

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

Parties to Dispute: { International Brotherhood of Firemen & Oilers
 { Southern Pacific Transportation Company

Dispute: Claim of Employees:

1. That in violation of the current agreement Fireman and Oiler R. G. Carvajal-Rojas, was unjustly dismissed from the service of the Carrier; following a hearing held on January 23, 1979. The Claimant was dismissed on January 31, 1979 and he was reinstated to his former position on June 27, 1979.
2. That accordingly, the Carrier be ordered to:
 - (a) To compensate the aforesaid employee for all time lost from January 31, 1979 through June 26, 1979, at the pro-rata rate of the position he held at the time he was dismissed.
 - (b) To restore him of all holiday, vacation, health and welfare benefits, pass privileges and all other rights, benefits and/or privileges that he is entitled to under rules, agreements, custom or law.
 - (c) In addition to money claimed herein, the Carrier shall pay the Claimant an additional amount of 6% per annum compounded annually on the anniversary date of this claim.

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.

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

Claimant, a laborer, was charged with falsifying his time card in violation of carrier general rule 801 (which prohibits employe dishonesty) on January 16, 1979. After a plenary hearing on January 23, 1979, the carrier dismissed the claimant from service. Subsequently, asserting that the discipline has served its purpose, the carrier reinstated the claimant to his position, without back pay, on or about May 10, 1979. The claimant actually reported back to work on June 27, 1979. The reinstatement was without prejudice and the claimant properly progressed his claim for back wages to this Board.

While most of the facts are uncontested there are two critical factual disputes. Claimant did not work on January 1 through January 7, 1979. On January 8, 1979, he inserted his time card into the time clock. Due to a mechanical malfunction, the stamp appearing on the card marked the starting time for January 1, 1979. The claimant brought the time card to his foreman and asked how he should correct the error. The foreman instructed the claimant to manually complete the time for January 8, 1979 and the claimant complied. At this point, the claimant and his foreman related contradictory versions of the events. According to the claimant, after punching his time card, he followed his habit of filling in the remaining times for breaks and for the end of his shift before he noticed the machine had stamped in the time for the incorrect date. The foreman testified that except for the time clock stamp, the remaining times for January 1, 1979 were not completed when the claimant presented him the card and asked how to rectify the error. The foreman looked at the card several times after January 8, 1979, and he did not observe the completed times for January 1, 1979 until January 15, 1979. Upon discovering the time card discrepancy, the foreman reported the matter to his supervisor. The second factual controversy concerns whether the claimant had the required intent to misrepresent his hours worked on January 1, 1979. The organization argues that the record reveals no substantive evidence to demonstrate claimant intended to obtain eight hours pay for January 1, 1979. The carrier contends that it may properly rely on the foreman's testimony and that an irrefutable presumption of claimant's wrongful intent arises from the sudden insertion of the remaining times for January 1, 1979 right before claimant's pay was to be computed.

To satisfy its burden of proof, the record must contain substantial evidence demonstrating claimant intended to cause the carrier to pay him wages for January 1, 1979. Intent is a state of mind which is not shown by direct evidence but rather a wrongful intent must be manifested from all the surrounding circumstances. Without proving wrongful intent, the claimant's alleged time card falsification is merely a mistake. Fourth Division Award No. 3552 (Scearce). After carefully reviewing the record, we find the evidence insufficient to support a finding of fraudulent intent. On the contrary, most of the objective facts indicate claimant was confused and committed an unintentional error. The entire problem grew out of a time clock error which the claimant promptly reported to his foreman. On January 8, 1979, the foreman knew not only that claimant did not work on January 1, 1979 but also that there was an error on the card for the same date. Regardless of whether or not the remaining shift times were filled in on January 8, 1979 or thereafter, the claimant could hardly expect the carrier to pay for time that he had already reported as incorrect. The record discloses that the combination of an improperly functioning time machine and a confused employee resulted in the erroneous time card. Thus, the carrier failed to prove the claimant intended to falsify his time card for January 1, 1979.

Rule 33(a) expressly provides for the compensatory remedy in this case. Claimant is entitled to net wages lost for the period from January 31, 1979 to June 27, 1979 at the rate of pay then in effect under the applicable agreement. Claimant's request for overtime, interest and other retroactive benefits is denied. We have consistently ruled that net wages lost means all earnings the claimant gained from other employment or received in unemployment during the period he was out of service shall be deducted from our back pay award.

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 4th day of March, 1981.