Award No. 13179
Docket No. MS-14482

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

HUMPHREY A. MOYNIHAN, JR.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of Humphrey A. Moynihan, Jr., on The New York, New Haven and Hartford Railroad Company, that:

(1) The Carrier's action in dismissing Humphrey A. Moynihan, Jr., from service on November 6, 1959, was in violation of the applicable collective bargaining agreement between the Carrier and The Order of Railroad Telegraphers governing the claimant's rate of pay, rules and working conditions as an employe of the Carrier, was arbitrary and that the penalty invoked was excessive and unreasonable;

(2) That Humphrey A. Moynihan, Jr., be reinstated to service with seniority and other rights unimpaired;

(3) That Humphrey A. Moynihan, Jr., be reimbursed for all wages lost because of the unfair and improper action taken by the Carrier.

OPINION OF BOARD: The following charge and notice of hearing, under date of October 26, 1959, was received by Claimant at 2:00 P. M., October 28:

"Please arrange to be present at an investigation to be held in the Assistant Superintendent's Office, Room 446, South Station, Boston, Mass., Thursday, October 29, 1959, at 10:00 A. M., for the alleged violation of Rule 'N', as the records so indicate falsification of time slip of July 27, 1959.

You may, if you so desire, be accompanied by one or more persons of your own choosing subject to the terms of your agreement, without expense to the company.

You may produce witnesses in your own behalf without expense to the company and you or your representative may cross-examine witnesses.

You will be expected to be present throughout the entire investigation."

Rule "N", referred to in the charge, reads:

"Employes who are careless of the safety of themselves or of others; also, those who are insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who conduct themselves in such a manner, or handle their personal obligations in such a way that their railroad will be subjected to criticism and loss of good will, will not be retained in the service.

Employes who are charged with the duty of preparing time returns and time books must show correct information thereon."

Hearing was held on the date appointed in the notice. Decision issued on November 6, 1959:

"Under date of October 29, 1959, investigation was held by the Assistant Superintendent concerning your time slip of July 27, 1959, for working as Operator at Davisville Tower.

You have been found guilty of falsifying a time slip, and you are dismissed from the service.

Any Company property in your possession must be returned to the Superintendent's Office, Room 440, South Station, Boston, Massachusetts."

THE BOARD'S APPELLATE REVIEW

In discipline cases, the Board sits as an appellate forum. As such, our function is confined to determining whether: (1) Claimant was afforded a fair and impartial hearing; (2) the finding of guilty as charged is supported by substantial evidence; and (3) the discipline imposed is reasonable.

We do not weigh the evidence **de novo.** If there is material and relevant evidence, which if believed by the trier of the facts, supports the finding of guilt, we must affirm the finding.

CLAIMANT'S AVERMENTS

Claimant avers:

1. He was not given a fair and impartial hearing in that he was not given "a reasonable time prior to the hearing" in which to prepare his defense and arrange for representation;

2. The finding of guilty as charged is not supported by substantial evidence; and

3. Even if the finding of guilty as charged is affirmed, the disciplinary action taken — dismissal from the service — is unreasonable.

THE FACTS

Claimant, a telegrapher, worked for Carrier about 8½ years plus summer seasons, for a period of 4 or 5 years.

On Sunday, July 26, 1959, Claimant was under orders to report for a tour of duty at Davisville Tower, Davisville, Rhode Island, commencing at 10:00 P. M. and continuing through until 6:00 A. M., Monday, July 27. In the afternoon of July 26, Claimant noticed a freight train in difficulty. He telephoned the dispatcher and notified him of his availability. The dispatcher instructed Claimant to report for duty to the Davisville Tower and perform necessary tower service. Claimant complied. Then, sometime before 10:00 P. M., he requested the dispatcher to relieve him from working the shift starting at 10:00 P. M., to which he had been assigned. Because of unavailability of another telegrapher, the dispatcher directed Claimant to continue to work until relieved. Claimant continued to work until 4:30 A. M. on July 27, when he was relieved in accordance with the requirements of Federal law. At that time he filed a Form 4020, which is captioned "Payroll Time Report–General"; also, two Forms 394-A2, having the caption "Daily Time Report of Employes Who By Use of The Telegraph or Telephone, Dispatch, Report, Transmit, Receive, or Deliver Orders Pertaining To or Affecting Train Movements. Name of Tower, Place or Station....., Date....., 19....."

Form 394-A2 is used for reporting time worked to the Interstate Commerce Commission, and for no other purpose. Form 4020 is a record kept by Carrier in the course of its business from which wages earned is computed.

* * * * *

FORM 4020

Form 4020, as executed by Claimant, shows Claimant as having worked 8 hours at straight time rate on both Sunday and Monday, July 26 and 27, respectively.

FORMS 394-A2

On Form 394-A2, No. 5, Claimant filled it in to show that on July 26 he was assigned and did work for eight hours from 2:00 P. M. to 10:00 P. M.

On Form 394-42, No. 6, Claimant filled it in to show that he was assigned and did work for eight hours from 10:00 P. M., July 27, to 6:00 A. M., July 28.

* * * * *

Claimant admits that on July 27 he was called at his home and advised that "his time form was incorrect." For the purposes of this case we can assume, notwithstanding a conflict in the evidence, that Claimant, as he testified, corrected Form 394-A2 to show that "he worked from 7:30 P. M. on July 26, 1959, to 4:30 A. M. on July 27, 1959." This correctly reflected the hours he worked. Claimant admits he did not correct Form 4020, notwithstanding that he had been informed that "his time form was incorrect."

