

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26207
Docket Number X-26310

Edwin H. Benn, Referee

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Southern Pacific Transportation Company (Western Lines)

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the
Brotherhood of Railroad Signalmen on the Southern
Pacific Transportation Company (Western Lines):

(a) Claim on behalf of Mr. B. G. Wimberly, Jr. who was removed from
service between January 13 and May 1, 1984, in connection with charges of
dishonesty and indifference to duty involving a broken gate arm at 11th Ave.
in Portland, Oregon, on August 19, 1983.

(b) Carrier should now be required to reimburse Mr. Wimberly for
all lost time and benefits during the period that he was removed from service
of the Carrier."

OPINION OF BOARD: At the time of the relevant incident, Claimant had over
seven years seniority with the Carrier and was employed as
a relief Signal Maintainer.

According to Claimant, while on his way to work on August 19, 1983,
he overheard a radio communication between an Operator and a train crew dis-
cussing a broken gate tip allegedly on the ground at 11th Street in Portland,
Oregon. Claimant, realizing that the gate was in his District and he was
therefore responsible for it, took it upon himself to inspect the crossing
prior to reporting to work. According to Claimant, at approximately 6:20
A.M., he arrived at the 11th Street location which involved a merger of three
streets at one crossing. Claimant did not find a gate tip on the ground but
found all the gates in an upright position. Claimant nevertheless proceeded
to perform tests on the crossing gates and they performed in a normal fashion.
Claimant was satisfied that no life endangering situation existed at the cross-
ing and proceeded to the Shop. Claimant stated that he was at the site per-
forming tests and checking the gates for 20 minutes. Claimant arrived at the
Shop at 6:45 A.M. Claimant's normal starting time on that date was 7:00 A.M.

Claimant testified that after arriving at the Shop, he was
approached by Signalman H. I. Storie who informed Claimant that there was a
call from an Operator concerning a broken gate at 11th Street. In order to
verify that the call Storie was referring to was not the result of another
malfunction occurring after he performed his inspection and tests and left the
site, Claimant testified that he asked Storie what time the call came in.
Claimant then called Signal Supervisor C. R. Beasley and notified Beasley that
he was already at the 11th Street site and found nothing and he would need
further time at that location to make sure there was absolutely nothing wrong.
Claimant then returned to the 11th Street site and retested the gates. The

gates acted in a normal fashion for **two** tests. However, on the third test, one of the gate tips did touch the street. Claimant then returned to the Shop and called and consulted with Signal Construction Supervisor R. L. **Harkins** who instructed Claimant to call a Maintenance Foreman at Salem, Oregon. Claimant did so and that Foreman stated that he did not have replacement rubber stops and Claimant should simply reverse the positions of the up and down stops. Claimant returned to the 11th Street site, performed the switch, and the gates operated normally.

Because he **performed work** prior to his starting **time** which was not continuous with his regular working hours, Claimant testified that he put in an overtime claim for two hours and forty minutes under **Rule 18** of the Agreement ("**Employees** released **from** duty and notified or called to perform work outside of and not continuous with regular working hours, shall be paid at a minimum allowance of **two** (2) hours and forty (**40**) minutes at the time and one-half rate...").

At the **December 14, 1983, Hearing**, Signal Supervisor **Beasley** testified that he had a conversation with Signalman Storie on October 20, 1983. According to **Heasley**, Storie told him that he received a phone call on August 19, 1983, about a broken gate at 11th Street and when Claimant arrived, Storie informed Claimant of the malfunction. According to **Beasley**:

"Storie stated a few minutes later he noticed **Wimberly** had written down a call on his time roll for replacing the gate arm at 11th Street. Storie said he told **Wimberly** he shouldn't put in a call when he didn't even go. Storie stated **Wimberly** responded, 'I don't see why not'."

At the **December 14, 1983, Hearing**, Signal Construction Supervisor **Harkins** testified that on October 21, 1983, he met with Claimant and questioned him about the propriety of claiming overtime for the August 19, 1983, gate repair. **Harkins** testified that he concluded that Claimant falsified his overtime claim on August 19. This conclusion was based in part upon Storie's alleged statement that when Storie advised Claimant of the call, Claimant did not indicate to Storie that he previously checked the gates. **Harkins acknowledged** that in the event a crossing **warning** system malfunctions, a Signalman should respond to the type of radio call Claimant asserted that he heard on **the morning** of August 19.

The Carrier also produced Signalman Storie. At the Hearing on **December 14, 1983**, Storie testified that he received a call **from** an Operator at about **6:20 A.M.** on August 19, concerning a broken gate at 11th Street. **The** Operator asked Storie to relay the information to the Signal Maintainer. According to Storie, at approximately **6:45 A.M.**, Claimant arrived at the Shop and Storie informed Claimant of the broken gate. Storie then testified contrary to **Beasley** and **Harkins** that he could not recall any further conversations with Claimant on that date but that Claimant did call and report the matter to **Beasley**. **The** Hearing Officer then **Stated**:

"Mr. storie, this hearing is being held for the purpose of developing facts and this hearing officer will not tolerate a convenient forgetfulness. I want you to understand that I have serious misgivings about the testimony that you're giving me. You cannot conveniently forget a serious matter regarding dishonesty, and I want you to do your best to remember this incident. ~~We~~ have testimony that directly involves you and I'm not inclined to believe that an officer of the ~~company~~ would be dishonest in relating that testimony."

