

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35722
Docket No. MW-34700
01-3-98-3-351

The Third Division consisted of the regular members and in addition Referee Robert L. Douglas when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Denver and
(Rio Grande Western Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (suspension from service and subsequent dismissal) imposed upon Mr. J. C. Sanchez for alleged ‘ . . . dishonesty while working as welder on the R-7 Rail Gang by knowingly and willfully falsifying company pay records for personal gain for services not performed, the latest incident being January 7, 1997. . . . ’ was arbitrary, capricious, based on unproven charges and in violation of the Agreement (System File D-97-12D/1065738D).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered.”

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.

Rule 29 (Discipline) provides, in pertinent part, that:

- “(a) An employee who has been in the service more than sixty (60) calendar days shall not be disciplined or dismissed without being given a fair and impartial investigation, except as provided in Rule 7 of this agreement. He may, however, on proper authority be held out of service pending such investigation.

* * *

When an investigation is necessary, it will be held as soon as possible, ordinarily within ten (10) calendar days but not to exceed thirty (30) calendar days from date of report. The accused employee shall be advised of the charges against him and shall have reasonable time to secure the presence of a representative of his choice and necessary witnesses.”

A careful review of the record indicates that the Claimant did not report for work on January 7, 1997. The Claimant received a Letter of Instruction from the Assistant Roadmaster on January 8, 1997. The Claimant submitted his time record on January 10, 1997. The time record sought payment for January 7, 1997. The Assistant Roadmaster explained that he first discovered the alleged improper request for payment on February 3, 1997, when the Roadmaster reviewed the time records.

The Organization asserts that the date when the Claimant submitted the time record on January 10, 1997 triggered the maximum of 30 days for the Carrier to schedule the Investigation. The Carrier argues that the Assistant Roadmaster first learned about the Claimant's effort to be paid for January 7, 1997 on February 3, 1997 and that the Carrier therefore conducted the Investigation in a timely manner.

This particular and unusual dispute is quite fact sensitive. The Assistant Roadmaster was intimately involved in all aspects of the events that involved the Claimant and the absence on January 7, 1997. In this regard the record indicates that an alleged arrangement existed on the property in which employees could bank certain overtime and then trade or use the accumulated time to take emergency time off from work. Under this set of circumstances, the record fails to substantiate that the Assistant Roadmaster first should have learned about the Claimant's submission of the time record and its contents on

February 3, 1997. Although the record reflects that the Assistant Roadmaster was on vacation for the last two weeks of January 1997, no evidence exists in the record to explain why the Assistant Roadmaster did not learn about the contents of the time record between January 10 and January 17, 1997. In the absence of any such explanation, the record fails to provide any indication why the Assistant Roadmaster did not know about the contents of the time record on January 10, 1997. Although there may well have been a perfectly logical, plausible, and reasonable explanation for the Assistant Roadmaster not to have known before February 3, 1997 about the contents of the time record that the Claimant submitted, the record lacks any credible information in this regard. No basis therefore exists in the record to explain the purported lack of knowledge by the Assistant Roadmaster without engaging in inappropriate conjecture, improper guesswork, and impermissible speculation.

For these reasons this very specific record fails to explain why a representative of the Carrier did not know about the contents of the time record submitted by the Claimant before February 3, 1997. In the absence of any such probative and credible evidence, the record fails to refute the Organization's reasonable assertion that January 10, 1997 constituted the proper time to begin measuring the 30 days for the Carrier to have scheduled the Investigation. As a consequence, the Carrier failed to schedule an Investigation in a timely manner in this matter.

AWARD

Claim sustained.

ORDER

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 24th day of October, 2001.