CONTENTIONS OF PARTIES

Carrier contends, in effect, that Claimant falsified Form 4020 with the object of getting 16 hours' pay for 9 hours of actual work. Further, while it placed no charge relative to Forms 394-A2, it says the false information placed thereon by Claimant is evidence of his intent in executing Form 4020 as he did.

It is Claimant's contention that under the Agreement he was entitled to 8 hours' straight time pay for the work he performed between 7:30 P. M. and 10:00 P. M. on Sunday, July 26, and 8 hours' straight time pay for the work he performed from 10:00 P. M. on Sunday, July 26, to 4:30 A. M. on Monday, July 27. Therefore, instead of showing hours actually worked on Form 4020, he rightfully showed the number of hours for which he claimed pay.

RESOLUTION

A. FAIR AND IMPARTIAL HEARING

Claimant's contention, after the hearing, that he was not given a reasonable time in which to obtain representation and prepare his defense is untimely. His testimony at the opening of the hearing constitutes a waiver and is a bar to this attack:

"Q. Were you properly notified of this investigation?

A. Answering that I will say, I received the registered letter and signed for it and obtained possession of it at 2:00 P. M., October 28, 1959.

Q. Mr. Moynihan, I asked you 'were you properly notified of the investigation'?

A. I would like to say I received the letter at 2:00 P. M., October 28, 1959, it was extremely short notice to get representation to clarify the issue.

Q. Would you like to postpone this investigation until you get your representative?

A. At this point I do not think so.

Q. Mr. Moynihan, were you properly notified of the investigation?

A. If you refer to this registered letter that I received at 2 P.M., the 28th of October, yes.

* * * * *

Q. Do you desire representation?

A. Yes, I do.

Q. Was request made to Mr. J. J. Marr, General Chairman of the ORT and Mr. Hoxie to be present?

A. I may state that Mr. Hoxie refused to represent me, and he did not give me any reason.

Q. Do you wish to hold this investigation up until such time as you reach Mr. Marr?

A. No.

Q. Do you desire representation?

A. For the moment I will waive representation."

B. SUBSTANTIAL EVIDENCE

The charge of "falsification" connotes wilful misrepresentation. Intent?

The conclusion as to what is intent, unless admitted to, is subjective. Where a subjective finding as to intent must be made, an appellate forum will not reverse the judgment of the trier of the facts if the conclusion is one that, in the light of the evidence, could be arrived at by a reasonable man.

Form 4020 is on its face a "Time Report." Notwithstanding, when Claimant was told that "his time form was incorrect" he did not choose to correct that Form. In asserting that he changed Form 394-A2 to show hours worked to 7:30 P. M., July 26 to 4:30 A. M. on July 27, Claimant admits that he did not properly record his "Time" on Form 4020.

The evidence accumulates as to Claimant's intent.

Claimant, with more than 8 years' service, knew, or should have known, and is chargeable with knowledge that, in the industry, the time of the work of a shift which extends from one calendar day into the next, is chargeable to the day on which the shift started. See Award No. 5442.

All the work which Claimant performed on Sunday, July 26, and Monday, July 27, was chargeable to Sunday. Consequently, taking Claimant's assertion that he was reporting hours for which he claimed pay and not hours actually worked, he should have shown 16 hours for Sunday, July 26. He has no defense for showing 8 hours worked on Monday, July 27. He worked no hours chargeable to that day. It is reasonable to infer that Claimant had ulterior reason for not showing 16 hours worked on Sunday, July 26.

There is a hollow sound to Claimant's averment that he showed 8 hours worked on both July 26 and 27, because under the Agreement, in his interpretation, that is the number of hours for which he was entitled to pay without regard to the lesser number of hours actually worked. With his over 8 years of experience, Claimant knew, or should have known, that a time report differs from a wage claim; also, that having filed an accurate time report, if he felt the wages he received, based on the reported time actually worked, were less than those prescribed in the Agreement, his recourse was the filing of a wage claim.

We find, from the record, that a reasonable man could conclude that Claimant wilfully misrepresented the time worked.

C. REASONABLE DISCIPLINE

We find that a wilful misrepresentation of time worked is a violation of Carrier's Operating Rule "N", and the discipline imposed — dismissal from service — is reasonable.

CONCLUSIONS

We find that:

1. Claimant was given a fair and impartial hearing;
2. From the facts of record, a reasonable man could conclude that Claimant had the intent to falsify the time report. Therefore, this Board cannot disturb the finding that such was his intent; and
3. The discipline imposed was reasonable.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1964.

DISSENT TO AWARD 13179, DOCKET MS-14482

Even though it be inappropriate to quarrel with the majority's finding from the record that a reasonable man could conclude that the claimant intentionally misrepresented the time worked, I believe a denial award was not warranted.

Awards of this Board, impressive in number, have held that the severity of punishment must be reasonably related to the gravity of the offense. We have repeatedly observed that misdemeanors do not require life sentences.

In Award 2632 Referee Shake gave us this wise advice:

> "A word of admonition for the benefit of those charged with meting out discipline may not be here out of place. We would remind them that long experience has demonstrated that certainty of punishment is usually more of a deterrent to wrongdoing than the severity of the penalty; that the imposition of excessive penalties is calculated to breed disrespect for authority; and that tolerance and moderation are always safe guides for those entrusted with the solemn responsibility of passing judgment upon their fellow men."

Considering the relatively minor rule infraction found by the majority to have been involved, and that reasonably careful supervision of time reports by management would have detected the irregularity immediately, I am convinced that outright dismissal was too severe.

The extreme discipline imposed should have been modified by this award; therefore, I dissent.

J. W. Whitehouse
Labor Member