Storie then testified that after he told Claimant that there was a call concerning a broken gate, Claimant "said 'okay, ~~yeah,~~'...[and] asked me what time they called me." According to Storie, Claimant then called **Beasley**. Storie admitted that he could not hear the **Beasley** conversation. Storie testified that with respect to whether Claimant actually did the ~~work~~ prior to his starting time as he claimed "I didn't know whether he went out before that or not."

During an adjournment between Hearing dates, Carrier suspended Claimant ~~from~~ service. By letter dated January 13, 1984, ~~from~~ **Harkins** to Claimant, Claimant was informed:

"Upon receipt of this letter you are suspended ~~from~~ the service of the Southern Pacific ~~Transportation Company~~ pending the outcome of the investigation concerning your alleged failure to ~~comply~~ with the provisions of Maintenance of Way and Structures Rules 801 and 802."

At the Hearing on January 23, 1984, **Harkins** testified that the reason Claimant was suspended ~~from~~ service was:

"After recessing the last investigation, I found additional witnesses that corroborated Mr. **Beasley's** testimony about what he was told by Howard Storie. ~~Based~~ on this and other discrepancies and Mr. ~~Wimberly's~~ story, [I] felt that it was now necessary to ~~remove~~ him ~~from~~ service because I felt that charge of dishonesty was conclusive."

When asked ~~who~~ the additional witnesses were, **Harkins** identified **Beasley** (again) and Signal For- **Patrick Fogarty**.

Concerning the "additional" witnesses, **Beasley** testified about a conversation that was clearly hearsay and further testified that Storie had a certain degree of animosity towards Claimant. Specifically, **Beasley** testified that he had a conversation with Storie wherein Storie told **Beasley** that he felt Claimant did not ~~respond~~ to the call on August 19 in such a fashion that ~~would~~ entitle Claimant to the overtime claim.

Fcgarty testified that he also had a conversation with Storie and Storie related the August 19 incident. According to Fcgarty, Storie stated that he questioned Claimant **about** claiming the **two** hours and forty minutes and Claimant allegedly responded "why not?".

On January 24, 1984, Storie testified again. Storie first directly contradicted **Beasley**. Storie was read Beasley's testimony concerning their **conversation**. Storie testified "it is very doubtful that I had a conversation with him because me and Mr. **Beasley** have not seen eye to eye" Storie then proceeded to completely change his prior testimony. Storie testified:

"Okay, Mr. Lewis, since you want to keep digging and bringing this up, I feel that, as a Brotherhood of **Railroad** Signalman, a lapse of **memory** was a very **good** conversation but, since you are bringing it out, I feel that Mr. **Wimberly** is guilty on the fact that he did not state he went out, he did not know about it the morning I notified him and that, when I told him, he was mad because they did not call him at **home** and that he said he was going to turn in two hours and forty minutes and I told him he had netter **not**."

Storie further testified:

"[Q] On the **morning** of August the 19th. did the events take place as you described them?

[A] In my earlier testimony, in my earlier testimony, no.

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[Q] Do you have any reason to lie here today?

[A] **No**, I don't and the reason I did before was I was trying to protect Bill [Claimant]."

Storie then testified that Claimant told him that he did not go out on the call. Claimant denied any conversation to that effect and consistently maintained that he performed the **work** as claimed. It is undisputed that Claimant had **no** obligation to report his overtime to Storie in any fashion.

Storie again testified that he simply concluded that with respect to whether or not Claimant actually performed the work prior to arriving at the Shop on August 19, "I have **no** idea what **Wimberly** did **before** he got to the **Shop**" and, with respect to whether Claimant was notified of the malfunctioning gate prior to arriving at **work**, Storie testified, "I just don't feel that he was notified."

The Hearing Officer **recommended** that Claimant be dismissed. The Hearing Officer found:

"Evidence adduced at hearing supported charges of dishonesty in that Mr. **Wimberly** falsely reported and received **compensation** for an overtime call he did not make. Carrier witness **Howard Story** [sic] presented extremely convincing testimony which must be given considerable weight account of his **dramatic** shift of allegiance during the course of the hearing. Testifying early that he **remembered** nothing, Mr. Story confessed later that he had lied in an attempt to protect his friend Mr. **Wimberly**"

On February 2, 1984, Claimant was dismissed **from** service for violating Carrier's Rules 801 and 802 which prohibit dishonesty and **indifference** to duty.

Notwithstanding all of the above, on May 1, 1984, Claimant was restored to his Signalman position.

