

The Second Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States
and Canada
{ Southern Pacific Transportation Company

Dispute: Claim of Employees:

1. That the Southern Pacific Transportation Company (Texas and Louisiana Lines) violated the controlling agreement, particularly Rule 34, when they unjustly dismissed Carman M. L. Sanders from service on November 27, 1978, following investigation which was held on November 22, 1978.
2. That accordingly, the Southern Pacific Transportation Company (Texas and Louisiana Lines) be ordered to compensate Carman Sanders as follows:
 - a) Paid for all time lost beginning November 16, 1978, until returned to service on September 5, 1979;
 - b) Returned to service with seniority rights unimpaired;
 - c) Made whole for all vacation rights;
 - d) Made whole for all health and welfare and insurance benefits;
 - e) Made whole for pension benefits including Railroad Retirement and Unemployment Insurance;
 - f) Made whole for any other benefits earned during the time she was held out of service.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant, a carperson at the carrier's Houston Car Heavy Maintenance Plant, was suspended from service on November 16, 1978 pending a Rule 34 investigation for her alleged dishonesty in completing her time card. Dishonesty, according to Rule 801, is grounds for discharge. After the hearing held on November 22, 1978, the claimant was dismissed from service. On or about May 29, 1979, the carrier

offered to reinstate the claimant (without pay for time lost) on a leniency basis. Claimant rejected the offer. Subsequently, on August 16, 1979, the carrier unconditionally reinstated the claimant to her former position. The claimant returned to work on September 5, 1979 and she continued to prosecute this claim for back wages for the period from November 16, 1978 to September 5, 1979.

The organization initially raises two procedural objections. First, the organization contends that the carrier improperly interrogated the claimant concerning her alleged dishonesty on November 15, 1978 without providing the organization with proper notice. The organization timely raised this objection at the beginning of the November 22, 1978 hearing. The record here reveals no evidence that the claimant requested union representation either before or during the November 15, 1978 interview. The organization relies on Rule 34 which covers formal investigations. There is no language in Rule 34 which mandates notice to the organization whenever a supervisor has a discussion with an employee. On the contrary, in large and segmented railroad operations, supervisors must daily converse with employees regarding timekeeping and other clerical matters. We overrule the union's objection regarding the November 15, 1978 interview. The organization also contested the dual role of the hearing officer because he was presiding over the investigation and assessed the discipline. While the hearing officer engages in multiple roles at the company's peril, the claimant was not prejudiced by the hearing officer's conduct in this case.

Turning to the merits of the charge, the basic facts are uncontested. The claimant was absent for her entire shift on November 3, 1978. The Car Foreman stamped her card "ABSENT" for that day. On or before November 7, 1978, the claimant filled in eight hours for November 3, 1978. At the end of the pay period, claimant totaled her hours, including the eight hours for November 3, 1978, and turned in her time card. Claimant did not mark any number in the column titled "PAID FOR BUT NOT WORKED". The Car Foreman prepared a revised time card decreasing the total hours in the column completed by the claimant and adding eight hours in the pay for time not worked column to reflect compensation for November 11, 1978 which was a paid holiday. The Car Foreman, on the revised time card, also corrected the total number of hours claimant worked on November 1, 1978 which resulted in thirty additional minutes paid work time for the claimant.

The organization argues that the carrier failed to proffer substantial evidence that the claimant intended to defraud eight hours pay from the carrier. Repeatedly, the claimant testified that she mistakenly claimed eight hours for November 3, 1978 because she forgot she was absent and the word "ABSENT" was only lightly stamped on the card. According to the claimant's testimony, she unsuccessfully tried to erase the error. Unable to cancel her eight hours entry for November 3, 1978, she ostensibly compensated for the error by leaving the number of hours blank for November 11, 1978. The organization alternatively asserts that, even if the claimant was guilty, the carrier imposed an arbitrary and excessive penalty. A final defense was raised by the claimant, at the hearing, when she stated that the charge brought against her was a pretext for race and sex discrimination.

The organization has cited to us numerous awards which reiterate the well entrenched rule that the carrier has the obligation of proving a disciplinary charge by substantial evidence. Second Division Award No. 7483 (Eischen); Second Division Award No. 7522 (Franden). Speculative testimony or suspicious circumstances fail

to satisfy the carrier's burden. Second Division Award No. 7663 (Williams); Second Division Award No. 7634 (Van Wart); Second Division Award No. 6419 (Shapiro). If, however, the carrier meets its burden of proof, as an appellate body, we are barred from substituting our judgment for that of the carrier. Second Division Award No. 6372 (Bergman); Second Division Award No. 6498 (Lieberman). Substantial evidence is simply relevant and reliable evidence that could lead a reasonable mind to conclude the claimant committed the offense. Second Division Award No. 7492 (O'Brien).

After carefully reviewing the instant record, we find substantial evidence to support the dishonesty charge. Claimant completed her own time card and claimed eight hours of pay for November 3, 1978. The hearing officer could discount claimant's testimony about her attempted erasure since she could easily have crossed out the eight hours or mentioned the matter to her supervisor. Claimant turned in a time card for which she would have been paid for November 3, 1978 plus an additional eight hours of holiday pay. Therefore, she was clearly claiming more wages than she was entitled to receive. Claiming eight hours pay for the day on which the claimant is absent constitutes dishonesty. Second Division Award 1756 (Carter). The organization also argued that the claimant's erroneous completion of her time card for November 1, 1978, where she claimed thirty minutes less time than she actually worked, demonstrates that she was not adept at filling out time cards and thus she never intended to defraud the carrier when she claimed the additional eight hours for November 3, 1978. The argument is irrelevant. The times claimant punched in and out on November 1, 1978 are correctly entered on the time card and the thirty minute discrepancy resulted from an obvious error in computing the number of hours she worked on that day. On the other hand, tendering a time card to the carrier which has eight hours completed for a day on which claimant was absent can hardly be characterized as a minor mathematical mistake. Thus, there is sufficient evidence to support a reasonable finding of claimant's wrongful intent to claim eight hours pay for November 3, 1978.

As to claimant's discrimination defense, the record reveals no probative evidence demonstrating that the carrier used these proceedings as a subterfuge for disparate treatment based on sex or race. The record contains only her own speculative statement on possible discrimination. Also, since we find substantial, neutral evidence to support the charge, this finding inherently undermines claimant's discrimination defense.

We do, however, rule that the discipline assessed was not commensurate with the proven offense. The discipline was excessive in light of the surrounding circumstances. The claimant apparently had a good work record and while there is substantial evidence to prove the charge, she immediately tried to rectify the matter when confronted with her incorrect time card. Thus, we will reduce the penalty. Second Division Award No. 8157 (Dennis); Second Division Award No. 7341 (McBrearty); Second Division No. 7318 (Twomey). The strictest penalty which would have been appropriate in this case was a ninety day suspension. The claimant is entitled to back wages for the period from February 14, 1979 through September 5, 1979 at the rate of pay in effect for that period less earnings the claimant received from outside sources. Rule 34 does not authorize us to grant any monetary remedies beyond wages lost, so claimant's request for other retroactive benefits and pecuniary relief is denied.

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2-SPT-CM-'81

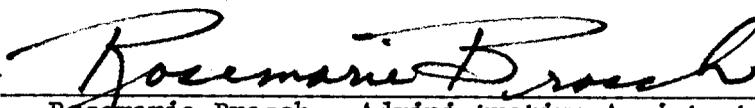
A W A R D

Claim sustained, but only to the extent consistent with our findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 29th day of April, 1981.