Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28934
THIRD DIVISION Docket No. CL-28834
91-3-89-3-233

The Third Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
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(Soo Line Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10361) that:

(1) Carrier's action in the dismissal from service of Ms. R. (Rewolinski) Schwab, seniority date of 9-26-81, Clerk, Milwaukee, Wisconsin, effective October 21, 1988, was excessive, discriminatory, arbitrary and capricious.

(2) Ms. R. (Rewolinski) Schwab shall have her record cleared of all charges which may have been placed against her as a result of this case.

(3) Ms. R. (Rewolinski) Schwab shall be reinstated to the service of the Carrier with seniority and other rights unimpaired.

(4) Ms. R. (Rewolinski) Schwab shall be compensated for all wages and other losses sustained account her dismissal."

FINDINGS:

The Third 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.

This claim involves the Carrier's October 21, 1988 dismissal of the Claimant who at the time of dismissal was on the Extra List in Milwaukee, Wisconsin, having held GREB Board No. 21 position until August 7, 1988. Claimant's seniority date was September 26, 1981.

On September 7, 1988, the Superintendent notified Claimant of an Investigation scheduled for September 13, 1988:

> "for the purpose of developing all the facts and circumstances in connection with your alleged sleeping on duty while employed as a yard clerk on position 80438 at Glendale Yard on August 4, 1988 while working overtime at approximately 12:30 a.m. until 2:00 a.m. and also your alleged falsification of your timeslips while employed as a yard clerk on position 80438 at Glendale Yard account of claiming overtime on the following dates: August 4, 1988 from approximately 12:30 a.m. until 2:00 a.m.; August 8, 1988 from approximately 12:15 a.m. until 2:10 a.m.; August 22, 1988 from approximately 12:10 a.m. until 2:35 a.m. You are entitled to a representative of your choice present at this investigation as is provided for in your schedule rules."

The investigation in this matter was held on October 6 and 10, 1988. It had been postponed four (4) times at the request of the Organization, and once at the Carrier's request. The October 6, 1988, Investigation was recessed four (4) days to October 10, 1988, at the Organization's request.

On October 21, 1988, the Superintendent dismissed Claimant from her position. His written notice to Claimant stated that:

> "after giving due consideration to testimony developed [at the formal investigation...] and as a result of your falsification of your timeslips while employed as a yard clerk on position 80438 at Glendale Yard account claiming overtime on the following dates: August 4, 1988 from approximately 12:30 a.m. until 2:00 a.m.; August 8, 1988 from approximately 12:15 a.m. until 2:10 a.m.; August 22, 1988 from approximately 12:10 a.m. until 2:35 a.m.
>
> Accordingly your services with the Soo Line Railroad are terminated effective today, October 21, 1988. Please turn in all company property in your possession to the Terminal Superintendent's office at Muskego Yard, Milwaukee, Wisconsin."

Most of the facts in this case are disputed, with the exception of the entries on the timesheets and Claimant's payroll for the dates in issue. In the payroll for the first half of August 1988, which Claimant prepared herself and signed, she claimed a total of eleven (11) hours and forty (40) minutes of "Relief Overtime," including overtime for August 4 and 8, 1988. The timesheet for August 4, 1988, indicates "R. Rewolinski working o/t on open

position 80438," and a handwritten notation that "R. Rewolinski [was] done at 2:40 a.m." The timesheet for August 8, 1988, shows that Claimant worked from 3:00 P.M. to 2:10 A.M. on that date on Position 80438, for overtime of three (3) hours and ten (10) minutes. A handwritten notation on that timesheet stated that "R. Rewolinski [was] done at 2:10 a.m." of the shift that had started on August 8, 1988.

The payroll for the second half of August 1988, states that Claimant worked three (3) hours and thirty-five (35) minutes of overtime on August 22, 1988. As with the earlier payroll, this document was prepared and signed by Claimant. The timesheet for August 22, 1988, shows that Claimant worked Position 80438 from 3:00 P.M. to 2:35 A.M., including three (3) hours and thirty-five (35) minutes of overtime. That timesheet includes a handwritten notation that Claimant was "done at 2:35 a.m."

The Organization advances three (3) arguments for consideration by this Board: (1) that Claimant was unable to properly prepare for the Investigation because Carrier allegedly changed the dates of the incidents under Investigation from those listed in the charge; (2) that the Carrier improperly refused to accept Organization Exhibit No. 1, which the Organization identifies as the Yardmaster's "sign-out sheet" for Train Crews and Clerks; and (3) that the Carrier failed in its burden of proof that Claimant falsified her timeslips.

