

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32707
Docket No. MW-33281
98-3-96-3-760

The Third Division consisted of the regular members and in addition Referee Katherine Gerstenberger when award was rendered.

PARTIES TO DISPUTE: (**(Brotherhood of Maintenance of Way Employees
(CSX Transportation, Inc. (former Chesapeake &
(Ohio Railway Company)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline (suspended from service pending investigation and subsequent dismissal) imposed upon Welder T.D. Atkins for alleged ' . . . responsibility, if any, in connection with falsifying time sheets submitted by you for the dates of September 5, 6 and 7, 1995, wherein you claimed to work 8 hours on each date as a Welder on Force 5G67. . . .' was arbitrary, capricious, without just and sufficient cause, in violation of the Agreement and at a hearing that was neither fair nor impartial [System File C-TC-6165/12 (95-1179) COS].
- (2) As a consequence of the aforesaid violation, the Claimant shall be reinstated to service with all seniority and benefits unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

On October 9, 1995, Claimant was dismissed from service after an Investigation on the charge that he falsified time sheets for the dates of September 5, 6 and 7, 1995, in order to wrongfully receive pay for days not worked. Claimant had 18 years of service with the Carrier at the time of his dismissal.

On August 17, 1995, Claimant sustained an on-duty injury to his knee while working as a Foreman on a switch tie gang at Peach Creek, West Virginia. He reported the injury to Roadmaster S. Bartlow. Because the injury did not appear serious enough to require medical attention, no personal injury report was completed. Claimant continued to work until August 24, 1995, when he was furloughed.

In late August 1995, Claimant bumped into a Welder position on Force 5G67 in Russell, Kentucky. On September 1, 1995, his first day in this position, Claimant's knee became swollen and painful. He completed his assignment that day and returned home to rest over the three-day Labor Day weekend. On September 4, after a family outing, his foot and leg became so swollen that he sought medical treatment at a local urgent care facility. The attending Physician determined that Claimant's leg was infected. He prescribed antibiotics and directed Claimant to rest for five days.

Claimant testified at the Investigation that he contacted Roadmaster Bartlow on September 5, 1995, advised him of his medical condition and asked if he should now file an injury report. Claimant further testified that he expressed concern about losing pay for the days he would be off due to the injury. Claimant's testimony in this regard was as follows:

"... I asked him if he wanted me to fill an injury report out at this time or if he wanted to see what happens with it and he said he would like to wait and see if the medication would take effect at this time. I asked him about my lost time on the 5, 6, and 7 on the date of September 5. I said I am concerned about losing time on the job since I had this injury, this injury was on the job. I was concerned about losing my time, did he want to go through the Claim Agent or did he want to leave me on the time sheet,

whatever he wanted to do is what I asked him that would be okay for me. I had no inclination of anything that I was doing at this point that was wrong."

Claimant also spoke with Roadmaster Bartlow on September 6 and 7, 1995. During one conversation, Bartlow indicated that he had arranged for Claimant to be paid for the days he was off work due to the injury. Claimant returned to work on September 8.

Upon his return to work, Claimant asked Roadmaster M. Hinnant, who he then worked for, if he would be left on the time sheets for September 5, 6 and 7. Hinnant said yes, that Roadmaster Bartlow had approved it. He asked Claimant to submit a note containing the hours worked on September 5, 6 and 7. Hinnant then entered Claimant's time into the computer payroll system.

Claimant admitted that he received pay for September 5, 6 and 7 and that he did not work on those days. The payment of wages to the Claimant for those days was later discovered by the Division Engineer's office. After an inquiry, Claimant was charged with falsifying time sheets. Roadmaster Bartlow was dismissed from service and Roadmaster Hinnant was demoted as a result of their conduct in connection with this incident.

The Organization advances two procedural arguments. First, it contends that the Hearing Officer at the October 9, 1995 Investigation was biased against Claimant, and, consequently, he was denied a fair and impartial Hearing. In this regard, the Organization submits that the Hearing Officer arbitrarily and repeatedly restricted the Organization representative's lines of questioning and rejected the representative's attempts to offer a critical document (Claimant's injury report) into the record. Second, the Organization asserts that the Carrier's refusal to make Roadmasters Bartlow and Hinnant available to testify at the Investigation demonstrates that the Carrier had prejudged Claimant guilty of the alleged misconduct. Although the Organization had made a written request that the Carrier make the two Roadmasters available to testify at the Investigation, the Carrier did not respond to this request, and did not produce the two witnesses.

The Board carefully considered the Organization's procedural arguments and finds them to be without merit. With regard to the Carrier's failure to make Bartlow

and Hinnant available to testify, the record reflects that the Carrier did not dispute Claimant's testimony regarding the actions of the two Roadmasters. Inasmuch as there is no issue of fact relating to the conduct of Bartlow and Hinnant, we find that their failure to attend the Investigation was not prejudicial and did not violate Claimant's due process rights. Moreover, we carefully reviewed the transcript of the Investigation and find insufficient evidence to support a finding that the Hearing Officer was biased against Claimant or that his rulings deprived Claimant of a fair and impartial Hearing.

With regard to the merits of the claim, the Carrier argues that the Claimant committed a deliberate act of dishonesty, and that it is well established in the railroad industry that dishonesty is ample and just cause for dismissal. The Carrier further contends that falsification of time sheets for personal gain is tantamount to theft and cannot be tolerated.

While the Board has consistently held that theft of Carrier property is an offense warranting dismissal, it has also recognized that the quantum of evidence required to prove such a charge is higher than in cases involving other types of discipline. This is so because an accusation of theft carries with it the element of moral turpitude, and, indeed, possible criminal liability. See, Third Division Awards 16154 and 23977.

Upon full consideration of the entire record and the arguments raised by the parties, the Board finds that the Carrier presented insufficient evidence to satisfy the requisite degree of proof to support the Claimant's dismissal. There is no question that Claimant acted improperly when he submitted the note indicating that he had worked on September 5, 6 and 7, 1995. We are not persuaded, however, that by doing so Claimant intended to steal from or defraud the Carrier.

First, Claimant stated that he believed that he was entitled to compensation for the three days in issue, and that he was being paid as a result of his on-duty injury. Indeed, Claimant was entitled to compensation for the days he was off work due to his injury, albeit from the wage continuation program rather than payroll. Second, while it is true that Claimant expressed concern about losing pay for the time off he needed to recuperate from his injury, it was Roadmaster Bartlow who made the decision to leave Claimant on the payroll and authorized the payment of his wages.

The Board finds it significant that even though Roadmaster Hinnant was aware that the Claimant had not worked on September 5, 6 and 7, he nevertheless entered

Claimant's time into the computer payroll system. We see no meaningful difference between this act and the Claimant's, yet Roadmaster Hinnant's conduct resulted only in a demotion.

Finally, in reaching its decision, the Board considered the Claimant's 18 years of service to the Carrier, and his unblemished record, which serves to mitigate the seriousness of his conduct.

In view of the extenuating and mitigating circumstances discussed above, and the disparate penalties imposed by the Carrier, the Board finds that the Claimant's dismissal was arbitrary and excessive. Accordingly, Claimant's dismissal shall be reduced to a 30-day suspension, and he shall be reinstated to service. Claimant shall be made whole for wages and contractual benefits lost as a result of his dismissal, and his record shall be amended to so reflect.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of August 1998.