

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29745
Docket No. SG-29913
93-3-91-3-323

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(Elgin, Joliet and Eastern
(Railway Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Elgin, Joliet and Eastern Railroad:

(a) Carrier violated the parties' Working Agreement, as amended, particularly Discipline Rule 76, when (1) Claimant's right of due process were violated when Carrier failed to charge Claimant in writing within ten (10) working days of the offense and/or the date it is deemed to have knowledge of the offense; (2) Carrier failed to meet the required burden of proof showing that Claimant '...falsified your Foremen's Field Labor Information Reports...February 1, 1990...February 6, 1990;' and (3) without prejudice to the foregoing positions, discipline rendered is excessive for the offense charged in light of mitigating circumstances brought out at the investigation.

(b) As a consequence of such action, Carrier be required to (1) make Steve A. Tharp, ID No. 50742 (Claimant) whole for all wages and benefits lost, if any; and (2) clear Claimant's service record of all reference to such charges, including all seniority, vacation and holiday rights unimpaired." Carrier file 144-293 Tharp. G. C. File 90-2-EJE. BRS Case No. 8416.EJE.

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

Claimant was a signalman with headquarters at Joliet, Illinois, at the time of his dismissal. His assigned hours were 7:30 A.M. to 12:00 noon and 12:30 to 4:00 P.M. Monday through Friday, with rest days of Saturday and Sunday. On February 28, 1990, Claimant was dismissed for "fraudulently requesting pay" to which he was not entitled. Claimant's dismissal resulted from the following sequence of events:

On February 1, 1990, Claimant responded to a "trouble call" at 6:00 A.M. at the Chaney Hill Road crossing where the crossing gates remained in a down position. At 7:30 A.M. he had completed the repairs and returned to Joliet to begin his regular tour of duty. Claimant recorded his time worked for February 1, as ten hours and 40 minutes, indicating eight hours at the straight time rate for his regular tour of duty, plus two hours and 40 minutes at the time and one-half rate for the "trouble call."

On February 5, 1990, Claimant worked his regular tour of duty. Later that day he responded to a trouble call at 8:00 P.M., completing the task at 12:00 midnight. Thus, Claimant worked 12 hours of broken service, and, in accordance with the Hours of Service Act, he required eight hours' rest before he could report for work. On February 6, Claimant did not report for duty until 11:00 A.M., however, he claimed three hours and 30 minutes as a "Code 50" for time not worked on his regular position (7:30 - 11:00 A.M.). Code 50 is compensation allowed at the straight time rate for time an employee cannot work his regular assignment due to the Hours of Service Act.

On February 14, 1990, Claimant was instructed to report for a formal Investigation on February 22, concerning the following charges:

"...you allegedly falsified your Foreman's Field Labor Information Reports as follows:

1. Claiming 2 hours and 40 minutes at the time and one-half rate for working from 6:00 A.M. to 7:30 A.M., February 1, 1990.
2. Claiming 3 hours and 30 minutes at the straight time rate, pay type 50, for the time not worked between 7:30 A.M. and 11:00 A.M., February 6, 1990."

At the hearing, the Signal Supervisor offered the Claimant's daily payroll records as evidence in support of the charges. Following the Investigation, the Carrier determined that Claimant was responsible as charged, and by letter dated February 28, 1990, Claimant was dismissed from Carrier service. The letter of dismissal further indicated that:

"Due to mitigating circumstances, leniency is shown in that no discipline is assessed for your responsibility in connection with Item 1 above."

The Organization appealed Claimant's dismissal and the claim was handled up to and including the Carrier's highest designated officer. This dispute is therefore properly before the Board for resolution.

It is undisputed by the Parties that the charge cited in Item 1 of the letter of February 14, 1990, did not meet the contractual time limits and is, therefore, not before the Board.