The Carrier argues that the disputed claims for overtime work were properly listed on the dates in the charge, and that Claimant was not at all confused as to the dates in question at the Investigation. The Carrier further contends that Organization Exhibit No. 1 was properly excluded from the record, since it was not a document prepared for the use for which it was submitted at the Hearing. In addition, the Carrier maintains that its decision to discharge Claimant was based on substantial evidence in the record, and that the penalty was not arbitrary, capricious or excessive.

This Board agrees with the Carrier on the issues in dispute in this matter, and therefore denies Claimant's appeal in its entirety. This Board has initially determined that Claimant was not surprised or in any way prejudiced by the dates of the incidents listed in the charge. Rather, the record leaves no doubt that Claimant was fully aware of the dates that were in dispute. The Carrier presented uncontradicted evidence that it was standard practice to report overtime in the manner done in this case; e.g., overtime started on the second shift was recorded on the day on which the shift began, even if the work was completed on the next calendar day. The Organization acknowledged this practice at the Investigation.

The documentary evidence supports the Carrier's statement of the dates at issue in the charge. The timesheets referred to above show that Claimant began her overtime on August 4, 8 and 22, 1988 on the second shift, and that she finished her work on that shift on August 5, 9 and 23, 1988.

These documents, which were compiled by a bargaining unit employee, also contain specific notations as to the times at which Claimant ended her overtime on those days. Moreover, Claimant acknowledged that she did finish work at 2:40 A.M. on the morning of August 5, 1988, as the timesheets state. Claimant's explanation at the Hearing--that she entered her overtime on her payroll on the wrong dates--is not supported by any evidence in the record, and is contradicted by the evidence reviewed above.

This Board, therefore, concludes that the Carrier did not "change the dates" of the disputed events at the Hearing, and that the charge fully advised Claimant of the issues to be investigated.

This Board has also determined that the Carrier did, in fact, carry its burden of proving that Claimant falsified the payroll entries in question and that she did not work overtime on August 4, 8 and 22, 1988, as she had claimed. The Board initially notes that this is essentially a credibility dispute between the witnesses of the Carrier and those of the Organization. Normally this Board does not resolve such disputes on appeal. [See, Third Division Awards 25916; Second Division Award 25907.] However, we must make a credibility resolution in this case because the Superintendent was not the presiding officer in the Investigation in this case. He also is not listed as having been present at the Hearing.

However, even though we did not have the opportunity to observe the witnesses at the Hearing, the Board's review of the transcript and exhibits before it clearly indicates that the Carrier's witnesses were more credible than those of the Organization. This Board specifically refers to the first-person testimony of the Carrier's policeman and the Trainmaster about Claimant's activities on August 4-5, 8-9 and 22-23, 1988. The Board notes the absence of any evidence that the testimony of these eye-witnesses was subject to bias or self-interest, and the absence of any other possible motive to discredit their testimony. Both men testified candidly and consistently on cross-examination. The Board particularly further notes that one of Carrier's witnesses is a policeman whose job entails careful observation of events such as those in dispute in this case.

In contrast, the Yardmaster is the husband of the Claimant. While the Board does not automatically assume that his testimony was not credible on that account, that factor causes the Board to examine his testimony very closely for other credibility factors. When viewed in context with the timesheets and payrolls for these dates, and other evidence noted below, the Board concludes that the testimony of Claimant and her husband was simply not as credible as that of the Carrier's witnesses.

As to the claimed overtime for August 4, 1988, the Trainmaster testified that he saw Claimant "curled up" in a prone position on the driver's side of the Yardmaster's pick-up truck at approximately 12:30 A.M. on August 5, 1988. He further testified that he then returned to the office, where Claimant was assigned to work. The Trainmaster credibly explained that he took no action at that time since he assumed that Claimant had finished her shift and was not working at that point, and that he first became aware that she was still on duty when she returned to the office at approximately 2:00 A.M.

Claimant, on the other hand, admitted that she was in that truck at 12:30 A.M., but testified that she was sitting up and not sleeping. In addition, she testified that she had not been able to take her twenty (20) minute lunch break earlier in the shift, and that she was therefore at lunch at the time she was observed by the Trainmaster. However, Claimant offered no "paper trail" of work performed earlier to support her claim that she was unable to take her lunch break at its scheduled time. Claimant also did not explain why she took a thirty (30) minute lunch break, as she herself testified. In addition, her testimony that she was "at lunch" is corroborated only by her husband, who testified that he went to the truck at approximately 1:00 A.M. to give her her next assignment. However, neither of them explained why she did not return to the office at the end of the claimed lunch break, and why the Yardmaster had to instead go to the truck.

