

PUBLIC LAW BOARD No. 6721

In the Matter of the Arbitration Between:

BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY

NMB Case No. 54
Claim of D. A. Beesom
Dismissal:
Theft of Time

and

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Request on behalf of Southern California Conductor D. A. Beesom 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 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 by the Carrier as a Conductor. At the time of his dismissal, he had 35 years of service. The Carrier does not rely on any prior discipline to support the action which is at issue in this proceeding.

On February 22, 2006, Claimant was assigned as Conductor on a road switcher working out of La Mirada, California. His on-duty time was 0715. He logged on to his Renegade at 0705 and downloaded information from the Carrier's Hammerhead data base identifying equipment and locations required to perform his duties. The Road Foreman of Engines observed Claimant's crew at 0720, at 0800, at which time they were still performing paperwork and conducting a crew safety briefing, and again at 0830, at which time the crew had not started working because they were blocked by another crew. The crew was observed to have departed the crew lounge at 0930.

The RFE stated that, at 1130, he observed the locomotives assigned to road switcher service tied up and shut down and the

automobiles of the crew no longer in the 12-car parking lot. He assumed the crew to have left for the day and inquired of the Trainmaster who was there whether he had given the crew permission to leave, to which the Trainmaster replied in the negative. At 1300, the RFE returned from lunch and found the locomotives in the same position and state and the parking lot still empty, a condition which continued through his departure from the office at 1550.

At the end of the afternoon, Claimant entered into the system a "quick tie" indicating an off-duty time of 1715. He was necessarily on the property when he made that entry, but it is not apparent from the entry where he was or what he was doing. The next day, Claimant submitted documentation for the tie-up. He claimed, on behalf of his crew, 10 hours of work for the previous day, including two hours of overtime.

The Trainmaster reviewed the time claim for the 22nd and, apparently suspicious, downloaded the event recorder for the locomotive which had been used for Claimant's assignment that day. The data indicated that it had not been moved between 1112 and 1745, when the next crew used the locomotive. CTC records confirmed return of the locomotive to La Mirada at 1056 on February 22nd, leaving no documentation of work having been performed by the crew for the remainder of the time claimed. Management determined to hold an investigation to ascertain Claimant's responsibility for the work and time claimed. The Carrier scheduled and held the investigation on March 31, 2006 at which the preceding information was provided.

Claimant testified at the hearing that he continued to work following his return from his road switcher duties on the 22nd and that, but for a period when he went to lunch, sat in his car in the parking lot for a period of approximately four hours, filling out customer survey forms, as he had previously been instructed by the Trainmaster. He did not leave the forms in the office or bring them the next day, but presented the forms at the hearing. He testified that he kept the forms to document the work he had done.

The Organization also submitted evidence that Claimant uploaded information into the Renegade/Hammerhead system at 1617 hours on the 22nd, an act which he could have only performed while on duty. On behalf of Claimant testified Conductor John Phillips, who worked the next assignment. He testified that he had seen Claimant on the property at the time he came on duty and that Claimant provided him with a job briefing.

Following the hearing, and based on evidence adduced at the hearing, Claimant was dismissed from service for theft of time, in violation of GCOR Rules 1.4, 1.6 and 1.9.

The instant claim protesting Claimant's dismissal and seeking his reinstatement was presented in due course, was progressed on the property in the usual manner, but without resolution and was then submitted to this Board for hearing and decision.

POSITIONS OF THE PARTIES: The Carrier argues that it proved, by substantial evidence based on the record as a whole, that Claimant violated the Rules with which he was charged and was properly dismissed. It asserts that the evidence establishes that Claimant and his crew were not at the La Mirada office, in the small parking lot or otherwise performing service, during the period after approximately 1130 on the 22nd, but claimed 10 hours of pay for the day, including overtime. It points to the testimony of the Trainmaster and RFE and to data from the Renegade/Hammerhead system, CTC and the locomotive event recorder to establish Claimant's absence.

BNSF maintains that Claimant's explanations of where he was and what he was doing after the locomotives returned to La Mirada on the 22nd are neither plausible or consistent; and it maintains that the weight of the evidence is that Claimant was not present or performing work during time he claimed. It asserts that Claimant's failure to have submitted the forms that day or the next warrants an inference that the work was not done at the time Claimant alleges, but only later, to provide justification for the time he claimed. The Carrier challenges the use of overtime to produce those forms as unjustified and unauthorized.

The Carrier argues that Claimant not only willfully and knowingly claimed time and pay to which he was not entitled, but thereby destroyed the trust in his integrity to which the Carrier is entitled. It points out that Claimant denied his conduct and gave implausible explanations, which indicate he does not accept the wrongfulness of his actions. BNSF argues that proven theft and dishonesty are grounds for dismissal, without regard to an employee's length of service. It urges that the claim be denied.

The Organization argues that the Carrier failed to sustain its burden to substantiate the charges and prove that Claimant violated the rules cited in the investigatory notice. It asserts that the record contains no evidence that corroborates the Carrier's allegation that Claimant committed time-slip fraud.

By contrast, the Organization argues, the record demonstrates that Claimant was on the property at 1617 when he accessed the Renegade/Hammerhead computerized record keeping system. The Organization points to testimony from several witnesses which indicate that Claimant was on the property and performing duties as required. It denies that Claimant is guilty of theft of time. The Organization argues that the evidence establishes that Claimant did not violate any Carrier rules.

The Organization contends further that the Carrier has different assignments; in some of which, the employees are allowed to go home at the conclusion of their work. In some positions that are overseen, the Organization argues, employees must notify their supervisors and obtain permission before they are released; in others, impliedly including the La Mirada road switcher assignments, that has not been required in practice. UTU maintains that if employees are going to be held to such requirements, then the Carrier must make clear that Claimant is required to contact his supervisor, which had not previously been the case.

