

PUBLIC LAW BOARD NO. 3558

PARTIES)
TO)
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
) SOUTHERN PACIFIC TRANSPORTATION COMPANY
) EASTERN LINES

AWARD

STATEMENT OF CLAIM:

"1. Carrier violated the effective Agreement when Houston Division Assistant Foreman Dalton Abraham was improperly and unjustly dismissed.

2. Claimant Abraham shall now be reinstated and paid for all time lost, with seniority, vacation and all other benefits restored intact and with the charge of violation of Company Rule 801 removed from his personal record." (MW-85-144)

OPINION OF BOARD:

By letter dated October 7, 1985, Claimant, an Assistant Foreman on the Houston Division with a service date of May 11, 1964, was charged with violating Rule 801 for allegedly claiming overtime on twenty dates during the period January 28, 1984 through June 21, 1985 for derailments which did not exist or time duplicating hours on two different payrolls. After hearing on October 29 and 30, 1985, and by letter dated November 7, 1985, Claimant was dismissed from service.

Assistant Division Engineer L. Mahon testified that a log is maintained by each Roadmaster showing a record of all derailments indicating cause, location, employees working and sometimes the number of hours worked. According to Mahon, he checked Claimant's time rolls against the log books to determine if the time rolls wherein overtime was claimed by Claimant corresponded with dates of derailments found in the log books. According to Mahon, only one of the twenty dates listed in the charge wherein Claimant claimed overtime for derailment work was shown in the Roadmaster's log book as actually

having a derailment on that date (November 22, 1984). Mahon checked other log books maintained by other departments and those books contained no record of derailments as asserted by Claimant. Further, on several occasions (January 28, August 23, 1984 and February 23, 1985), Claimant was the only employee claiming overtime for a particular derailment. Division Mechanical Officer C. E. Day gave similar testimony concerning the dates claimed by Claimant as checked against the four derailment books maintained in the Car Foreman's Bowl Tower. According to Day, every derailment in the Houston area called into the Bowl Tower is noted in the derailment books. Likewise, Assistant Terminal Superintendent W. E. Hand testified that of those records kept by the yardmasters and the safety department which were available, no derailments or accidents were found on the dates specified in the charges. Assistant Manager of Payroll Accounting W. E. Karl testified that he reviewed Claimant's time slips for overtime resulting from derailment work on the dates at issue and Claimant received pay in accord with those submissions.

With respect to the Organization's argument that the charge was not brought in a timely fashion within the sixty day time limit found in Article 14, Section D, we must reject that argument. That section provides that "[n]o discipline shall be assessed that involves any matter of which the Carrier's head of department *had knowledge* sixty (60) days or more" [emphasis added]. Here, the record shows that Mahon first learned in September 1985 that an audit was being conducted. The record reveals that Claimant reports to a Foreman who in turn reports to a District Manager, who reports to Mahon. The charges were issued on October 7, 1985. Thus, Mahon's knowledge within the meaning of Article 14, Section D was well within the sixty day period set forth in that Rule. In similar situations where audits have been conducted revealing misconduct on dates outside of the specified contractual time limits, and barring any undue delay by the Carrier in taking action (which we do not find to be the case in this matter), the measuring point is the date that the results of the audit become known and not the date of the alleged infraction. See e.g., Third Division Award 26395.

With respect to the Organization's argument that Claimant's earlier dismissal was not proven and the current charges were brought as an after thought, we find no evidence in the record to support that argument.

With respect to the merits, we have considered the Organization's arguments and we have further considered Claimant's oral presentation before this Board. Nevertheless, we find substantial evidence in the record to support the Carrier's conclusion that Rule 801 was violated. Although the record keeping was by no means perfect for some of the reasons pointed out by the Organization, nevertheless, the evidence in this case was overwhelming. On at least nineteen of the twenty dates charged, the evidence indicates that Claimant sought and received compensation for working on derailments that did not occur on those dates. Rule 801 prohibits dishonest conduct. Claimant's actions fall within the scope of that Rule.

The Organization's position that other time rolls were not made available that would have refuted the charges is also without merit. Our review standard is one of determining the existence of substantial evidence in the record to support the Carrier's decision to impose discipline. We do not review the facts de novo or substitute our judgment for that of the Carrier. See Third Division Award 26276. Considering the types of records referred to by the Organization, there has been no showing that the alleged existence of those records alluded to by the Organization could detract from the Carrier's substantial evidentiary showing made on the basis of the primary records introduced during the investigation. Further, the fact that Claimant asserts that he can neither read nor write or that he merely conveyed the time information to his Foreman cannot change the result. During the investigation, Claimant admitted that he was responsible for correctly reporting his time.


Claimant's prior disciplinary record shows that he has been the subject of numerous disciplinary actions including being assessed forty demerits for removing Carrier property (1975); dismissed and reinstated on a leniency basis without backpay for removing spilled


freight (1975); suspended seven days for carrying a pistol while on duty (1978); assessed forty-five demerits for working unauthorized overtime (1984); suspended 30 days for submitting a false overtime claim (1984); and dismissed for falsifying time rolls which action was settled in an Equal Employment Opportunity Commission settlement agreement wherein Claimant waived any right to reinstatement in exchange for the payment of \$4,263.90 for time lost. While we cannot consider Claimant's prior disciplinary record in order to assess whether or not the Carrier has proven the violations alleged against Claimant in this matter, we can consider Claimant's prior record in order to determine if the amount of discipline imposed was arbitrary or capricious. See Special Board of Adjustment No. 280, Award 220 and awards cited therein. In light of the above, we cannot say that dismissal was an arbitrary or capricious action. We are mindful of Claimant's lengthy period of service with the Carrier. However, that length of service cannot change the result. We therefore find no basis to disturb the discipline taken in this case.

AWARD:

Claim denied.


Edwin H. Benn, Chairman
and Neutral Member


C. B. Gayne
Carrier Member


S. A. Hammons, Jr.
Organization Member

Houston, Texas
November 24, 1987