

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39846
Docket No. MW-39115
09-3-NRAB-00003-050526
(05-3-526)**

The Third Division consisted of the regular members and in addition Referee Danielle Hargrove when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Northern Indiana Commuter Transportation District**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (immediate termination) imposed upon Mr. R. Fedder under date of June 25, 2004 for alleged violation of General Rules K-2, P and Attendance Policy-Employee Relations Policy 20, in connection with charges of submitting time sheets for payment that did not reflect time actually worked and in regard to his testimony relating the time variance by relying on a non-standard clock, was arbitrary, capricious, excessive and in violation of the Agreement (System File D-35-04-N).**
- (2) As a consequence of the violation referred to in Part (1) above, the discipline shall now be removed from Mr. R. Fedder's record and he shall be reinstated to service with all rights and benefits intact and compensated for all lost time.”**

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.

At the time of the incident that gives rise to this claim, the Carrier had employed the Claimant for approximately five years. The Claimant held the title of Employee in Charge (EIC) and as a Bridge and Building Mechanic. He was responsible for securing on-track protection for a contractor engaged in a station rebuilding project in the East Chicago, Indiana, area. In order to ensure that on-track protection was available for the contractor's employees during their full eight hour work shift from 7:00 A.M. to 3:30 P.M., the Claimant was authorized by his supervisor to report for duty one hour prior to the start of his regularly assigned hours and to work one hour past his assigned quitting time in the afternoon.

On or about May 11, 12, 14, 18, 20, and 21, Carrier police and management personnel observed the Claimant leaving his headquarters in East Chicago before the end of his scheduled shift, 4:30 P.M. Upon further review, the Claimant's daily time reports reflected different departure times than when he was purportedly observed leaving in his personal vehicle on the aforementioned dates.

There is no dispute between the parties that the Claimant departed Carrier property prior to 4:30 P.M. on the dates in question. The remaining issue is why. The record evidence reflects that the Claimant improperly referenced a desk clock, as he had for more than one year, to complete his daily timesheet entries in violation of Standard Time Rules 2 and 3. The Claimant's defense before the Board is that the desk clock must have been incorrect or malfunctioning. The record evidence indicates that the clock was malfunctioning at some point and was confiscated by the Claimant's supervisor after the Claimant received notice of his Investigation. Despite taking the clock because it was not functioning properly, the record is absent concerning any determinations he may have made concerning the Claimant's use or his possible use of the clock to complete the daily work records.

The record, however, is less clear that the Claimant was dishonest or willfully neglectful in his duties in violation of the Carrier's Rules. Notably, when the Claimant noticed that his supervisor took issue with his timesheets, management refused to answer the Claimant as to what the perceived problem was or advise him

of the issue raised regarding his time entries. We find that it is possible that an opportunity was lost to clearly establish that the Claimant's actions were deliberate with the intent to defraud rather than a mere oversight. See Third Division Award 21122.

Policy 20 reads, in pertinent part, as follows:

“ . . . Employees may not leave the property prior to the end of the shift without advance permission from their supervisor. Employees shall be classified as having taken an ‘Early Leave’ if they leave their work area without permission in advance of their scheduled quitting time. Each such incident shall trigger imposition of one (1) point on the employee’s attendance record. Persons who leave work without permission by more than two hours before the regularly scheduled quitting time will be considered absent for the day and will incur two (2) points on the employee’s attendance record for their absence. In addition to the imposition of incident points, leave without permission may also be pursued separately as a violation of Rule K-2.”

Rule K-2 of the Carrier’s Operating Rules states, in pertinent part, that “employees must not be ‘dishonest’ and must not ‘willfully neglect their duties’ or make false statements of fact concerning matters under investigation.”

Standard Time Rule No. 3 provides that an employee’s watch “must be compared with a standard clock before commencing each day’s work” and “Where a standard clock is not available, correct time must be obtained from the train dispatcher or from an employee who has made a time comparison. If watch varies more than twenty (20) seconds, it must be set to the correct time.”

Looking to the record as a whole, the Board finds that there is not substantial evidence to sustain a finding of guilty. For the above reasons, the instant claim is sustained and the Claimant is to be reinstated.

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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 9th day of July 2009.