

PUBLIC LAW BOARD No. 6721

In the Matter of the Arbitration Between:

BURLINGTON NORTHERN SANTA FE

RAILWAY COMPANY

NMB Case No. 49

Claim of J. R. Johnson

Dismissal: Theft of Time

and

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Request on behalf of Southern California Brakeman J. R. Johnson 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. Claimant was 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.

Claimant was employed as an Brakeman assigned to the Carrier's San Bernardino Helper. He had eleven years of service at the time of his dismissal and, insofar as the record indicates, a satisfactory prior record. At the time of the incident at issue, he was located at San Bernardino, where the helper crews reported and waited to be called out to provide additional power at the end of trains over Cajon Pass.

The San Bernardino helper assignment had become less busy over the years, but a California legislative mandate required helpers to be available on certain trains and routes. In an effort by the Carrier to reduce overtime, the San Bernardino helper assignment had been reduced from 12 hour tours to eight hour tours. Nevertheless, the periods of inactivity might be broken by a call for a prompt dispatch of power to assist a train. Even with the reduction in work and in the hours of the assignment, the Carrier continued to experience overtime claims.

In mid-November, the Carrier received an anonymous "tip" on its corporate hot line that an Engineer who was regularly assigned to the San Bernardino helper assignment, was falsifying time claims

to obtain payments for time to which he was not entitled. Claimant worked as Brakeman to the Engineer in question. The Carrier's Corporate Audit Service Office transmitted the information to then San Bernardino Carrier Officer Kevin McReynolds with the instruction to "study the information" and provide it to Corporate Audit for review.

On November 17, 2005, Claimant was called for duty to work as Brakeman on a crew where the above-referenced Engineer was assigned. The crew had a scheduled on-duty time of 0800, and the Terminal Superintendent observed the Engineer arriving on time at San Bernardino. At 1030, neither the Engineer nor Claimant could be found on the property; it became apparent that they had been given permission by the dispatcher to leave in order to get something to eat. The record shows that the Engineer returned at 1050. At 1120, the Terminal Superintendent noted that the Engineer's vehicle was no longer in the parking lot; he did not return on November 17th. At 1515, Claimant departed the property. Thus, both the Engineer and Claimant departed the property before the expiration of their eight-hour basic day. The record indicates that the Engineer and Claimant did not help any train on November 17th and did not move their locomotive.

The record further indicates that the Engineer and Claimant used the "quick tie" process for tying up on November 17, 2005. This procedure - which involves the entry of only minimal on/off-duty information - is reserved for situations where either the computer system is unavailable or not working or when the employee has reached the limits of allowable time under the Hours of Service Law.

Claimant's quick tie was submitted on November 17th at 2049; the Engineer's was submitted at 2048. Both quick ties show an on-duty time of 0800, a departure time of 0900, an arrival time of 1515, and a final release time of 1630. This release time also involved a claim of 30 minutes of overtime. On November 19th, Claimant submitted his ticket which indicated the same information (i.e., a basic day plus 30 minutes of overtime).

The Terminal Superintendent determined that there was at least an "irregularity" in Claimant's time statements and submitted the information to Corporate Audit Services for review. Corporate Audit took until February 21, 2006 - approximately 113 days - to advise the Division General Manager that the time information appeared accurate and that Claimant claimed and was compensated for unearned overtime, in violation of his pay entitlement.

By notice dated February 23, 2006, Claimant was notified to attend a formal investigation as to his responsibility in connection with the alleged falsification of his time for the date, resulting in payment for time not worked and for which time he was not available for service, in violation of GCOR Rules 1.4 (employees must cooperate and assist in carrying out Rules and instructions. They must promptly report any violations to their proper supervisor . . . and any misconduct which may affect the interest of the railroad), 1.6 (providing, in part, that employees must not be dishonest) and 1.9 (employees must behave so that the railroad will not be criticized for their actions) and LA and California Division General Notice 132 dated September 9, 2005 (making employees responsible to tie up by computer, completing tickets at the end of their tour of duty to ensure accuracy, completeness and timely processing). The notice of investigation contained a statement that the Carrier first had knowledge of the incident on February 21, 2006.

The investigative hearing was held on March 16, 2006. The hearing addressed both Claimant and Engineer Sauer, both of whom were present and testified. The foregoing and following additional facts were ascertained. Claimant acknowledged that he had passed periodic examinations on the Carrier's Rules and that he understood the relevant provisions. Noting the passage of more than 90 days since the incident, Claimant testified that he did not know the sequence of events on the day in question; he stated, however, that the tie-up took place after eight hours. He testified further that he understood that he was not entitled to overtime.

Claimant asserted that he was a "good employee" and acknowledged that he had made mistakes during his employment at the BNSF. He testified that he was "ashamed" that he was associated with the incident in question and that he was "morally and ethically wrong concerning this incident and the taking of the overtime". Claimant stated that he was "certain[]" that "this type of offense will never take place again" and that his certainty was based on a "deep seated" "moral conviction . . . that it was wrong to take this overtime" and that he was "embarrassed and ashamed" to be involved in this conduct. He took "full responsibility for [claiming the 30 minutes]" and reiterated that such conduct would never happen again.

