Claimants are guilty of theft of time and dishonesty. It asserts that the evidence establishes that Claimant claimed pay for time they were not on the property and remained on duty after returning to Glendale on the basis that they had been told to be available, but after the Trainmaster had determined the move would not be necessary and the crew could be released and left the message to that end at the crew office where the crew should have been, but was not, either when he wrote the note or three times thereafter when he checked. It points to Claimant [Conductor's] testimony that he returned to the crew office not later than 0415, and as soon as the Conductor saw the message, he knew what it meant and instructed the crew to tie up. That testimony notwithstanding, the Carrier points out that the crew did not tie up until two hours and 20 minutes later.

The Carrier also points out that Claimants claims two hours for hanging off at a time (0500-0515) when they were not on the road at all and that they claimed management authorization for the move which was never requested or given.

As to the levels of culpability of Claimants, the Carrier points out that Claimant Collins submitted a time claim which falsely claimed both time and penalty payment to which he knew he was not entitled. It points out that Claimant Marquez was a promoted Conductor and had worked that position on the job at issue. He also knew, asserts BNSF, that he was not entitled to overtime or the two hours claimed for hanging off. It points out that the crew was together when they left the property with the locomotive shut down and returned only later, but without conducting any further moves. The claim could not, therefore, have been correct. The Carrier urges that Marquez' culpability is not reduced by his convenient inability to recall the times in which he engaged in particular activities. He knew he was not entitled to

overtime and was not entitled to the HO claim during the time he claimed it took place, it asserts.

As to the penalty appropriate to the proven violations, the Carrier argues that their actions affirmatively claiming compensation to which they were not entitled are not mere mistakes and served to destroy the relationship of trust which the employer is entitled to have in its employees. It asserts that such conduct warrants their dismissal. Indeed, the Carrier maintains that the circumstances suggest that Claimants had been claiming and being paid for time to which they were not entitled on a regular basis, pointing to the large percentage of times on the crew claimed overtime for the job. The Carrier argues that, in circumstances where employees are intentionally dishonest, abundant authority supports dismissal as the appropriate penalty, notwithstanding seniority or other factors.

The Carrier argues that it has put in place safeguards to eliminate excessive penalties, and it contends that disciplinary decisions which do survive the review process are reserved for clear cases and should be respected and upheld.

The Carrier urges that the Claims be denied. It argues that, if Claimant were to be reinstated, any back wages awarded should be reduced by the time period the hearing would have been timely and offset by Claimant's outside earnings, if any, during the period Claimant was dismissed. It argues that reductions for outside earnings are consistent with the contractual "make-whole" purpose of the arbitration process and maintains that failure to take such outside earnings into account would constitute a windfall for Claimant. It points to prior awards to establish that such offsets have been imposed by arbitrators.

The Organization argues, as an initial matter, that the Carrier improperly withheld Claimants from service, in violation of the requirement that employees only be held out of service in "aggravated cases", which it contends this is not. It points to other instances in which Coast Line employees charged with falsification of time slips were not withheld from service. UTU asserts that the Carrier's action constituted prejudgment on the Carrier's part.

The Organization also argues that the Carrier failed to prove that Trainmaster Colin was present at the times he claims to have been at the Glendale crew office. It maintains that his uncorroborated testimony is not sufficient to meet the Carrier's burden of proof that Claimants violated the rules they were charged with, in light of the testimony of the three crew members that they

were on the property and performing service, which is inconsistent with Colin's version of events. Indeed, points out the Organization, Claimant Collins - and, by implication, his crew - were indisputably on the property at 0606 on the morning at issue because he downloaded the hammerhead at that time, which he necessarily did on Carrier property. It asserts that the implication to be drawn from the crew's testimony and the objective evidence requires a conclusion that the crew was entitled to claim pay for the times entered. The Organization also maintains that Claimants did hang off, as they claimed, and were entitled to be paid. The time period is irrelevant.

