

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: ( System Federation No. 2, Railway Employees'  
( Department, A. F. of L. - C. I. O.  
( (Electrical Workers)  
(  
( Missouri Pacific Railroad Company

Dispute: Claim of Employees:

1. That the Missouri Pacific Railroad Company is violative of Rule 32 (a) and (b) and has unjustly dealt with and damaged Division Electrician D. J. Foster when they denied him the right to a fair and impartial hearing on March 14, 1977, subsequently dismissing him from the service of the Carrier by Notice Number DWM-837-Di dated March 19, 1977.
2. That, accordingly, the Missouri Pacific Railroad Company be ordered to compensate Mr. D. J. Foster as follows:
  - (a) Compensate for all time lost plus 6% annual interest;
  - (b) Return 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 that he would have earned during the time withheld from service;and, further, any record of this disciplinary action be removed from his record.

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 employe 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.

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

Claimant was dismissed from service on March 19, 1977, "in connection with your being absent from your assignment between 8:15 A.M. and 3:50 P.M. on January 26, 1977, and falsification of time slip in that you reported having performed eight hours work on that date...."

Rules 32 (a) and (b), of which the Organization claims violation by the Carrier, provide in part that an employee "shall not be disciplined or dismissed without first being given a fair and impartial investigation" and that "the employee will be apprised of the precise charge against him". Review of the record and the parties' arguments in connection therewith show that the Claimant did receive a full, fair and impartial hearing, was afforded full representation to defend his position, and no doubt was left -- before and during the hearing -- that the issue at hand was the Claimant's activities on January 26, 1977, and his account for such day through his time recording.

The hearing record does indeed disclose direct conflicts in testimony. There was testimony as to two different telephone reports made in the early morning to Carrier employees by the Claimant; whether the Claimant advised these two employees in a conflicting manner or the testimony of one or both of the employees was inaccurate was not, or could not be, fully resolved. There is the Claimant's testimony, supported by signed statements, that he spent the day of January 26, 1977, on personal business in Rusk, Texas, and apparently contrary testimony by two Carrier investigative agents that Claimant's personal vehicle was observed elsewhere during the middle of the day. These questions were not fully resolved, but the Board finds they are not central to the single issue at hand. Claimant makes no claim that he performed work for the Carrier on January 26, regardless of his particular location that day.

Claimant also readily admits initially claiming eight hours' pay for the day on his time slip. His claim, however, was that this was a simple error and that, when it was called to his attention by the Carrier, he promptly returned the pay for that day.

Claim for pay for time not worked and not otherwise compensable is a serious matter, going to the heart of the employment relationship. If the claim for pay was simply a mistake, the employee making the error must be prepared to offer proof and logical reasons for the error; otherwise, any false claim, upon its discovery, could be defended by claiming "mistake". The Board finds no such convincing proof nor unusual circumstances in this case. The Claimant's defense is not enhanced, in addition, by the unclear account of events of the day as referred to herein. Claimant's particular position of working from day to day without direct supervision enhances his responsibility for accurate time reporting.

Given all the circumstances, however, the Board finds that the penalty of dismissal in this instance is unduly harsh. The Board will modify the Carrier's disciplinary action to the extent of restoring the employee to seniority status without back pay and without restoration of retroactive benefits. The Board notes that Claimant's position was abolished, as a matter of record, on December 31, 1977.


A W A R D

Claim sustained to the extent provided in 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 10th day of January, 1979.