

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37546
Docket No. MW-38599
05-3-04-3-629

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(CSX Transportation, Inc.)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [thirty (30) day suspension and disqualified from holding any assistant foreman-timekeeper position on any System Production Team for a period of one (1) calendar year] imposed upon Mr. E. Horton under letter dated October 10, 2003 in connection with charges of alleged fraud, conduct unbecoming and possible violation of CSX Transportation Operating Rule 501, was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement [System File D21128903/12 (03-0843) CSX].
- (2) As a consequence of the violation referred to in Part (1) above, all references to the charges leveled against Mr. E. Horton shall be removed from his personal record and he shall be compensated for all losses suffered as a result of the Carrier's action.”

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.

Undisputed record evidence discloses that Claimant E. Horton, a 26-year employee was suspended without pay for 30 days on October 10, 2003 and disqualified from working in his position for one year after being found guilty of wrongly generating travel pay for himself and others in connection with his gang's move to a new location.

The facts underlying the dispute are largely uncontested. The Claimant, functioning as Assistant Foreman Timekeeper on SPG Curve Patch Rail Team 6XC1, was responsible for entering payroll information into the Carrier's timekeeping system for the week of August 3 - August 8, 2003. In that capacity he input travel time for himself and approximately 12 other employees claiming "standby service" performed in connection with his team's move from Brooksville, Florida, to Manchester, Georgia, over the weekend of August 1 - 3, 2003. The Carrier maintains that none of the employees for whom pay was authorized performed any services on the days for which pay was allotted on their time sheets. It thus takes the position that the Claimant's time entries were improper and fraudulent and that the discipline imposed was lenient under the circumstances.

The Carrier's charge letter of September 5, 2003 initially cited fraud, conduct unbecoming an employee and possible violations of CSX Transportation Rule 501. (Rule 501 does not appear in the record before the Board.) It is not entirely clear, however, from its notice of discipline dated October 10, 2003, specifically what violations it determined the Claimant was responsible for based upon the Hearing evidence as it simply informed the Claimant that, "You did pay yourself for time not worked."

The Carrier's records reveal that the Claimant entered straight time travel pay for himself and five other employees who had been designated to work as "chase men" or "followers" when other members of the Curve Patch Rail Team were

directed to drive company vehicles to the work site at Manchester, Georgia. Employees who actually drove the vehicles being moved were paid at overtime rates, and those payments are not in dispute. There is no question on this record but that neither the Claimant nor any of his five co-workers did no work during the hours for which pay was claimed. It is also plainly the rule in this and most industries that falsely claiming pay for time not worked is theft by fraud and, if established, warrants dismissal.

Here, however, there is more. The relocation of Curve Patch Rail Team 6XC1 to new headquarters at Manchester necessitated transferring all gang vehicles and equipment to the new location. Five of those units were to be driven by the assigned Vehicle Operator, among them a truck which Foreman W. E. Hutto would drive. Hutto designated the Claimant as his "follower." And that is where the Carrier's case carves out a hole for concern.

The Board's discomfort is triggered by Foreman Hutto's testimony describing his intentions in asking the Claimant to serve as his "follow man." Although lengthy, for the sake of completeness we set forth that explanation substantially in full as depicted in the following colloquy between Conducting Officer D. L. Moss and Witness Hutto:

"MOSS: Mr. Hutto, you heard charges placed against Mr. Horton and the information that was shared while you were in the room earlier, are you . . . aware of the instructions that were given to the men on your team for moving the vehicles from the completion of the job on the Brooksville Sub in Brooksville, FL to Manchester, GA? Were you aware of what instructions the men were given to move the trucks?

HUTTO: From who?

MOSS: Well, what . . . instructions were the men . . . given to get the trucks, or what was the plan to get the trucks moved from Brooksville, FL to Manchester, GA?

HUTTO: The same way we'd been moving them all year. A certain truck driver has certain people that follows him or what they call follow men and it was presumably lined up the same way.

MOSS: So did each of these truck drivers have a man following them move a truck that weekend?

HUTTO: That's usually the way it goes.