Because of the **issues** involved in this matter and our ultimate disposition of the Claim, we have found it necessary to **&tail** the testimony as set forth above. **The** standards involved in our review function are certainly well-established. **We** do not substitute our judgment for the Carrier's **nor** do **we** decide what **we** might or might not have done on a de novo basis. Our function is to determine whether or not there is substantial evidence in the record to support the Carrier's decision. If substantial evidence exists, then the Carrier's decision with respect to the penalty imposed cannot be set aside unless it was **discriminatory**, unjust, unreasonable, arbitrary or **capricious**, so as to constitute an **abuse** of discretion. Third Division Awards Nos. 21299; 21241; 21236; 13127; Second Division Award No. 7325. In this regard, the evidence presented cannot be flimsy. Third Division Award No. 21109. On the basis of our careful review of this record, we must find that there is not substantial evidence in the record to support the Carrier's decision to terminate Claimant.

First, the Carrier's entire case depends upon Storie's testimony. Storie admittedly lied and **changed** his testimony. Under the **circumstances** of this case, in light of Storie's admitted false testimony, **we** feel corroborating evidence is **required** for us to give weight to Storie's assertions that Claimant admitted that he did not perform the work. Claimant steadfastly denied ever making such an **admission** and consistently maintained that he performed the **work** prior to arriving at the Shop. The Carrier urges that we consider the testimony of **Beasley** and **Fogarty** that Storie told them that he felt that Claimant had not performed the **work**. **That** testimony is not corroborative that Claimant put in a false overtime claim. Such testimony, aside from being contradictory (e.g. Storie denied that he had the conversation attributed to him by **Beasley**) is clearly hearsay **and** at best, simply reflects what Storie concluded - not what actually transpired. under the **circumstances**, **such** hearsay cannot rehabilitate a witness who admittedly previously falsified his testimony.

Second, an examination of Storie's account leads us to the finding that Storie came to the conclusion that Claimant did not perform the **work on** August 19, because Claimant did not so inform Storie of that fact when Storie told Claimant about the call. Yet, it is undisputed that Claimant **does** not report his overtime to Storie. Claimant's **inquiry** of Storie as to the time of the call was explained and remains unrefuted in the record. Claimant testified that he wanted to be certain that another call did not come in after he made the test and inspection so that he could be certain that the signal was not malfunctioning again. Such an explanation is clearly logical.

Third, we are very cognizant of the fact that the Hearing Officer credited Storie. Under the circumstances of this case, **we** do not feel bound by **such a** determination. The Hearing Officer's early assessment of Storie that he had "**serious misgivings**" about Storie's testimony is not, in our opinion, eradicated in this record to a sufficient degree to demonstrate a basis upon which such a change in credibility determination can be made **from** the Hearing Officer's standpoint. **We** need not determine where Storie's allegiances ultimately ended up. **Even** after Storie changed his testimony, glaring contradictions remained. As testified to by **Beasley**, Storie demonstrated a degree of animosity towards Claimant notwithstanding Storie's claim of friendship for Claimant as the motivation for his giving false testimony. **This** record just **does** not demonstrate, through substantial evidence, that the version finally credited by the Carrier was worthy of belief. Although **we** are normally very reluctant to do so, we believe that in this case, especially in light of Storie's admitted false testimony and the lack of corroboration to rehabilitate Storie's assertions, we can give little weight to the Hearing Officer's credibility determination.

Fourth, there is simply no evidence to refute Claimant's testimony that he heard the **transmission** about a malfunctioning gate and went to the 11th Street location to inspect the signal (which was in his District and was his ultimate responsibility). Suspicions obviously existed **from** the Carrier's standpoint. But suspicions do not constitute substantial evidence. **The** evidence found in this record supporting the Carrier's determination is, to say the least, flimsy. **The** Carrier's argument that Claimant requested the wrong amount of **compensation** (i.e., that he should have only received a time and one-half rate as opposed to the **two** hour and forty minutes minimum under Rule 18) does not demonstrate that Claimant did not perform the work as he **asserts**. At best, such an argument only demonstrates a miscalculation and calls for an interpretation of the **compensation** provisions of **Rule 18**. Such was not the basis of the discipline imposed. The discipline was imposed for making the claim and allegedly not performing the work in the first instance.

Fifth, the other reasons asserted by the Carrier to justify the termination, i.e., that Claimant did not accurately **complete** his **paperwork** concerning the incident and that when questioned by **Harkins** on October 21, 1983, Claimant initially thought that a sheer pin as opposed to a defective down stop caused the malfunction, do not change the result. **Again**, these incidents **may** raise questions, but under the **circumstances** of this case, these instances do not amount to substantial evidence to support a termination decision.

In light of the **above**, we find it unnecessary to address the Organization's argument that the Carrier prejudged Claimant's culpability when it suspended him **from** service during the course of the Hearings.

The Claim is therefore sustained.

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 **Employees** involved in this dispute are respectively Carrier and **Employees** 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 the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Lever - Executive Secretary

Dated at Chicago, Illinois, this 15th **day** of January 1987.