POSITIONS OF THE PARTIES

The Carrier argues that it met its burden to prove, by substantial credible evidence, that Claimant is guilty of theft of time. It asserts that the evidence establishes that Claimant improperly claimed time, and regular and overtime pay to which he

was not entitled. BNSF points out that the Organization never asserted Claimant's innocence, but acknowledged in its closing statement at the hearing and through Claimant's own testimony, that he was guilty of violations and accepted responsibility for his actions.

In response to the Organization's argument that the claim must be sustained based on the Carrier's failure to meet the time limits to conduct the investigation, BNSF argues that it did not have knowledge of the violation sufficient to trigger the time limits until Central Audit had reviewed the information and reached a conclusion that a violation had occurred. To hold otherwise would, in the Carrier's view, require it to bring serious charges that have not yet been substantiated. The Carrier contends that the time limit for bringing charges should be tolled pending the entire preliminary investigation by Central Audit. Further, BNSF argues that even if there were a technical violation of the time limit, it was not prejudicial to Claimant and that he has been accorded reasonable fairness.

BNSF maintains that permanent dismissal is the appropriate discipline because Claimant's actions of theft and dishonest destroyed the employer-employee relationship and it cannot be mended. It contends that Claimant's actions were not a simple mistake, but a knowing and willful claim for compensation to which he knew he was not entitled. The Carrier notes that severe penalties are not uncommon in the railroad industry.

The Carrier argues that if Claimant is reinstated, any wages awarded should be offset by outside earnings during the period when Claimant was dismissed.

The Carrier urges that the Claim be denied.

The Organization argues that the Claim must be sustained and Claimant reinstated and made whole because the Carrier violated the requirement set forth in Article 13 of the governing Agreement by failing to hold the investigation within 30 days from the date the Carrier "first has knowledge of the occurrence of the incident to be investigated". It asserts that the evidence establishes that the Carrier was aware of Claimant's times of arrival and departure on November 17th and became aware of the time for which Claimant had claimed two days later, but did not hold the investigation until March 16th, more than 113 days later. The Organization argues that the Carrier's assertion that it did not have knowledge of

Claimant's alleged conduct until February 21, 2006¹ is contrary to the record, self-serving, and an attempt to circumvent the provisions of Article 13. The Organization contends that Corporate Audit added no knowledge about the incident, but merely determined, after 72 days, that the conduct of which the Carrier was already aware was a violation.

The Organization points out that Article 13 (g) (6) of the Agreement requires that when either Party does not meet the timeliness requirements, "the matter shall be considered closed, and settled accordingly". UTU contends that, because the Carrier failed to meet the timeliness requirement to hold the investigatory hearing within 30 days from "the date the Company has knowledge of the occurrence of the incident to be investigated", the terms of the closure and settlement must be to rescind Claimant's dismissal, reinstate him to service and make him whole for wages and benefits lost.

The Organization also argues that the evidence establishes that Claimant and other crews working the San Bernardino helper assignment who have been dismissed were merely engaged in working, or being available to work, through lunch and then claim their meal break as overtime at the conclusion of the day, conduct in which the helper crews had engaged for an extended period of time and of which Carrier officers were fully aware and allowed.

UTU argues that Claimant should not only be reinstated and made whole for wages and benefits lost, but that no deduction should be made for outside earnings. It cites a 1984 interpretive letter agreement between the UTU and the Atchison, Topeka and Santa Fe Railway Company regarding the "computation of 'time lost' in discipline cases or where [an employee is] improperly held out of service for medical reasons". UTU contends by implication that there is no provision in the Agreement providing for deductions and argues that, where the Parties intended such offset, they so provided. Absent such provision, the Organization contends that no offset is appropriate.

The Organization urges that the claim be sustained, that Claimant's dismissal be rescinded and that he be reinstated to employment and made whole for wages and benefits lost, without deduction for any outside earnings.

¹This date is stated as "February 27, 2006" in the Organization's brief. The record indicates that this is a typographical error.

DISCUSSION AND ANALYSIS

It was the burden of the Carrier to prove, by substantial evidence on the record as a whole, that Claimant is guilty of violating the Rules with which he was charged. The Carrier was also obligated to comply with the procedural requirements of the governing Agreement. The Organization has raised the timeliness of the Carrier's investigation as an affirmative defense to the charges. It was the burden of the Organization to establish the Carrier's non-compliance with those requirements. It was then the Carrier's burden to establish, based both on the merits of the case and its procedural handling of the case, that the penalty of dismissal which it imposed is appropriate.

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 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 compromised, and frequently 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 might steal again. Thus, dismissal is the presumptively appropriate penalty for proven theft, without regard to the employee's seniority or record.

