

PUBLIC LAW BOARD No. 6721

In the Matter of the Arbitration Between:

BURLINGTON NORTHERN SANTA FE

RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

NMB Case No. 55

Claim of J. R. Pugh

Dismissal:

Theft of Time

STATEMENT OF CLAIM: Request on behalf of Southern California Brakeman J. R. Pugh 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.

The Parties stipulated to the facts presented in Case No. 54, which was presented to the Board immediately preceding this case.

Claimant was employed by the Carrier as a Brakeman. He had 39 years of service, including prior service as a Conductor. 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 Brakeman on a road switcher working out of La Mirada, California. His on-duty time was 0715. Conductor D. A. Bessom (the claimant in Case No. 54) logged on to his Renegade at 0706 and downloaded information identifying equipment and locations required to perform his duties at 0706. 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 all of the locomotives assigned to roadswitcher service tied up and shut down and the automobiles belonging to 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.

Conductor Bessom entered a "quick tie" indicating an off-duty time of 1715. It is not apparent where the Conductor was when he made that entry. The next day, Conductor Bessom submitted documentation for the tie-up. He claimed, on behalf of his crew, 10 hours of work (eight hours of straight-time and two hours of overtime).

The Trainmaster reviewed the time claim and downloaded the event recorder for the locomotive to be used for Claimant's assignment. 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.

Article 29(a) of the collective bargaining agreement provides, in relevant part, that

[an employee's] time will commence at the time [he is] required to report for duty and will continue until the time [he is] relieved. Time of the crew as a unit to continue until the conductor registers off duty on the hours of service register. . . .

The Carrier scheduled and held an investigation on March 31, 2006 at which the preceding information was provided.

Claimant testified at the hearing that he did not assist Conductor Bessom in completing any paperwork nor with any of the duties associated with the Renegade/Hammerhead system. He testified that as the Brakeman, his duties do not include keeping track of time, but he stated that he recalled that his time was correct. Claimant testified further that there came a point where Conductor Bessom was completing extensive paperwork (customer survey forms) and Claimant asked if he was needed any longer. According to Claimant, when Conductor Bessom told him that he was not needed any longer and that he could leave, Claimant testified that he departed the property between 1500 and 1515 whereupon he went to conduct some personal business. Claimant's 10 hours of pay for the date necessarily included payment for time after he left work.

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 ceased to perform service and left the La Mirada office not later than 1515, but claimed and received 10 hours of pay for the day, including overtime.

The Carrier argues that Claimant knew or should have known that the Conductor did not have the authority to send the crew home and claim pay and overtime on their behalf. It contends that Claimant has too much seniority to claim plausibly that he simply relied on what his Conductor told him in terms of authorizing his departure from the property before the expiration of eight hours.

BNSF maintains, in any event, that Conductor Besson's explanations of where he was and what he was doing are neither plausible nor consistent. It argues that the evidence shows that the Conductor was not present and did not perform work during time he claimed. The Carrier contends that Claimant had no basis for the claim to time on the job up to the time that the "conductor registers off duty" (see Article 29(a) of the collective bargaining agreement).

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. 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 insufficient evidence that corroborates the Carrier's allegation that Claimant committed time-slip fraud.

The Organization contends that the Carrier did not prove the whereabouts of one of the Carrier officers on whose testimony the dismissal is based. It asserts that there is a lack of precision and absence of documentation with respect to the presence of the Carrier officers. The Organization challenges the Carrier's alleged time line of the officer's movements and observations. It argues, apparently, that the Carrier failed to prove that it maintained a constant observation of the terminal area and crew lobby. The Organization points out that one Carrier officer who might have been called to substantiate the movements of the other Carrier officer did not testify.

The Organization also points out that the Carrier only produced one engine tape even though the evidence shows that there were four engines in the tie-up track. UTU asserts that it is possible that the crew used another engine but opines that the Carrier did not fully develop the

facts in its investigation (an assertion which the Carrier protests as new and unsupported argument).

