

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30836
Docket No. MW-31058
95-3-92-3-935

The Third Division consisted of the regular members and in addition Referee Dennis E. Minni when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(CSX Transportation, Inc. (former Seaboard
(System Railroad Company)

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

- (1) The dismissal of Machine Operator D. R. Watson for alleged violation of Rule 17(b) in connection with the payroll for October 23 and 24, 1991 was excessive, exceedingly harsh and in violation of the Agreement [System File DRW-92-02/12(92-81) SSY].
- (2) As a consequence of the aforesaid violation, Mr. D.R. Watson shall be reinstated to service with seniority and all other rights unimpaired, he shall be compensated for all wage and benefit loss suffered and his personal record shall be cleared of the charges leveled against him."

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 waived right of appearance at hearing thereon.

On October 31, 1991 a letter was addressed to the Claimant notifying him that he was being charged with a violation of Agreement Rule 17(b) and falsifying records in connection with his payroll for October 23 and 24, 1991. Following a formal Investigation held on November 11, 1991, he was found guilty of the charge and dismissed by letter dated November 25, 1991.

Claimant's discipline was based on two separable aspects of the charge. First, there is the charge that he violated Agreement Rule 17(b) which obligates an employee to obtain permission from his Foreman or proper officer prior to absenting himself from service. Secondly, there is the charge that he falsified his payroll in that the time he reported did not accurately reflect the actual time he worked during his workweek. Claimant's dismissal is based on the Carrier's finding of guilt on both aspects of the charge.

Facts developed at the Investigation indicate that Claimant, a Machine Operator with 23 years of satisfactory service, regularly worked independently and reported his own time for payroll purposes. At the time of the incident in question, the Claimant was assigned to a regular 40 hour workweek consisting of 10 hour days, Monday through Thursday, operating a crawler type backhoe near Pembroke, North Carolina. It is clear from a review of the transcript that the Claimant absented himself from service without permission for at least a portion of the period charged. It is also clear, however, that the Claimant worked additional "make up" time which was not reported on his payroll. The Organization contended, and the Carrier did not refute, that there was a practice of "making up" time at this location.

While the Board is satisfied that there was a practice of "making up" time at the involved location, such practice does not relieve the Claimant of his obligation under Agreement Rule 17(b) to obtain permission from his Foreman or proper officer prior to doing so. On this record, it is clear that the Claimant failed to obtain such permission. Hence, the Carrier met its burden of proving the Claimant was absent without permission.

The second aspect of the charge stands on a different footing. At the Investigation, the Claimant testified that he had worked the number of hours claimed and had not reported more time than he was entitled to. While the Claimant was absent for a portion of his regularly assigned hours, given that there was an unrefuted practice of "making up" time, such absence in and of itself does not constitute proof that the Claimant worked less time than he reported on his payroll. While the payroll records did not accurately reflect the exact times worked on each date, there is no evidence in this record that the Claimant reported more time, cumulatively, than that to which he was entitled.

Inasmuch as the Carrier failed to prove that the Claimant reported more time than he actually worked, there is no basis for its conclusion, as stated in its letter of dismissal, that the Claimant's actions were tantamount to theft. Since theft was not involved, the Board finds that dismissal of the Claimant was excessive. Accordingly, the Claimant shall be reinstated with seniority and all other rights unimpaired, but without pay for the time held out of service. His record should be adjusted to reflect his out of service time as a suspension.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

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 27th day of April 1995.