

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36579
Docket No. MW-36761
03-3-01-3-251**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company (Western Lines))

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (withheld from service and subsequent Level 5 permanent dismissal on February 25, 2000) imposed upon Mr. L. J. Goins in connection with alleged responsibility for claiming time not actually worked on January 21, and 28, 2000 while employed as a specialized foreman was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (Carrier’s File 1231511 SPW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants L. J. Goins shall now ‘...be reinstated to the service of the Carrier to his former position with seniority and all other rights restored unimpaired, compensated for net wage and benefit loss suffered by him, including, but not limited to, medical and/or insurance premium costs for the Claimant and his family beginning on the date the Claimant was dismissed and continuing, and the alleged charge(s) be expunged from his personal record.’”**

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.

By letter dated February 7, 2000, the Claimant was advised to attend an Investigation in connection with charges that, while working as a Specialized Foreman, he claimed time not actually worked on January 21 and 28, 2000. After the February 25, 2000 investigative Hearing, the Claimant was assessed a Level 5 discipline, which is dismissal.

At the Investigation, the Manager of Track Maintenance testified that he informed all employees, including the Claimant, that careful attention would be paid to payroll submissions and that employees would be expected to review and initial them to ensure their accuracy. When the Manager reviewed the pay period at the end of January 2000, he was informed that the Claimant was not at work on January 21. He also testified that the Claimant had requested and received permission to take a safety day on January 28, 2000. Yet, in reviewing the Claimant's time roll, it showed that he had worked on January 21 and 28. In addition, the Claimant had put in for one hour of overtime on January 28.

The Claimant testified that he was fairly new to the foreman class, and had requested on occasion that Tamper Operator Lenz complete the necessary time roll forms because of his greater familiarity with their use. The Claimant and Lenz both testified that for the second half of the January 2000 work period, Lenz entered in eight hours for the Claimant for the dates of January 21 and 28, 2000. In addition, in accordance with the Claimant's request, Lenz entered in a one hour overtime payment for the Claimant for January 28. When asked whether the Claimant verified his time rolls prior to his submission, the Claimant acknowledged that he glanced at them. Because they appeared to be accurate, he initialed the forms.

The Organization contends that the Carrier failed to meet its burden of proof in this instance. It argues that charges of time card fraud or theft require evidence of

intent. Based on the record, it is clear to the Organization that there is lacking here any evidence showing that the Claimant was deliberately dishonest or that he intended to defraud the Claimant. Although the Claimant's time claims were incorrect, the errors were due to an incorrect assumption by Lenz that the Claimant worked on the dates in question. The Organization notes, too, that the Claimant had permission to be off on January 28 and thus the time roll error merely reflected the wrong time code and not a deliberate attempt to obtain pay for time not worked. The Organization acknowledges that the Claimant made a mistake in not checking the accuracy of the forms before they were submitted, but asserts that the factual predicate in this case merely shows an inadvertent error for which the penalty of dismissal is plainly excessive.

In the Carrier's view, there is no question that substantial evidence exists on this record to support the determination of the Hearing Officer that the Claimant in fact committed the misconduct alleged. The Carrier points out that all employees, including the Claimant, had been informed that they were expected to review the time rolls to ensure their accuracy before submission. In light of that admonition, the Claimant's assertion of innocent mistake is not credible. Moreover, regardless of his attempts to shift responsibility, the record shows that the Claimant was the assigned Foreman, and as such, it was his responsibility to ensure that the payroll submissions were accurate. Dismissal under these circumstances was not an excessive application of discipline or an abuse of discretion.

After careful examination of the record in its entirety, the Board must conclude that substantial evidence exists to support the Carrier's charges. There is no question in this case that the Claimant's time records for January 21 and 28, 2000 were inaccurate. Instead, a determination of wrongdoing centers on whether the Claimant possessed the requisite intent to establish that his actions amounted to a deliberate act of misconduct.

It must be remembered that proof of intent may be inferred from all the surrounding circumstances. Absent a confession or a direct admission, an employee's subjective state generally must be determined by his course of conduct. Intent is present when an employee knowingly or willfully commits the misconduct alleged. The terms "knowing and willful" serve to distinguish intentional acts of theft, stealing or fraud from situations in which the employee simply exercised poor judgment, made a good faith mistake or was excusably ignorant.

As the Organization pointed out, it appears at first glance that there are factors militating against the conclusion that the Claimant intended to receive pay for time not worked. It was Lenz and not the Claimant who entered the information for the time rolls at issue, the Board recognizes. Moreover, the Claimant had obtained permission to take a safety day on January 28.

Still, there are other circumstances present which convince the Board that the Hearing Officer was correct in concluding that the overall evidence adduced on the record belied the Claimant's assertions of innocent motive. First, the Claimant had been placed on clear notice to accurately report time and to carefully check the time records. This factor greatly diminishes the credibility of his claim of carelessness in submitting inaccurate time records.

Second, the Organization's attempt to shift responsibility to Lenz does not distract our attention from several glaring facts. The Claimant acknowledged that he had a conversation with Lenz about his time records prior to their submission. Unexplained on this record is why the Claimant would remember to tell Lenz to report overtime for January 28 while omitting any mention of the fact that he was off work on January 21 and January 28. And, no convincing reason was forthcoming to explain why the Claimant submitted an hour of overtime for a day not worked. The Claimant's general claims of cell phone use as a basis for overtime did not explain the specific hour of overtime claimed on January 28, the Board concludes.

Third, we do not agree that the January 28 time roll simply reflected a coding error. By not reporting January 28 as a safety day off, and requesting pay for that day as if he had been at work, the Claimant put himself in a position of taking another safety day off in the future, the record established.

To say that all these events were the result of mistake or carelessness is contrary to logic and human behavior. We find that the Hearing Officer could properly infer intent from this record.

Concluding as we do that substantial evidence exists for the finding that the Claimant received pay for time not worked, as charged, the Carrier's argument with respect to the penalty becomes persuasive. This sort of misconduct is widely regarded as a serious offense which the Carrier is justified in dealing with severely. Summary discharge under these circumstances was warranted, as numerous decisions have

recognized. Third Division Awards 27795, 27949 and 28951. Accordingly, the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 16th day of June 2003.