

The Second Division consisted of the regular members and in addition Referee Thomas F. Carey when award was rendered.

Parties to Dispute: (International Association of Machinists and
(Aerospace Workers
(Southern Pacific Transportation Company

Dispute: Claim of Employees:

1. That Carrier improperly dismissed Machinist A. G. Acosta (hereinafter referred to as Claimant) from service on December 22, 1980.
2. That Carrier be ordered to restore Claimant to service with seniority and service rights unimpaired and with compensation for all wage loss from date of dismissal to date of restoration to 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 employe or employes involved in this dispute are respectively carrier and employes 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 began employment with the Carrier at its Bakersfield shops in 1963 as an apprentice. He subsequently established seniority as a Machinist in 1967. After investigation held on December 1, 1980, the Claimant was dismissed from service effective December 22, 1980. The Carrier charges that:

"... the Claimant knowingly and purposely falsified his time card for September 22, 1980, thereby receiving compensation for his regular assignment on that date."

Carrier maintains that such actions constitute a violation of Rule 801 in that:

"Employees will not be retained in the service who are ... dishonest ..."

The Organization asserts that the hearing officer deprived the Claimant of a fair hearing pursuant to Rule 39. While it is true that the initial request for postponement was originally denied by the hearing officer, the hearing was subsequently rescheduled.

The record indicates that on the day in question, September 27, 1980, the Carrier's operations were shut down because of a labor dispute and as a result no employees reported for duty or performed any service at Bakersfield. The Claimant himself testified that he did not work on September 27, "nor did he even claim to make such an inclination. No one worked that day ... I was in the pool hall all that day."

Claimant's time card for the period in evidence indicates that September 27, 1980 is the one day without a time clock impression. Instead, a handwritten entry appears. Yet that date shows a certifying signature, as well as an "8" under the category "time worked", and also includes initials over the handwritten "3:20" commencing time.

Claimant maintains that he normally fills in most portions of his time card ahead of time in that:

"At the first of the half, I fill in all of the 6 PM's, 6:20 PM's, 11: PM's, the number 8, all the way down and I fill in the words Rest Days on my rest days and cross out those 8 hour columns and I sign it."

Claimant contends that when he checked his time card on September 20, he noticed blank spaces:

"... in the column of the day number 27, also the commenced time where it should have been punched in that was blank. The regular time initialed by that was blank and the assigned hours straight time that was blank also."

No refutation exists in the record to dispute the manner and the time in which the Claimant normally made entries on his card. In point of fact, the "white out" of the entry on September 25, when the Claimant was absent tends to support his contention of completing most of his handwritten entries in advance.

The testimony of the Carrier's witnesses is found to be ambiguous and at times contradictory. Under cross-examination Assistant Trainmaster Larsen identified the "DJS" initials over the handwritten entry of 3:25 as that of "Don Simpson", the Foreman. Larsen noted that Simpson indicated to him that he could have initialed the certification column.

Foreman Simpson, however, testified that he did not enter the time of 3:20 p.m. in the "commenced column" nor did he initial it, claiming he was not available to do it. Yet while the Foreman could identify his initials in the certifying column, he could not make out the initials in the "commenced time" column. The time card presents further problems, since it shows a handwritten commenced time of "3:25", with a full eight hours being indicated in error, thus making even the total of 80 hours for the period to be incorrect.

The record indicates that Supervisor Simpson's initials appear over the handwritten entry of the 3:20 "commenced time" for the date in question. Supervisor Larsen testified that he asked Supervisor Simpson if he initialed the time card in the certification column, and he was informed "He could have initialed that by mistake."

For the Board to accept the findings of the Carrier's hearing officer, it would have to conclude that the Claimant sought improper compensation for the one day in the payroll period when the property was shut down and no employee was on the property because of a strike. The Board would further have to find that the Claimant improperly entered a "3:20 commencing time" and then forged Supervisor Simpson's initials over that entry on his time card. The Board would also have to presume that the Claimant, if indeed it were he who made the "3:20" entry, then failed to adjust the eight (8) hour entry for that day.

The Board would finally have to conclude that Supervisor Simpson, as the last supervisor to make an entry on the card, subsequently, but inadvertently, certified eight (8) hours for the day in spite of the fact that on its face the card would clearly show less than eight hours worked. Simpson would also have had to see that someone had entered "3:20" in the commenced time slot and placed his (Simpson's) initials over it.

The First Division Award 14552 (Makry) the Board held:

"In proceedings such as these we do not examine the record of testimony to determine weight or credibility. We look for substantial and satisfactory support and when that is found our inquiry ends."

A fair analysis of the record, however, does not establish "with substantial and satisfactory support" that the Claimant made any of the several disputed entries of his time card on September 27, 1980. When those entries were made on the cards and who actually put those entries on the card is not supported in the record. If all the disputed entries were in fact on the card when Supervisor Simpson approved it, why was the time card processed at all? The Claimant's contention that those spaces on the card were blank when he reviewed it on September 30 stands largely unrefuted. Yet it was these disputed entries that caused the overpayment check to be issued to the Claimant.

The record does show the Claimant testified upon receipt of his check for the period on Friday, October 10, he examined the amount and found it to be in error on two (2) counts. However, it also appears he cashed the check some time on Friday, since he could not "cash it on Saturday".

Claimant asserts he tried to contact Larsen on Saturday, but was unable to do so. He contends he planned to see Larsen on Tuesday upon his return from a trip. He claims that when he went to see Larsen on Tuesday, he was charged before he had a "chance" to explain. This aspect of the Claimant's testimony is somewhat self serving and is not supported in the record. Even if his version were to be accepted in the most favorable light, his failure to call the error to the attention of the Foreman or Roundhouse Clerk would, and has, contributed significantly to the Carrier's belief that records had been falsified and compensation had been received improperly. There is also no indication in the record that the Claimant either offered, or if in fact did, make restitution for the compensation received in excess of his entitlement for the period in question. Accepting such payment for time not otherwise compensable is a serious matter (see Second Division Award 7817 - Referee Marx). The Claimant is found guilty of this aspect of the charge based upon the record before the Board.

However, there is a serious question in the record as to how the erroneous entries were placed on the time card and by whom. The Claimant does not have "clean hands" on the matter of not promptly reporting the overpayment and failing to strike out his original "8" hour entry for September 27, particularly since he claims no "time clock" entry or certifying signature were on the card when he reviewed it on September 30. The Carrier and/or its agents must also assume some culpability for processing a time card for payment with such flagrant and obvious errors. This factor alone creates major flaws in the Carrier's charge of "falsifying his time card on September 27, 1980". The deficiency of supportable proof of such a charge of falsification establishes sufficient mitigating circumstances to find the Claimant not guilty of this one aspect of the charge.

The Carrier has not sustained its burden of proof on both elements of the charges. Only the overpayment charge remains, which by itself is serious. Only this one (1) charge has been established in the record. Even that charge must be reviewed against explanations offered by the Claimant. The charge proven is serious and cannot be treated lightly.

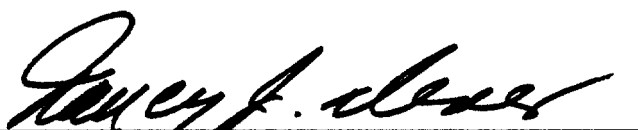
Since the Carrier has not substantiated both aspects of his charges, the penalty of dismissal is found to be excessive and unreasonable. However, since the Claimant is also not without some culpability in that one element of the charge was proven, the Claimant is entitled to reinstatement without any loss in seniority and service rights, but without any back pay being granted.

A W A R D

The claim is sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: _____


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 7th day of March, 1984.