The Organization argues that Claimants were merely following the instructions of Trainmaster Conlin, who had instructed them not to tie up until they received a call releasing them, but that no such call came. To have done otherwise would be to risk a charge of insubordination, UTU maintains. It points out that when the crew saw the message from Mr. Conlin, they wrapped up so they could tie up.

The Organization urges that the claim be sustained, that Claimants' dismissals be rescinded and that they be reinstated to employment and made whole for wages and benefits lost, without deduction for any outside earnings.

DISCUSSION AND ANALYSIS: Claimant is charged with theft of time. The essential elements of the offense are that an employee did not work during time for which the employee knowingly claimed pay to which he or she was not entitled. Like any other type of theft, proof of the offense also includes the element of wrongful intent, which the Carrier must establish. That burden can be met by establishing circumstances which warrant an inference of such bad intent.

The usual consequence of employee theft is that the employer's ability to trust the employee, which is an essential element of the employment relationship, is destroyed. An employer is not obligated to maintain in its employ an employee who has stolen from it, has breached the employer's trust, and may steal again. Thus, dismissal is the presumptively appropriate penalty for proven theft, generally without regard to the employee's seniority or record.

It was the burden of the Carrier to prove, by substantial evidence on the record as a whole, that Claimants are each guilty of violating the Rules with which they were charged and that the penalties of dismissal imposed on them were not arbitrary or excessive. The Carrier was also obligated to comply with the procedural requirements of the governing Agreement. For the

reasons which follow, the Board concludes that the Carrier complied with the procedural requirements of the Agreement, afforded Claimants due process, met its burden to prove them guilty of the charges brought and established their dismissals as appropriate. The claims must be, and will be, denied.

The Carrier has in place reasonable rules requiring employees to stay on the property and devote their full time and attention to their duties. It requires employees to be honest and to disclose to management on request all facts relevant to their employment. It required Claimants to file accurate and complete time claims.

The evidence persuades the Board that Trainmaster Conlin went to the Glendale crew office at 0030, 0130, 0230 and 0415 and each time found the locomotive shut down, the crew not there and one of the crew's personal vehicles missing. Although his visits are not corroborated by any other witnesses and were at least partially contradicted by Claimants, who asserted that they were not away from the Glendale office as long as would have been necessary for the trainmaster to miss them over that period of almost four hours. the note which Mr. Conlin left on the grease board confirms that he was there after the crew left, his description of the personal effects the crew had left was unrebutted and also confirms that he was there.

Moreover, although the crew changed stories from their first statements to Mr. Strong and the RFE to their revised stories to the testimony they gave at the investigatory hearing, their various statements confirm that the crew was not at the office at any of the times Conlin was there. Strong and the RFE also interviewed Claimant Marquez' testimony that he recalled no times and few facts about the evening of the 26th and morning of the 27th and that whatever the Conductor said was correct is unpersuasive and does nothing to reduce his responsibility for his actions and time claims.

Although, as indicated, the crew changed its stories during the process of the investigation, the evidence convinces the Board that Claimants did not perform any work on their locomotive after 2230. The data from the locomotive event recorder is dispositive as to the time. The Board is persuaded that the crew was off the property without authorization from sometime not long after 2230 until sometime after 0415, including an authorized one-hour lunch. If the crew had been in the office, Claimants would have seen Mr. Conlin and been released at his instruction, either at that time or at the end of their scheduled tour. They would not have incurred over three hours of overtime. If the crew had been at the office after 0030, they would have seen Trainmaster Conlin's note advising

them that there would be no move of empties to Mobest and releasing them from service. According to Claimant Collins, he saw the note at 0515, and immediately knew what it meant, but then he and the crew then spent an hour and 20 minutes dealing with the hammerhead.

Claimants' stories as to what they did after they returned their locomotive to Glendale and shut it down, taken together, appear to establish that they left Carrier property in one of the crewmember's cars and rode around for a period of at least four and one-half hours while being paid by the Carrier for their time. The time they were allowed for lunch, even if an "extended lunch" is assumed to be authorized, does not come close to covering the time they were absent.

