

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20211
Docket Number MW-20145

Joseph A. Sickles, Referee

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it disciplined Extra Gang Foreman G. DiIoli on the basis of a hearing that was not fair or impartial and on the basis of unproven charges (System File 011-181-D).

(2) The personal record of the claimant be cleared of the charges placed against him and reimbursement be made for all wage loss suffered in accordance with Rule 45(b).

(3) The Carrier shall also pay the claimant six percent (6%) interest per annum on the monetary allowance accruing from the initial claim date until paid.

OPINION OF BOARD: Claimant was terminated for claiming overtime work for himself and others for August 5, 1971, when no such work was performed, in violation of Rule 801:

"Employees will not be retained in the service who are...dishonest..."

Claimant stated that his crew of 34 employees had each accrued 5 hours of overtime as of August 5, 1971. This had been accumulated in amounts of one hour, or one-half hour at a time.

On August 5, 1971, trailers were being moved and set up at a commercial park. Some men in Claimant's gang were concerned with the trailers and went to the park, while others went home. Claimant felt that August 5 was the appropriate time for him to claim all of the overtime accrued to date for his entire gang, and accordingly, his pay report showed five hours for each man on that date for moving and setting up trailers. When questioned by the Roadmaster, Claimant admitted that the claim was actually for work performed prior to that time.

Claimant insists that he was denied a fair and impartial investigation because the Hearing Officer excluded certain testimony and evidence. Claimant had all 34 members of his gang present at the hearing to "...state the fact that those hours were owed them." The Hearing Officer refused to allow each employee to testify, but stated that one man could testify in corroboration of Claimant's statements. When the one employee was called, he could not be located. At the conclusion of the hearing the Hearing Officer noted that anything Claimant had entered into the hearing would be accepted due to the absence of the witness.

The Organization cites Awards which have held that a Claimant's rights to a fair and impartial investigation may not be impeded and that a Claimant is entitled to have "all" material evidence and significant facts presented. See for example Awards 20014 (Lieberman), 20148 (Sickles), 16166 (Perelson), 14479 (Dugan) and First Division Awards 20094 (Seidenberg), 20071 (Seidenberg) 14354 (Guthrie), 10348 (Sharpe) and 5248 (Simmons).

While we concur with the results of the above cited Awards, we do not agree that they dispose of this dispute. Each allegation of a denial of a fair and impartial investigation must be thoroughly scrutinized upon its own individual merits. We have done so here. At first blush, it might appear that 34 witnesses is an excessive number and that their testimony would be, of necessity, cumulative. At the same time, we can perceive of instances where that number might be necessary to establish separate and isolated factors which, when united, establish a factual defense to a charge. Under those circumstances, exclusion could be prejudicial.

In this case, Claimant notes an ironic circumstance that each of the 34 men had amassed, in small amounts, exactly five (5) hours of overtime as of August 5, 1971. If Carrier's action was based solely on a disbelief of that assertion, then Claimant should have been given every opportunity to corroborate his statement. Thus, in considering this record we will do so under circumstances most favorable to Claimant, granting him the benefit of all doubts and we will conclude, for purposes of this Award, that as of August 5, 1971, each of the 34 employees had accumulated at least 5 hours of uncompensated overtime. Under these circumstances, any error of excluding testimony cannot be considered as prejudicial.

Next, we will examine the question of whether Claimant's act was dishonest. We conclude that it was, even if no employee received any money not otherwise due him.

Claimant admitted that his report was erroneous and was contrary to Carrier's rules, but defends his action based upon a previous discussion with the General Track Foreman. Claimant asserts that the General Foreman had told him that overtime should be spread out so as not to show an overabundance at any one time. The Foreman concurred that on one occasion he had told Claimant (with reference to an incident of 7 hours overtime for 8 men) to split the time into 2 days, rather than showing it all on one day. The Foreman denies that Claimant was instructed to do so on a regular basis.

While it could be argued that the one time instruction from the General Foreman (which appears to be contrary to Carrier's rules) could have resulted in a misunderstanding by Claimant which would tend to mitigate his offense; the facts of this case militate against any such conclusion. Surely, a claim for 5 hours of overtime for 34 men - a total of 170 hours at time and one-half (255 straight time hours) for one day would not appear to be a "spreading out of overtime" so as to mask an overabundance. Of greater significance is the discussion between the Claimant and the General Foreman after August 5, 1971.

The General Foreman was instructed by the Roadmaster to discuss the overtime claim with Claimant. The Claimant insisted to the Foreman that the claim of 5 hours per man was for moving and setting up trailers, and Claimant asserted that all men were entitled to the time since they were all assigned to the gang. Apparently, the General Foreman was never advised of the actual basis for the overtime claim until the day of the hearing.

If Claimant violated a Carrier Rule because of assumed instructions from the Foreman, we find it most difficult to believe that he would not have reminded the Foreman of those prior instructions when, in fact, his report was being checked.

Although Claimant was terminated on September 27, 1971, the record shows that he was reinstated on May 1, 1972, but without compensation for wage loss.

We find that substantial probative evidence was presented, including Claimant's own statements, to demonstrate his responsibility, and we find nothing of record to suggest that we set aside any of the quantum of discipline imposed.

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

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 11th day of April 1974.