This Board therefore concludes that substantial credible evidence supports the Carrier's determination that Claimant was in fact not eating lunch, and not working, when the Trainmaster observed her in the Yardmaster's pickup truck at approximately 12:30 A.M. on August 5, 1988. In so doing, this Board notes that the Superintendent did not find that Claimant was "sleeping" at that time, as the charge had stated. This is evidence that the Superintendent carefully reviewed the record in making his decision to dismiss Claimant, since that finding incorporates the Trainmaster's testimony that he could not determine whether Claimant was sleeping when he observed her.

This Board has reached a similar conclusion about the charges that Claimant left the Glendale Yard on August 8 and 22, 1988, during the times she claimed she was working overtime. Both Claimant and her husband denied that she left the premises; both also testified that she was working during the periods for which she claimed overtime. The Carrier presented the testimony of a Special Agent that he saw Claimant leave the Yard on both nights in a Dodge Caravan at times for which she claimed overtime work. He also testified that on August 22-23, 1988, he continued his surveillance until 3:30 A.M., and that Claimant did not return to the Yard at that time. He had testified that he did not notice her return on August 8-9, 1988, but did not indicate the specific time at which his observation ended on that date.

As with the incident of August 4, 1988, this Board must resolve credibility conflicts among the witnesses. In so doing, the Board emphasizes Claimant's evasive testimony that she did not know whether her husband owned a Dodge Caravan at that time, a fact that the Yardmaster admitted at the Hearing. The Board finds her testimony in that regard to lack all credibility, and have utilized that conclusion, in addition to the other factors discussed above, in determining that her testimony was not credible on an overall basis.

In addition, this Board has determined that the Carrier did not err in refusing to admit Organization Exhibit No. 1 at the Investigation. The record supports the decision that this document was an unofficial record kept by the Yardmaster, and was not an official form used by the Carrier. Moreover, the record establishes that it was not maintained for the purpose for which it was offered at the Investigation; e.g. as a record of the times at which employees finished their work. Rather, it was a "switch list" that identified the arrival and departure times of cars, train and car numbers, and other information. These factors support the decision not to admit the document, since it was not the type of document which would ordinarily be relied on for this purpose. This case is thus distinguishable from Third Division Award 20853, to which the Organization referred in its brief to this Board, since the Carrier did not improperly limit the events on which the Organization could submit evidence. Rather, in this case, the Carrier excluded evidence whose probative value was not sufficiently established to warrant its admission into the record.

Moreover, even if the presiding officer erred in excluding this document, any such error would not require this Board to overturn the decision to dismiss Claimant. The disputed document was prepared by the Yardmaster, who was at that time married to Claimant. The Board is entitled to take that factor into account in determining the evidentiary value of that document, which he prepared. Thus, even if the "switch list" had been admitted, it is the conclusion of this Board that the record would still contain substantial credible evidence to support the dismissal. As a result, this Board also rejects the Organization's assertion that this document "discriminated" against Claimant because the exclusion of the document was compiled by her then-husband.

This Board further agrees with the Carrier that Claimant's conduct was of the kind that warrants immediate discharge. Falsifying payroll records to obtain payment for time not worked is a very serious offense; indeed, it is actually theft from the Carrier. This Board has sustained discharges of employees under similar circumstances. See, Third Division Awards 28360, 27949, 26533, 25989.

Moreover, the Organization advanced no reasons for which this Board should mitigate the dismissal penalty chosen by the Carrier, and this Board can find no such reasons in the record of this case. Claimant did not admit her conduct, apologize and ask for lenient treatment, as did the employee in the case submitted by the Organization. See, Third Division Award 21760. She did not advance any circumstances that this Board could even begin to consider as mitigating factors, as was also the case in that earlier Award; e.g. that the insubordinate employee had worked "all day in inclement weather," and that he had not been "dishonest." Rather, Claimant steadfastly maintained that she was working during the disputed time periods on August 4, 8 and 22, 1988. Her patently evasive testimony about her husband's Dodge Caravan underscores her determination to deny her misconduct at all costs.

The Carrier's decision to discharge Claimant was therefore not arbitrary or capricious, and the penalty was not excessive, as was in fact the case in Third Division Award 19559 on which the Organization relies. As a result, this Board finds no reason to disturb the Carrier's judgment that dismissal was required.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of August 1991.