

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41531
Docket No. MW-41751
13-3-NRAB-00003-110388**

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

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference

PARTIES TO DISPUTE: (

(Montana Rail Link, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (removed and withheld from service beginning October 1, 2010 and subsequent dismissal by letter dated November 3, 2010) imposed upon Mr. L. Sanders in connection with charges of the alleged violation of Montana Rail Link General Code of Operating Rule 1.6 in connection with charges that he allegedly submitted overtime to his foreman for payroll for Tuesday, September 28, 2010 which allegedly did not accurately reflect the actual time spent in service of Montana Rail Link and for allegedly lying to supervisors regarding the alleged incident on Friday, October 1, 2010 was arbitrary, unwarranted and in violation of the Agreement (System File MRL-262-C).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. Sanders shall now have the dismissal and all reference to these charges removed from his record and he shall be reinstated to service and compensated for all time lost and wages.”

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.

The facts in this case are in dispute. Prior to his discharge, the Claimant held seniority in various classifications within the Maintenance of Way Department. At the time of the events giving rise to this dispute, the Claimant was assigned as a Dump Truck Driver headquartered at Missoula, Montana. According to the Carrier, the Claimant was rightfully discharged on November 3, 2010 for falsely claiming overtime to which he was not entitled. The record does, in fact, establish that the Claimant requested one-half hour of overtime for working through his lunch period on September 28, 2010. Undisputed evidence further shows that Missoula Section Foreman S. Baertsch was responsible for submitting the Claimant's payroll information to the Timekeeping Department on the dates at issue. However, according to Baertsch and the Carrier, the Claimant expressly requested that a payroll adjustment be made to include the disputed overtime for 28 on September 30, 2010, and Baertsch simply complied with the Claimant's instructions. It is further undisputed that the Claimant and Baertsch did not work together on September 28, and thus Baertsch had no way of knowing first-hand whether the Claimant actually worked the overtime he alleges the Claimant requested.

As it happens, four Carrier Officers were performing operations testing at Missoula and Drummond on September 28, 2010, and in the course their travels, they had occasion to observe the Missoula section crew taking their lunch break. The Claimant was among the section crew employees, and no work was being

performed at the time. On September 30, 2010, Assistant Roadmaster F. Norby, who was among the Officers performing operations testing on September 28, noticed in the Claimant's payroll data that he (the Claimant) had claimed one-half hour of overtime for working through lunch on that date. On the morning of October 1, 2010, Norby, along with two other members of the operations testing team, thus confronted the Claimant about his petition for overtime on September 28, informing him that they had observed him eating lunch with the Missoula section crew. According to the Carrier, the Claimant proceeded to offer conflicting explanations, the first of which was that Foreman Baertsch must have mixed up the dates in his payroll records. Then, according to the Carrier, the Claimant changed his story and asserted that he had never instructed Foreman Baertsch to amend his payroll records to include an additional one-half hour of overtime for that or any other date. For his part, Baertsch informed the Carrier that he had acted upon the Claimant's direct instruction that he (the Claimant) had worked through lunch on September 28, and thus had merely amended the Claimant's timecard to include the ostensibly earned overtime.

The Carrier subsequently concluded that the Claimant had deliberately falsified payroll records, and thus scheduled a formal Investigation in connection with charges that he had allegedly violated GCOR Rule 1.6. At the evidentiary Hearing, Carrier Officers testified that the Claimant did not work lunch period overtime on September 28, because they had observed him eating with the Missoula section crew on that date. Section Foreman Baertsch also testified unequivocally that the Claimant had contacted him on September 30 and had asked him to amend his (the Claimant's) payroll records so as to include one-half hour of overtime for working through lunch on September 28. On cross-examination by the Claimant at the Investigation, Baertsch repeatedly insisted that "you" (referring to the Claimant) had asked for a payroll adjustment to include the disputed overtime. The Claimant did not accuse Baertsch of lying at the Investigation. Baertsch did acknowledge during cross-examination by the Claimant that other adjustments had been made to the Claimant's payroll during the week in question. However, according to Baertsch, those adjustments had had nothing to do with the Claimant's alleged petition for unwarranted overtime. Instead, Baertsch testified, the Claimant had been overpaid for a flagging job at Taylor on September 29 because he had arrived late to the worksite, and payroll adjustments had been made accordingly.