In the instant case, the evidence establishes that Claimant knowingly claimed pay for time he did not work. It may be that Claimant was simply following a long-established practice, in which Management had acquiesced and which had continued, even in the face of changes in tours (12 hours to 8) and workload (heavy to light) which undercut the original justification, such as it may have been, for the practice. Management's having crews continually available at their equipment during their "lunch break" to work the helper assignment, which was tacitly acknowledged, suggests a loose process in which such a practice might arise, with Management's tacit - and perhaps even direct - permission. It is not necessary for the Board to pass on whether such a practice might override or mitigate the Carrier's pay rules, which would not appear to allow such a practice. In its brief, the Organization certainly paints a not entirely implausible picture of such a practice. Unfortunately, there is insufficient evidence in the record to support the Organization's statement of "facts"; and the set of

assertions set forth in its brief cannot form a basis upon which to decide the dispute.

It was, as indicated, the burden of the Parties to comply with the negotiated time limits for the processing of discipline or else live with the negotiated consequences. One of those time limits is the requirement that the Carrier convene the investigation within 30 days of when it first had "knowledge of the occurrence of the incident to be investigated." It is clear that Claimant claimed pay for time that he did not work on November 17th. The evidence persuades the Board that the Carrier's Officer became aware of Claimant's tie-up and, shortly thereafter, became aware that Claimant had put in a time claim which included a request for pay for one-half hour of overtime for the day. He knew that Claimant had not worked overtime and was not entitled to the pay. Everything the Carrier needed to charge Claimant with submission of a false time claim - which it characterizes as theft of time - a Management official with authority to initiate a request for an investigation possessed as of late November.

The Board concludes that the Carrier had "knowledge of the occurrence of the incident to be investigated" at that time. Under the provisions of Article 13, the Carrier had an obligation to hold an investigation "promptly, but in any event not later than [30] days from the date the Company has knowledge of the occurrence". The Carrier has characterized the Terminal Superintendent's actions as mere "information" to be submitted to Corporate Audit, which had to "analyze" the information deliberately and to avoid acting on potentially inaccurate information. After 72 days, Corporate Audit advised Mr. McReynolds that the evidence appeared accurate and that the Claimant claimed, and was compensated for, unearned income. Each element of that statement was known to the Terminal Superintendent by a time not later than November 20th. While the Terminal Superintendent might not have known whether Claimant received payment for the time not worked, Claimant was not charged with receiving payment, but with improperly claiming it.

Corporate Audit added nothing from its 72 day delay to the knowledge the Carrier officer on the scene possessed; and the Board concludes that the Carrier's knowledge, for purposes of triggering the Article 13 time period, was not delayed as a result of the referral to Corporate. Put another way, the Carrier's determination to take disciplinary authority away from local level line managers does not excuse it from compliance with the negotiated time limits. That delay rendered the investigation untimely under the Rule.

The Carrier's inclusion in the notice of investigation that it first had knowledge of the incident in February of 2006 is not only

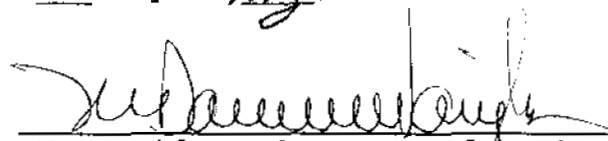
facially incorrect and self-serving, but adds an element of advocacy in what is supposed to be a fair and neutral investigatory process for which there is no place.


The Carrier argues that, even if a procedural violation were found, it did not prejudice the Organization and should not result in voiding the discipline. At most, it contends, Claimant might be paid for the period of the delay. The Board is not persuaded. Whatever might be practical consequence of the Carrier's delay, the Parties in the instant dispute have specifically prescribed the consequences of failure to comply with the contractual time limits. The governing Agreement provides, as indicated, that "[t]he matter shall be considered closed, and settled accordingly". In this case, the Board concludes that the term "closed" must mean that the discipline imposed cannot stand and the phrase "settled accordingly" means that the Claimant must be placed in a position where he would have been, but for the imposition of the discipline now overturned for violation of the time limits. The Parties are each entitled to the benefit of their bargain, including the quoted consequences of failure to comply with their negotiated time limits. The Award so reflects.

A W A R D

The Claim is sustained. The Carrier failed to comply with the negotiated time limits by failing to conduct the investigation within 30 days from the date the Carrier had "knowledge of the occurrence of the incident to be investigated". The Agreement requires in such situation that the matter be considered "closed" and "settled accordingly". Claimant's dismissal shall be rescinded and he shall be reinstated to service, with seniority unimpaired and made whole for wages and benefits lost in consequence of his dismissal. The Carrier shall implement the Award within 30 days of its issuance.

Issued this 23rd day of Aug, 2007.


M. David Vaughn, Neutral Member


Gene L. Shire, Carrier Member


R. L. Marceau, Employee Member