With respect to the second charge, the Carrier points out that Claimant worked 12 hours of broken service under the Hours of Service Act; 7:30 A.M. - 4:00 P.M. and 8:00 P.M. - 12:00 midnight. Further, Claimant claimed one hour travel time between midnight and 1:00 A.M. This hour is not counted as either on-duty or off-duty time as the Hours of Service Act permits employees to count up to one hour of the return travel time from the final trouble call toward rest. The employee has the option of incorporating the travel time in his allocated rest period, or extending the rest period up to one hour from the final trouble call.

The hours the Claimant worked on February 5, required Claimant to take eight hours rest prior to reporting for work. Claimant was not rested until either 8:00 A.M. or 9:00 A.M. for his regular 7:30 A.M. assignment (depending upon whether he counted his travel time as rest time). Therefore, according to the Carrier, Claimant was entitled to only one hour and 30 minutes of Code 50 compensation, and not the three hours and 30 minutes he sought.

The Carrier maintains that the Claimant "knew and understood" the Hours of Service Act and how to "handle and report travel time" in regard to his required rest. Carrier points to the conversation which took place between the Claimant and a Signal Foreman regarding Claimant's Hours of Service and his rest. The Signal Foreman informed Claimant that he required only eight (8) hours of rest rather than the ten (10) hours which Claimant had claimed. The Signal Foreman testified that he informed Claimant of the above and advised him to change his daily before he faxed it, which Claimant neglected to do.

Further, the Carrier notes that Claimant's previous work record reflected that in a period of five years, 1985-1989, Claimant was assessed 125 demerits with a residual total of 85 demerits at the time of his dismissal. Carrier maintains that Claimant's prior record, viewed in conjunction with the present offense, clearly supports Carrier's decision to dismiss the Claimant.

The Organization contends that the Carrier violated the current Signalmen's Agreement, Rule 76 in particular, when it dismissed Claimant. According to the Organization, Claimant admitted to being in error in filling out his Foreman's Field Labor Reports on February 6. Claimant maintains that he did not do it willfully, and simply was distracted by his wife's illness and the fact that he was commencing to train a new employee. Further, Claimant had been disciplined a few months prior to this incident for not taking enough rest time. The Organization argues that "this had to be on his mind to some extent."

Claimant admitted that he talked to the Signal Foreman about the situation, however, Claimant stated that he simply "did not respond" to the Signal Foreman's advice due to the "mitigating" circumstances, including the illness of his wife. The Organization asserts that Claimant was not trying to "deceive or defraud" the Carrier, and the discipline imposed was excessive.

Finally, the Organization points out that the FRA had absolved Claimant for a previous infraction, and that the Carrier has neglected to remove it from Claimant's record, thereby inappropriately inflating Claimant's actual current number of demerits from 50 to 85.

It has been well established by prior decisions on this and other Boards that it does not condone employee theft in any guise. In order to support an allegation of employee theft or fraud, however, the Carrier must present credible evidence that the individual concerned intended to defraud the Carrier. In this dispute, the Carrier was unable to meet that burden.

Claimant readily admitted to participating in conversation with the Signal Foreman. He did not attempt to dispute the nature or context of the conversation, but merely stated that he was distracted due to "mitigating" circumstances. The Board finds his testimony throughout the hearing to be disingenuous, consistent, and credible, and does not find evidence that Claimant intentionally misrepresented the monies due him. While the Claimant may have used poor judgement when he did not correct his paperwork before faxing it, there was nothing in his behavior which was indicative of a contrived or malicious attempt to defraud the Carrier. Moreover, a careful review of his personnel record indicates that his current remaining demerits should, in fact, be less than 50, since removal of the 35 demerits erased by the FRA decision gives him an additional "clear record" year in 1989, which would further reduce his "demerit bank."

The Carrier is well within its rights to expect employees to adhere to stated policy. However, the ultimate penalty of dismissal under the circumstances in the instant case, is excessive. In light of the particular circumstances of this case Claimant shall be returned to Carrier's service without backpay, but with seniority and other rights intact.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever
Nancy J. Dever - Secretary to the Board

Dated at Chicago, Illinois, this 12th day of August 1993.