The crew makes much of Mr. Conlin's statement that he would contact the crew by cell phone to advise them with respect to the necessity to stand by for a Mobest empties run; and they apparently used that statement to justify leaving the property for an extended period of time, during which they performed no service beyond taking their lunch break. But Mr. Conlin's statement was not authorization to leave the property or otherwise to violate the Carrier's rules; and, if he chose to come to the office to give the crew instructions, rather than phone them in, that was Management's right. Claimants have no basis to complain about being "set up"; they set themselves up by leaving the property and staying away without authorization.

A different situation might have been presented had Claimants tied up without claiming the extra time, once they realized that they were not any longer on stand-by, but they continued to claim time and to take an extended period to enter data in the hammerhead and upload it and, if their testimony is to be believed, figuring out how to make an HO claim.

As to the HO claim, it is certainly possible that Claimants did hang off of a car earlier that evening, but they claimed that the task was accomplished during a time when they were not engaged in train movements and claimed that they had approval from management which they did not have.

The facts in this case describe a dysfunctional employment relationship. Claimants were willing to go hours without communications from management, wasting their time and the Carrier's money and setting up a situation where they could claim unnecessary overtime, allegedly relying on Conlin's statement that he would call them and his instruction to stay on stand-by until he did, allegedly in fear of an insubordination charge if they did anything else. During that time, nothing stopped the crew from

calling the Trainmaster to ascertain the status of their move and whether they would be allowed to tie up. They apparently knew nothing of the other tasks the Trainmaster was tending to. The crew preferred to take advantage of the situation to grab more time off and more overtime. By their actions, the Board concludes that the crew did destroy the trust that the Carrier was entitled to have in them.

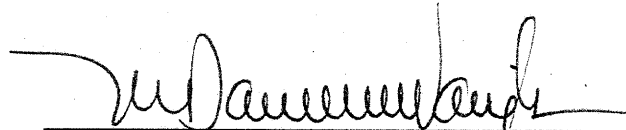
As for Trainmaster Conlin, his assertion that he did not call the crew by cell phone, even after he found them not to be present at the office several times, because he wanted to see them in person instead, is illogical and unpersuasive. If the Trainmaster needed the crew and could not find them, a cell phone call would have presumably ascertained their whereabouts. The implication is that the Trainmaster would rather catch and discipline loafing employees than run an efficient operation and correct problems before they became big. The crew's complaint that they were "set up" may well be true. Employees are entitled to trust their managers too.

In the end, Management "wins" this exchange, notwithstanding the possible set-up. The crew took deliberate advantage of the situation presented and got caught. The Award expresses the consequences of their actions. But the situation could have been handled significantly differently than it was; and facts only slightly different than those presented might have placed the responsibility for this unfortunate situation in substantial part on Management, with consequent reinstatement and possible back pay for the crew.

In the investigation, the Organization elicited testimony from Claimant Marquez that Trainmaster Conlin had a personal vendetta against him and had attempted on a number of occasions to get him fired. It is not clear how such bad motives would excuse Claimant's from their violations; however, the assertion is, at the very least, an affirmative defense which it was the employees' burden to prove. Claimants did not meet that burden, as they provided no specifics, corroboration or documentation to support the assertion; and the Trainmaster's denial of any such motive or conduct was not further explored.

AWARD: The Carrier proved, by substantial evidence on the record as a whole, that Claimants are each guilty of violating the Rules with which they were charged and that the penalties of dismissal imposed on them were not arbitrary or excessive. The Carrier met its procedural obligations under the Agreement to provide Claimants with due process and a fair hearing. The Claims are each denied.

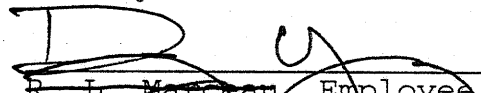
Issued this 21st day of Nov., 2007.



M. David Vaughn, Neutral Member



Gene L. Shire, Carrier Member



R. L. Marcou, Employee Member
