

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33981
Docket No. MW-34339
00-3-97-3-878**

The Third Division consisted of the regular members and in addition Referee Stephen B. Rubin when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(St. Louis Southwestern Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Welder D. B. Smith for his alleged falsification of DAR Time Report for hours worked on July 1 and 5, 1996 was without just and sufficient cause and in violation of the Agreement (System File MW-96-53-CB/MW D96-55).**
- (2) Welder D. B. Smith shall now be reinstated with seniority and all other rights unimpaired 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.

In June and July 1996 the Claimant was assigned as a Welder under the supervision of Roadmaster U. M. Hilke at Herington, Kansas.

During the month of June, according to the Claimant's unrefuted testimony, he had worked 11 hours of overtime for which he had not been compensated. Overtime was discouraged at the time and, according to the Claimant, there was a practice at the time by which an employee could accumulate overtime pay and then take compensatory leave in a subsequent pay period, provided there was agreement between the employee and his supervisor to do so. This evidence also was unrefuted. The Claimant admitted that such a practice was inconsistent with the Rules.

On July 1 and again on July 5 the Claimant was absent from work. During those dates Roadmaster Hilke was on vacation. There was no prior agreement for the Claimant to take compensatory leave on those dates. On July 8, when Roadmaster Hilke returned from vacation, he was asked by the Division Engineer if the Claimant had worked those dates. Roadmaster Hilke checked with central payroll and found no such claim. According to the Claimant it was on that day that he asked Roadmaster Hilke for permission to trade in the overtime (16.5 hours at straight time) for compensatory leave. The Claimant testified that Roadmaster Hilke agreed; Hilke denied that he had done so. Three days later the days had been claimed.

On July 29, 1996 a formal Investigation was conducted by an Assistant Roadmaster. By letter dated August 5, 1996 signed by the Division Engineer, the Claimant was discharged for knowingly and willingly falsifying his time record and paying himself for time that he did not work or perform services.

Rule 1.6 provides in pertinent part that employees are not to be careless of safety, negligent, insubordinate, dishonest, immoral, quarrelsome, discourteous or disloyal. The terms are not defined in the Rule, but "Any act of hostility, misconduct or willful disregard or negligence affecting the interests of the Company or its employees is sufficient cause for dismissal and must be reported."

The Organization argues that the Claimant was denied a fair Hearing when (1) he was denied a continuance so that he could be represented by his chosen representative and (2) credibility determinations adverse to him were made by the Division Engineer who was not present at the Hearing and did not see the witnesses. On the merits, the Organization argues that the Claimant honestly believed that he was entitled to claim

the hours and that he had supervisory permission to do so. The charge of knowingly and willfully falsifying his time records was not proved.

The Carrier argues that the Claimant did not expressly request a continuance and that, in any event, any such request should have been in writing. On the merits, there was substantial evidence to support the charge and dishonesty warrants dismissal.

As to the procedural claim, no representative appeared at the Hearing for the Claimant. When asked if he wanted representation, he said that he wanted Larry Wright, one of the Organization's representatives, but that Wright was not available. The Claimant did not expressly ask for a continuance, nor did the Investigating Officer pursue the unavailability of Wright, whether any request for continuance had been received or solicit an express waiver of the Claimant's right to representation. In post-discharge correspondence Wright asserted that Local Officer Mayo had in person asked for a continuance until Wright, who was then on business elsewhere, could be available. The Carrier does not appear ever to have addressed this assertion.

While the notice of Hearing required that a request for postponement must be in writing, the Organization points out that Article 14 of the Agreement provides that a request for additional time may be made in writing, in person or by telephone, provided that it be confirmed in writing within seven days. There is no indication here as to when Mayo made his request, but it necessarily had to have been less than seven days before the Hearing. The Notice of Hearing was dated July 22 and the Hearing was held on July 29.

In Third Division Award 30215, a case with a similar factual issue, the Board held that the Claimant's due process rights were denied when no Organization representative was present, even where the Claimant expressly waived the right to representation. The Board found, based on correspondence in the record, that a representative had asked for a postponement. The refusal of the postponement was held to be prejudicial. This case is stronger because the Claimant put the Investigating Officer on notice that he wanted Wright to be present and that Wright was unavailable. In Award 30215 the Board stated that the Carrier had the obligation to accommodate a reasonable request for a postponement, even where the Claimant waived it.

The Investigating Officer appeared totally unconcerned with the Claimant's right to representation despite the Claimant's desire to have Wright present. The Carrier

points out that the Claimant did not expressly ask for a postponement. It suggests that the claim of denial of representation was an afterthought. However, the post-discharge correspondence asserts that such a request had been made on the Claimant's behalf. The Investigating Officer did not inquire if the Claimant wanted a postponement, nor whether one had already been requested. The Investigating Officer did not ask if the Claimant was willing to proceed without Wright's presence. The Carrier states that the request could have been denied because it was not in writing. However, it also asserts that procedural safeguards need not be formally adhered to. As noted, the seven day period for confirming the request for a postponement had not yet expired when the Investigating Officer proceeded.

The Carrier asserts that the Claimant admitted the violation and therefore he was not prejudiced even if he was denied his procedural rights. The Organization submitted Third Division Awards 16064, 16154 and 21122 to the effect that falsifying time cards involves the element of intent to defraud. We are inclined to agree, particularly where, as here the Claimant was found guilty of acting "knowingly and willfully." Accordingly, although the Claimant admitted submitting a claim for time not worked, the element of intent had yet to be proved. This involved the resolution of the credibility dispute between the Claimant and Roadmaster Hilke, each of whom, it is alleged, had a motive to testify falsely – the Claimant in order to be vindicated, Roadmaster Hilke to cover a practice not condoned by the Rules.

Representation by a skilled and experienced representative was crucial to the Claimant's rights here, where there was a fact question concerning the practice of trading overtime for days off and a question of credibility.

Moreover, a careful review of the record developed on the property shows that proof of dishonesty was lacking. The Claimant did not claim the time until Roadmaster Hilke had returned, which suggests that he was waiting to have a conversation. He testified to just such a conversation. However, Roadmaster Hilke was asked only whether the Claimant's version was accurate. His response at first was that he had no such recollection and then he testified that it did not happen that way. Roadmaster Hilke was not asked if a conversation took place and, if so, what was said. It is consistent with the limited testimony that he gave that a conversation took place from which the Claimant took the impression, whether accurate or not, that the trade off was approved. Active and skilled representation might well have helped to resolve the facts. In no way was the denial of representation harmless. The Claimant was denied a fair

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Hearing to his prejudice, evidence of knowing and willful falsification was lacking and the claim must be sustained.

AWARD

Claim sustained.

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 28th day of March, 2000.