

Award No. 12954
Docket No. CL-12710

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4971) that:

The discipline of thirty days suspension imposed on J. H. Alston, Jr., Tractor Operator, Car Shop, Wilmington, Delaware, Chesapeake Region, on charge of "Leaving assigned duties without permission and falsifying time cards on December 17 and 18, 1959," be removed from his record and the claimant paid for his lost time. (Docket 809)

OPINION OF BOARD: Claimant, a Tractor Operator, Stores Department, Wilmington, Delaware, was disciplined by a suspension for thirty days on the charge of: "Leaving assigned duties without permission and falsifying time cards on December 17 and 18, 1959."

The record of the trial indicates that Claimant was positively identified by two witnesses a mile away from his place of work at a time he should have been at his post. He was also seen returning to the property some 20 to 30 minutes late.

In defense of the Claimant, the Organization attacked the identification as faulty in that, for example, the witnesses were unable to describe some of the Claimant's articles of clothing. There was, however, no attempt to refute the facts that Claimant's car was identified by means of its license plate number and description.

Claimant, on the other hand, was unable to name the person to whom he said he had loaned his car that day, nor was he able to say where he was at the time he was alleged to have been seen away from work.

The testimony clearly supports the finding of the trial court that Claimant was guilty as charged.

We have heretofore held that we will not disturb the finding of a Trial Court unless it is arbitrary or capricious or there is no substantial evidence

to support it. Award 4982 (Boyd). In this claim, Carrier has amply satisfied its burden and we will not overrule the Trial Court's finding.

Claimant's attack on the second part of his discipline is equally lacking in merit. The facts are that Claimant marked his time card at the beginning and end of the workday, making no mention of the time he was absent from work. The Gang Foreman testified that he had certified that Claimant's hours were correct and had noted that he should be paid for 8 hours. Claimant relied on this to refute the claim that he had falsified his time card. The testimony indicates that the foreman verified Claimant's attendance not from personal knowledge but from the entries on the time card itself. This means that the foreman was misled by Claimant's failure to enter his absence on the record. Claimant's failure to make the notation was as successful in securing payment for time not worked as if he had deliberately entered false information. Omission to act where there is a duty to act is as culpable as the commission of a prohibited act. We think the Carrier was justified in holding that Claimant had falsified his time card.

The trial record does not support the charge that Alston did not get a fair and impartial trial. The fact that the Carrier's higher officers reduced the suspension from 30 bulletined to 30 calendar days should not be interpreted as having any other significance than as an act of compassion towards an errant employe who had a good personnel record and long seniority.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of October 1964.