MOSS: Did any of these truck drivers take the trucks home for the weekend?

HUTTO: I do not know for sure if they did or not.

MOSS: So, to your knowledge, your instructions were for the truck drivers to move the trucks and there was a man to follow them?

HUTTO: I never gave anybody any verbal instructions on that. It was always that the truck drivers are responsible for getting their vehicles moved and they would turn the time in to Mr. Horton.

MOSS: Okay. And how about the followers as you call them?

HUTTO: That . . . was something that . . . has always been a standard for CSX and we would, they . . . would pay following guys to follow or be in position where if the truck broke down that they would be of assistance to the drivers.

* * *

MOSS: Did . . . anyone follow you and bring you back to Brooksville to get a personal vehicle or anything?

HUTTO: No. There's nobody to follow me and bring me back to Brooksville. My following man was Paul Horton and if I had broke down and needed assistance, I was to call Paul and he would come to my aid.

MOSS: Okay, but . . . so did you have to call Paul to come to . . .

HUTTO: No, I did not.

MOSS: . . . any aid or to perform any work . . . on that date?

HUTTO: Not on that . . . not on that date I did not.

MOSS: So, on the date of August the 3rd, you did not call Mr. Horton to work or to help you out with your vehicle move?

HUTTO: No. He was on standby in case I broke down or something or other, he would come. . . .

* * *

MOSS: Okay. Did you authorize as the Foreman, did you authorize the Timekeeper to pay anyone for time not worked that weekend?

HUTTO: No sir, I did not.

* * *

MOSS: Did you authorize the Timekeeper to pay anyone for following you that weekend?

HUTTO: It was a standard practice and that, that's what we done. That's what a follow man is all about. These follow guys do not stay right behind the trucks and follow them, inch for inch, they got . . . we got cell phones and if the driver gets in trouble, then that's what the follow man is supposed to do.

* * *

MOSS: So he's the one that's suppose to come and assist him if he breaks down . . .

HUTTO: Or has problems.

MOSS: So you are paying him whether he helps you or whether he doesn't help you?"

HUTTO: Well...

MOSS: Even if he doesn't work, you're still paying him?

HUTTO: That's my understanding."

Foreman Hutto went on to explain that while he had no way of knowing whether the Claimant was physically trailing him, that information was irrelevant because, "I knew I had a man on standby, if I needed him." Accordingly, he approved paying the Claimant 12 hours and 45 minutes pay for standby time spent over the weekend, consistent with his understanding of past practice. He further stated that while he lacked hard proof, he believed that a Supervisor likewise had signed off on the disputed time as required.

In that context, it seems difficult to credit in the Carrier's assertion that the Claimant engaged in deliberate, purposeful falsification of pay records. Rather, in our view the picture that emerges from this record is that of a 26-year employee with an exemplary record who had the inconvenience to have his time rolls reviewed by System Team Supervisor J. S. Vankirk, who declined pay for the days at issue because the Claimant had not actually traveled on the weekend of the gang move. Thus, whether compensation for such travel was, as the Claimant suggests, up to that time the Carrier's established practice is not dispositive. He believed it was, but more importantly, his Foreman thought it was because he believed he had asked the Claimant to do standby service.

The Carrier shoulders the burden of proof in a case in which it asserts dishonesty. Here we conclude it failed to carry that burden. Particularly in the face of the absence of any instructions, written, verbal or otherwise as to proper practice, the record in our view will not support the charge that the Claimant consciously and intentionally claimed time he believed he was not entitled to claim. If the Claimant was, or reasonably believed he was, subject to duty over the weekend of August 1 and remained on standby status relying on that misapprehension, he was entitled to be paid. If that understanding was mistaken, we favor the Organization's contention that the situation could have been more appropriately handled with a verbal admonition.

The Claimant's period of disqualification as Timekeeper has passed. In the event he suffered loss of pay or benefits for the period withheld from such service he shall be made whole for such losses.

All references to the alleged violation shall be removed from the Claimant's personal records and he shall be made whole for the 30-day disciplinary suspension at issue.

AWARD

Claim sustained in accordance with the Findings.

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 20th day of July 2005.