The Organization points out that Claimant had both a radio and cellular telephone, but that his supervisors never contacted him to ask his whereabouts on the 22nd or to direct him to report to the office. It argues that Claimant was on the property completing paperwork and, if Management had questions as to his whereabouts or work status, all that was required to find out was for his supervisors to contact him, which they failed to do.

The Organization urges that the claim be sustained and that Claimant be promptly returned to service with his seniority unimpaired and with all pay and benefits restored, without deduction for outside earnings.

DISCUSSION AND ANALYSIS: It was the Carrier's burden to prove Claimant's guilt of the violations charged, by substantial credible evidence on the record as a whole, and to establish that the penalty of dismissal was not arbitrary or excessive. The Board concludes that the Carrier met its burden with respect to guilt of the charges, but that dismissal was not appropriate under all of the facts and circumstances.

The Carrier's evidence establishes that Claimant was not present at the La Mirada office, the parking lot, or otherwise performing legitimate duties during a period of several hours on the afternoon of the 22nd, but that he, nonetheless, claimed 10

hours of pay, including two hours of overtime for the day. The Carrier's analysis is supported by the testimony of its witnesses and the automated data recorder. "The Board is persuaded that Claimant left the office at sometime prior to tying up and vanished until sometime after 1530 hours when he reappeared at the office, logged out on the hammerhead, and briefed the oncoming crew."

The Board finds that Claimant's explanations of his whereabouts and activities - that he was in his car in the parking lot filling out customer survey forms - during the afternoon are not persuasive and do not overcome the Carrier's proof that he was not present or performing service as required. In sum, the Board finds that the Carrier proved that Claimant committed the violation as charged.

The Organization implies that there were unofficial and unacknowledged practices whereby some crews in some locations left, or were allowed to leave, when their work for the day was completed, but were allowed to claim the entire day's pay and that the crew at this location was caught when the carrier moved to eliminate the practice. The Board recognizes the possibility that such practices might have developed, either with Management's knowledge or at the crews' gradual initiative. However, proof would be required to establish the existence of such a practice of allowing crews to work and then leave, but be paid for the entire day, let alone to be paid a day plus overtime. Such a practice would fly in the face of Carrier requirements. The Board is not convinced that the Organization met its burden in this regard.

Neither is the Board persuaded that the mere fact that such a practice might have developed without Management's knowledge is an excuse or mitigating factor for claiming pay for time not worked. Claimant's unconvincing explanation for what he was doing, rather than acknowledging that he had left work, persuades the Board that he knew it was unauthorized and inappropriate.

The Board notes that Management could have contacted Claimant if it could not find him. It did not do so, but allowed him to play out his absence, including claiming time the next day.

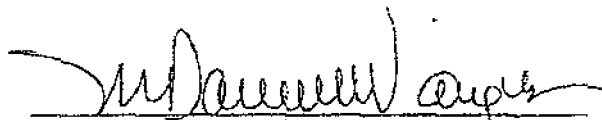
As to the penalty, the Board is aware that in a case of wilful and intentional theft of time, dismissal is presumed to be the appropriate penalty. An appropriate penalty is an necessary element of a just result in a disciplinary case. The record here, however, demonstrates that Claimant has more than 35 years of service and a generally good record. "He took advantage of a situation, perhaps

one that had developed over time." It was wrong that he did so. However, the Board notes that this situation could have been resolved short of firing an employee with 35 years of good service, particularly in light of the Carrier's stated commitment to fire employees only as a last resort.

In light of Claimant's extremely long service, the Board concludes that dismissal is excessive and it is appropriate to modify the penalty to a suspension the length of his absence, with his reinstatement on a last chance basis, with seniority unimpaired but without back pay or benefits for the time Claimant was off the rolls. The Award so reflects.

AWARD: The claim is sustained in part and denied in part. The Carrier proved by substantial credible evidence that Claimant is guilty of the charges against him. For reasons stated in the Opinion, the penalty of dismissal is reduced to a suspension of the time Claimant was dismissed. He shall be reinstated to service, with seniority unimpaired, but without wages or benefits for the period of his absence. Claimant is on notice that further instances of deliberate false time claims may result in his dismissal, without further resort to corrective discipline. The Carrier shall implement the Award within 30 days from its execution.

Dated this 8th day of AUGUST, 2007.


M. David Vaughn, Neutral Member


Gene L. Shire, Carrier Member


R. L. Marceau, Employee Member

PUBLIC LAW BOARD NO. 6721

**UNITED TRANSPORTATION UNION
COAST LINES**

Versus

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Case No. 054

UTU File No. A-13-1605

Carrier File No. 61-06-0031D

EMPLOYEE'S SUBMISSION

STATEMENT OF CLAIM: Request on behalf of Southern California Conductor D. A. Bessom 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.

STATEMENT OF FACTS At the time of the investigation, Claimant had over thirty-five (35) years of service and was working as a conductor in road switcher service at LaMirada, CA on February 22, 2006. Claimant is accused of falsifying his time slip by incorrectly reporting the time when he was released from duty (tied-up) following completion of service on train R.CAL0061-22. The facts developed at the investigation clearly evidence that he was on the property at the time recorded on his time-slip, working in his usual and customary manner, performing job related services which conductors are required to complete by instructions from their immediate supervisor, Train Master McAllister.

PROCEDURE On March 3, 2006, Conductor D. A. Bessom, (hereinafter referred to as the Claimant) was sent a certified mail letter from Burlington Northern Santa Fe Railroad (hereinafter referred to as the BNSF or