By contrast, the Organization argues, its timeline is "static" and places Claimant on the property for all the time he claims and provides an explanation for why additional time was required to carry out his duties. It asserts that the testimony, including that of Conductor Phillips, shows that Conductor Bessom was on the property performing service to the Carrier. The Organization points to the uploading of the Renegade/Hammerhead at 1617 and points out that such operation cannot take place except for from cradles located on the property, thereby establishing that Conductor Bessom was on the property performing service - extensive paperwork - until at least 1617. The Organization contends that according to Article 29(a), so long as the Conductor is on the property performing duty, then the brakeman is entitled to be paid to the Conductor's tie-up time.

UTU denies that Claimant is guilty of theft of time. 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, by substantial credible evidence on the record as a whole, Claimant's guilt of the violation charged 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 Claimant's guilt of the charges, but that dismissal was not appropriate under all of the facts and circumstances.

Claimant acknowledged departing the property on personal business not later than 1500 and 1515 on February 22nd. It is not disputed that Claimant accepted pay for hours after that time that he did not actually work. The record demonstrates that Claimant knew or should have known that the purported authorization to leave early that came from Conductor Bessom was not, by itself, sufficient under Carrier procedures to permit him to depart the property before the expiration of his duty day. The Conductor was in charge of the crew, but he was not a Management official and lacked authority to grant Claimant paid time off. The implied practice allowing employees to leave after their work was complete is not proven and did not authorize Claimant to leave work and still get paid.

The Organization's argument is not merely that Claimant's departure was authorized, but that, based on Article 29(a), so long as his Conductor was performing his duties on the property - in this instance, by filling out extensive paperwork - Claimant was properly considered on duty and entitled to be paid until the Conductor went off duty. Since the Conductor was on duty until 1715, argues the Organization, Claimant was entitled to be paid to that point. For several reasons, the Board is unconvinced.

Claimant's claim of derivative entitlement to continued pay when he was not working cannot be greater than that of the Conductor on whose status he was relying. The record here and in Case No. 54 establishes that Conductor Beesom was not present at the La Mirada office, the parking lot, or otherwise performing legitimate duties during a substantial period of the afternoon of February 22nd. Claimant's work status cannot be vicariously protected by a Conductor who is not at work himself.

Moreover, the conclusion that Beesom was not present during most of the afternoon calls into question Claimant's story that Beesom granted him permission to leave at 1515 or so, since the Board is not persuaded that Beesom was present to give such permission. Either Claimant lacked permission, he left at some time different than he testified or he obtained permission to leave at some time other than when he left. Finally, the same Management witnesses who were present and who inspected the property that afternoon looking for the crew did not see Claimant, who testified that he was present until 1515 or 1530. Claimant's story does not wash.

For the same reasons the Organization's allusions to practices allowing employees to leave early and still get paid were unconvincing in Case No. 54, they are unconvincing here.

The Board again notes that the Carrier could have gotten to the bottom of the situation at issue earlier than it did, and short of firing a crew of long-service employees.

An appropriate penalty is an necessary element of a just result in a disciplinary case. The Board is aware that in a case of wilful and intentional theft of time, dismissal is presumed to be the appropriate penalty. The evidence persuades the Board that Claimant knew better, and he knew that pay was being claimed on his behalf for time he did not work. That was wrong. His explanation for what happened is unpersuasive. And the Organization's asserted application of Rule 29 (a) to allow employees to be released from work but still paid is not adopted. However, Claimant had the permission of his Conductor to leave, and may have believed that was sufficient to protect him from discipline for taking pay for time not worked. He was in error. Neither is Claimant protected by any implied practice of allowing early departures. There is no proof of any such practice and no proof that any such practice overrode Carrier rules requiring employees to work in order to get paid.

The Board notes that Claimant has nearly 39 years of service and a generally good record. In light of his extremely long service, the Board concludes that the penalty of dismissal is excessive and it is appropriate to modify the penalty to reinstatement on a last chance basis, without back pay or benefits. The Award so reflects.

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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 length of time Claimant was off. 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