The Claimant denied ever directing Baertsch to alter his payroll records for September 28 so as to include lunch period overtime on that or any other date. The Claimant testified that perhaps he had, in fact, requested an “overtime” adjustment for the week in question, but he failed to offer any specifics concerning that alleged request.

After carefully reviewing the record, we find that there was substantial evidence to support the charge against the Claimant. In so concluding, we duly considered all arguments raised by the Organization and found them to be without merit. We appreciate the gravity of the charges against the Claimant and are aware of the Carrier’s burden of proof here. In this case, the Carrier was forced to assess the relative credibility of pertinent witnesses, including the Claimant, because there were patently conflicting versions of the same story. In the end, the Carrier endorsed the testimony of Section Foreman Baertsch over that of the Claimant, and we find nothing unreasonable in that outcome. Baertsch was unwavering in his assertion that the Claimant contacted him on September 30, 2010 and requested one-half hour of overtime for September 28. When Baertsch informed the Claimant that he needed to supply a reason for the adjustment, the Claimant was momentarily silent. Baertsch asked the Claimant if he had worked through lunch that day and the Claimant stated that he had.

Importantly, we observe that the Claimant never accused Baertsch of lying during his cross-examination at the Investigation. Moreover, the Claimant failed to point out to Baertsch that perhaps he had been mistaken or, in the alternative, had misunderstood some other overtime request. While the Claimant did allude to another payroll matter pertinent to the week in question during his cross-examination of Baertsch, the Claimant patently failed to establish a direct correlation between that adjustment and the instant charges. While the burden of proof is certainly on the Carrier in this case, we find that the Claimant’s cross-examination of his accuser was surprisingly insubstantial given the looming specter of dismissal relative to the pending charges. With an opportunity to do so, the Claimant neither accused Baertsch of lying nor of having made a serious error.

In contrast to Baertsch’s unwavering testimony, the Claimant was unclear on certain key points. Specifically, the Claimant first told his supervisors that Foreman Baertsch must have gotten the days mixed up and submitted an overtime

adjustment for the wrong day. We again note that the Claimant made no such observation during his cross-examination of Baertsch at the Investigation. Thereafter, the Claimant insisted that he had never requested lunch period overtime at all. In fact, the Claimant testified in relevant part as follows:

“Q. And when you were looking through the powertrack did you tell them which day it might have been that you worked lunch?”

A. No, I never said I worked lunch. I said I worked overtime.

* * *

Q. So if you were unclear on when the overtime was, Mr. Sanders, how were you so clear that it wasn’t lunch on Tuesday?

A. . . . Real hard days or real boring days. You just don’t forget them. And I knew then I didn’t work lunch that week or for that day.

Q. But you thought you might have worked lunch on another day and it was just entered wrong?

A. That’s correct.”

Thus, we observed obvious inconsistencies in the Claimant’s own statements at the Investigation. While the Organization argues that the Carrier had motive in this case to deprive the Claimant of his Agreement due process rights, we find no evidence of patent prejudice in this record, based on the fact that the Claimant was vague and contradictory in his own defense. Given the whole of this record, we affirm the Carrier’s ultimate assessment of the Claimant’s credibility. The record does not establish any motive for Baertsch (or any other Carrier witness for that matter) to lie about the Claimant’s request for lunch period overtime. The Claimant, on the other hand, had many reasons to lie. Had it not been for the unknown presence of an operations testing team in the area on that date, the fact that the Claimant ate lunch with the Missoula section crew on September 28, 2010 would never have come to light. The Claimant worked largely on his own as a

Dump Truck Driver, and thus, the Carrier was completely dependent upon his integrity in matters concerning compensation. The Claimant was obviously aware of that fact, and given the chance to confront an accuser (Baertsch) whose testimony could very likely cost him his job under these circumstances, he notably opted not to directly challenge the evidence against him. Therefore, we find the Claimant's obvious lack of passion in front of Baertsch supportive of the Carrier's final determination that Baertsch, and not the Claimant, was telling the truth.

As to the propriety of the Claimant's termination, it is well settled that proven charges of theft merit summary discharge. Furthermore, the record additionally establishes that the Claimant was previously disciplined for proven inappropriate conduct under GCOR Rule 1.6. Thus, we find that discharge under these particular circumstances was both warranted and appropriate. We find no basis for modifying the discipline.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 19th day of February 2013.