

PUBLIC LAW BOARD No. 6721

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

NMB Case No. 52

Claim of R. Austin

and

Dismissal: Theft of Time

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Request on behalf of Southern California Brakeman R. Austin 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 as an Brakeman assigned to the Carrier's San Bernardino Helper. He had eight 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 Engineer S. O. Sauers, who was regularly assigned to the San Bernardino Helper, was falsifying

time claims to obtain payments for time to which he was not entitled. The Carrier's Corporate Audit Service Office transmitted the information to then San Bernardino Terminal Superintendent Kevin McReynolds with the instruction to "study the information" and provide it to Corporate Audit for review.

On November 18, 2005, Claimant was called for duty to work as Brakeman on a crew where the Engineer was Mr. Sauers. It was not a regular assignment for Claimant, although Sauers did work the assignment regularly. The crew had a scheduled on-duty time of 0800, with a departure time of 0830 and a scheduled tie-up time of 1600. For reasons not the fault of the crew, Sauers and Claimant were not called by the Dispatcher and the crew never took their engine out of the terminal during their tour.

Despite the scheduled tie up time, neither Sauers nor Claimant were found on the property on the 18th at 1410 , when Mr. McReynolds attempted to locate them. In the investigatory hearing later conducted, Claimant testified that he talked with the Dispatcher at 1510 and was released by the Dispatcher at that time. He produced telephone records indicating that he did so. He testified that he was on the property until released, except for a period when he left to get lunch. Both Claimant and Sauers testified that, with the permission of Terminal Superintendent McReynolds, they were on "telephone standby", which meant that they could catch breaks and run errands close-by, so long as they were reachable by cell phones. Mr. McReynolds acknowledged that he allowed Claimants to be in that status while working. Why he did not call Claimant and Engineer Sauers on their cell phones to ascertain their whereabouts and status when he could not find them on the property is unexplained in the record.

Both Sauers and Claimant testified that Claimant was deep in domestic issues at the time and needed to leave when released. Upon being released, Claimant requested that Sauers tie him up, which Sauers agreed to do. Sauers used a "quick tie up", which recorded only minimum information, for both he and Claimant, although use of that procedure was not appropriate under the circumstances. Sauers claimed a tie-up time of 1630, which would have entitled him to one-half hour of overtime for the day in addition to his regular day.

Claimant did not claim compensation for the day until November 19th. He claimed on duty time of 0800, a departure time of 0830 and a simultaneous return and tie up time of 1630. The Terminal Superintendent reviewed Claimant's claim and believed, based on his observations, that Claimant had not been on the property, did not

tie up at 1630 and was not entitled to a half-hour's overtime for the day. Nevertheless, he forwarded the information to Corporate Audit, which took 71 days to determine that Claimant's claims were in violation of their pay entitlements.

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 18, 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 submitting a time ticket claiming pay until 1630 was wrong. He also acknowledged that having the Engineer handle the tie-up for him was also wrong.

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 really 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.

Indeed, points out the Carrier, in Claimant's testimony at the hearing, he acknowledged that he was released by the dispatcher shortly after 3:00 on November 18th. It asserts that Claimant was not, under any circumstances, entitled to pay for time after his release, rendering inappropriate Claimant's submission of a request for pay for the last hour and 20 minutes of time, up to 4:30 p.m.

BNSF points out that three days later, Claimant put in for pay for that time, notwithstanding the fact that, by his own admission, he was not even on the property after 3:10 p.m., and, the Carrier contends, based on the Terminal Manager's unsuccessful attempt on November 18th to locate Claimant, an hour before that.

As to the Organization's argument that Claimant was only engaging in a long-standing practice of claiming one-half hour of overtime at the end of his day based on not taking a meal period, the Carrier points out that there is no evidence in the record to establish such a practice, let alone Management's acquiescence to such a practice, which the Carrier contends, in any event, reduces to an improper claim for time not worked.

As to whether Claimant received overtime pay, the Carrier maintains that the evidence establishes that Claimant was paid for time over and above his daily rate, but contends, in any event, that whether Claimant received overtime to which he was not entitled or whether he merely claimed it, is a false issue, as the charges relate to his false claim for overtime, not his receipt of payment.

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 charges not yet substantiated.

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 18th and became aware of the time for which Claimant had claimed the next day, but did not hold the investigation until March 16th, over 114 days later. The Organization argues that the Carrier's assertions that it did not have knowledge of Claimant's

alleged conduct until February 18, 2006 is contrary to the record and self-serving. It maintains that Corporate Audit added no knowledge about the incident, but merely determined, after 71 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, since the Carrier failed to meet the timeliness requirement to hold the investigatory hearing within 30 days from when it first had "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 Bernadino 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 points out that there is no provision in the Agreement providing for such 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.

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 may 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 - an employee new to the assignment - 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 "cell phone standby" 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 colorful - and not entirely implausible - picture of such a practice. Unfortunately, there is no evidence whatsoever in the record to support the Organization's statement of "facts"; and the set of unsupported 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 not disputed that Claimant left earlier on November 18th than the scheduled end of his tour and that his absence, as early as 2:10 p.m., was observed by a Carrier

Officer on that date. The evidence persuades the Board that Carrier 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 that knowledge. 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 71 days, Corporate Audit advised the Division General Manager 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, except for whether Claimant was actually paid based on his claim. However, as the Carrier points out, Claimant was not charged with receiving payment, but with improperly claiming it.

Corporate Audit added nothing from its 71 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.

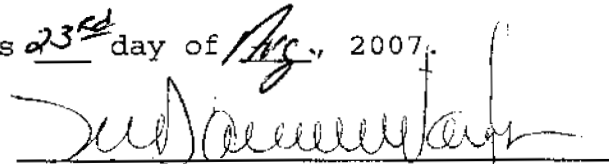
The Carrier argues that, even if a procedural violation were found, it did not prejudice the Organization and should not result in voiding the discipline. At most, it contends, Claimant might be paid for the period of the delay. The Board is not persuaded. Whatever might be practical consequence of the 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