

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

and

UNITED TRANSPORTATION UNION

NMB Case No. 46

Claim of Cathleen Obst

**Dismissal: Falsification
of Time Claim/Theft**

STATEMENT OF CLAIM: Request on behalf of Southern California Brakeman C. M. Obst for reinstatement to service on the BNSF Railway Company with seniority and all other rights unimpaired and without deduction for outside earnings.

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 August 17, 2006, at Washington, D.C. 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.

Claimant was employed by the Carrier as a Yardman beginning in 1995. On December 22, 2005, Management directed the helper power to which Claimant was assigned to change crews. The engine went through the OS at the GM Spur at 0142 and the crew was transported in at 0152. The Engineer on the crew documented his arrival time as 0245 and went off duty at 0330. The record also showed that a relief crew was placed on duty and had been taken to the engines. Claimant completed her ticket entering the same arrival and tie-up times. A Carrier officer observed Claimant wearing sandals and departing the crew lobby at 0215. She was not seen for the rest of the morning. The Carrier officer testified that he did not instruct Claimant's crew to take lunch at the end of the shift, nor did the crew request to take lunch at the end of the shift.

The Carrier notified Claimant on January 10, 2006 to attend an investigation to ascertain the facts surrounding her alleged falsification of her time claim and theft/defrauding of money from the Carrier. Following postponements, the hearing was held on January 31, 2006. Based on the record of the hearing, the Carrier found Claimant guilty of the charges and dismissed her from service.

The instant claim for Claimant's reinstatement was presented in due course, was progressed on the property in the usual manner, but without resolution; and it was submitted to this Board for disposition.

POSITIONS OF THE PARTIES: The Carrier argues that it proved, by substantial credible evidence, that Claimant violated the General Code of Operating Rules which require that employees assist in carrying out rules, prohibits dishonesty, and requires respect for the railroad. The Carrier further contends that Claimant violated the Carrier's Policy for Employee Performance Accountability ("PEPA") which prohibits "theft or other act with intent to defraud the carrier of monies . . . not due". It acknowledges that the charge against Claimant is for dishonesty, not fraud. The Carrier maintains that Claimant's conduct constituted stealing time, which is intolerable and that dismissing employees for doing so is supported by the PEPA and is a well-established precedent.

Specifically, the Carrier contends that it proved that Claimant left the property approximately one and one half hours before she claimed to have gone off duty. It argues that there is no credible evidence to support a claim that the engine was not tied up until 0330. The Carrier maintains that there is no evidence that Claimant's crew might have been used after it returned at 0152, pointing out that the new crew was taken to the helper at that time.

The Carrier rejects the Organization's anticipated argument that there was a long-standing practice on the property of having one crew member remain on the property while the other leaves for lunch and returns only if recalled. It also contends that there was no instruction to the crew to remain on duty and it asserts that the relief crew had been taken to the engine at the time of Claimant's conduct in question.

As to the Organization's procedural objections, the Carrier asserts that it was appropriate to remove Claimant from service on the day following the investigatory hearing. It argues that if an employee will steal then she might also fake an injury. With respect to preventing J. R. Murphy from testifying, it asserts that he had nothing to add to the investigatory record.

The Carrier maintains that Claimant's dismissal was warranted. It urges that the claim be denied and Claimant's dismissal upheld.

The Organization argues that the Carrier failed to prove that Claimant left the property early or without permission. It contends that the combination of the distance between the signal

and the GM, the securing of the engine, the completing of paperwork before going off duty, and the walk to the office accounts for most of the time between when the crew tied-up and when Claimant went off duty. The Organization maintains, in any event, that the Carrier's evidence shows only that Claimant left the crew building, not that she left the property.

The Organization asserts that the automatic log indicator shows that Claimant's engine did not enter the yard until 0142. It argues that it is impossible for the van log - which shows that Claimant's crew was picked up at 0113 - to be correct. The Organization maintains that the discrepancy in these records demonstrates a serious defect in the Carrier's case.

The Organization challenges the fairness of the investigation and claims bias in the Carrier's conduct. It protests that the Carrier prevented J. R. Murphy from testifying. The Organization also contends that the Carrier violated the CBA by removing Claimant from service on the day following the investigation.

The Organization maintains that, even if the Carrier's evidence is correct, "people make mistakes" and contends that there is no evidence of fraud in this case. It asserts that this is, at most, an isolated incident and that the Carrier failed to prove that Claimant falsified her time slip in an effort to obtain money.

The Organization urges that the claim be sustained.

DISCUSSION AND ANALYSIS: The core issue before the Board is whether the Carrier proved, by substantial evidence in the record, that Claimant sought to be paid for time after she went off duty. The Board finds that the BNSF proved the violation by substantial evidence and concludes that the nature of Claimant's conduct is sufficient to sustain the dismissal of Claimant.

The record demonstrates that, at 0215, Claimant was seen dressed in sandals - attire that is neither appropriate nor authorized for her work - and heading off the property. That is evidence from which it is reasonably inferred that she did not work any more that morning. There is no proof that she did more work. The evidence is undisputed that she submitted a time claim indicating that she had worked until 0330, despite having tied up prior to 0200 and having evidenced preparing to leave at 0215.

The Organization argues that there is some discrepancy regarding Claimant's arrival at the crew building based on the automatic record of the engine's entering the yard and the van log. The Board is not persuaded that this fact, even if correct, would

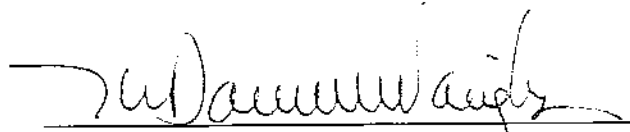
outweigh the substantial evidence that Claimant was heading off the property dressed in attire unsuitable for her work at 0215 while claiming time to 0330.


With respect to the Organization's procedural claims, the assertion of bias and unfairness is vague and general; it is unconvincing. There is insufficient evidence in the record to show that J. R. Murphy was in fact prevented from testifying to any facts not already in the record and/or that his testimony would have altered the findings of the investigating officer. As to Claimant's removal from service following the investigation, the Board finds that in light of the proof against her of dishonesty that was adduced at that investigation, removal was not unreasonable, and the Organization has not offered any proof or precedent to the contrary, only the assertion that removal was not proper.

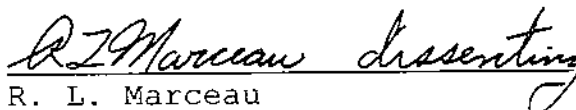
The Board has considered the Organization's arguments that Claimant is an 11-year employee with a clean record, that this was an isolated incident, that people make mistakes, and that Claimant did not commit fraud. It has also considered the Organization's assertion that the Carrier did not prove that Claimant purposely falsified her time slip in order to obtain money. The Board is persuaded that Claimant's misconduct was serious and that her intent can be inferred from what she did. It finds none of the Organization's arguments in mitigation sufficient to overturn the Carrier's determination to dismiss Claimant.

AWARD: The Carrier proved Claimant's violation by substantial credible evidence on the record as a whole and proved the penalty of dismissal to be appropriate. The claim for reinstatement is denied.

Dated this 29th day of September, 2006.


M. David Vaughn, Neutral Member


Gene L. Shire
Carrier Member


R. L. Marceau
Organization Member