

PUBLIC LAW BOARD NO. 5760

PARTIES) UNITED TRANSPORTATION UNION
TO)
DISPUTE) THE KANSAS CITY SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM:

Claim of Conductor David E. Vaughn for reinstatement to service with seniority, vacation and all other benefits unimpaired, with compensation for all time lost from until returned to service and the discipline expunged from his record. (UTU File: 0015-02-770D; Carrier File: K0202-2929)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon. Claimant was present for and provided opportunity to participate in hearings before the Board.

Claimant filed a time slip for himself, his brakeman, and the engineer of his assignment for service performed on a yard assignment for October 2/3, 2001. Apparently unbeknownst to Claimant at the time, the engineer submitted a separate time slip for himself on which he showed a time off duty and claimed overtime that materially differed from the times as shown by Claimant.

The time slip presented by Claimant showed the entire crew to have gone off duty at 6:10 a.m., and claimed 3 hours and 35 minutes overtime. The separate time slip as submitted by the engineer showed an off duty time of 6:00 a.m., or 10 minutes earlier than as stated by Claimant. Further, the engineer claimed 3 hours overtime, or 35 minutes less than the overtime listed on Claimant's time slip.

Following a formal investigation into a charge of "submitting a false time slip," Claimant was notified that he was dismissed from service effective December 15, 2001.

Before proceeding to the merits of the dispute, the Board will note that it finds the procedural challenges advanced by the Organization as concerns the conduct of the investigative hearing to be without merit. Studied review of the transcript of hearing supports a finding that the Carrier investigation was conducted in a fair and impartial manner consistent with the terms of Article 48 of the controlling agreement.

It has long been recognized that contract language similar to that contained in Article 48 does not provide for pre-hearing discovery or disclosure as in a court of law. The Carrier was not, therefore, in violation of Article 48 in not responding to a pre-hearing written request for "all the information" that the Carrier had, "including tapes, and fax communications that pertain to the incident." Further, that the transcript of hearing was found to contain numerous typographical errors is not sufficient reason to declare a mistrial. The errors were of a minor nature and did not involve substantive testimony.

Turning to the merits of the case, it is the position of the Carrier that testimony and evidence of record clearly shows that Claimant submitted a fraudulent time slip. It says that testimony adduced at the investigation established that the crew was instructed to tie up and go home at 5:40 a.m., and that, according to testimony of its principal witness, a trainmaster, a tie-up should take no longer than 20 minutes to complete. Thus, the Carrier says Claimant and crew should have tied up at 6:00 a.m. and reported off duty.

In the opinion of the Board, testimony of the trainmaster must be considered in the light of his having testified that he came on duty at about 6:10 a.m., and asked the assistant trainmaster as to the time that the Claimant crew "had tied up and gotten out." According to the trainmaster, he was told that the crew had "just tied up." The trainmaster also stated that the assistant trainmaster had told him:

That they finished pickling at 5:40 and he told them to tie up and, and go home. And, they had, they either were still out there or had just left. So at that point, I, I started wondering what time they tied up and looked in the computer to see if the tie up was in there yet and it wasn't. So, I, I started looking for, for time slips later on and that's when I discovered that there was a discrepancy in the tie up times.

No explanation is given as to why, if, at 5:40 a.m., Claimant and his crew had finished "pickling" (Perpetual Inventory Car Location), i.e., providing information involving the placement in trains of cars handled by a switch crew, and told to go home, that the assistant trainmaster would state to the trainmaster on or after 6:10 a.m. that Claimant and crew "were still out there or had just left."

The assistant trainmaster testified that the trainmaster had called him a little after midnight and asked him to keep a record of what the switch crew did that night. The assistant trainmaster said that he kept the information on a "sticky note." The note reads:

Midnite – Switching #45
0125 – lunch
0230 – Back from lunch
0355 – Out of shanty
0540 – finish switching #45
0600 - Off

The note appears to be of questionable import. We say this not only as concerns the assistant trainmaster having reportedly told the trainmaster at about 6:10 a.m. that the crew is still out there or had just left, whereas the note reads: "0600 – off," but also as concerns the note showing: "0125 lunch; 0230 back from lunch." Here it is significant that the assistant trainmaster testified that at 1:25 a.m. Claimant contacted him and said that the crew would like to go to lunch, and that is why he put down 1:25 a.m. However, the assistant trainmaster then said: "They actually left for lunch about, about 1:45 I believe it was [and] come back from lunch at 2:30."

Testimony of the assistant trainmaster also reveals that he was uncertain as to whether it was Claimant or the latter's brakeman that had been in the yard office working with him in the preparation of the PICLing list. Claimant and his brakeman each testified that it was the latter who had performed that work with the assistant trainmaster in the yard office, and that the brakeman thereafter met with the Claimant in the shanty to review the PICLing list.

The Board also finds it somewhat incongruous that the trainmaster, on the one hand, would say that following discussions with the assistant trainmaster that he looked at the time slips of the Claimant and the engineer and saw there was a discrepancy. This notwithstanding, on the other hand, that when it came to light from subsequent testimony of the engineer that he had filed his time slip when he next reported for his assignment, and Claimant said that he filed his time slip the following day, the trainmaster then changed his testimony to that of saying it may well have been that he did not review the time slips until the next day.

The company hearing officer, in apparent recognition before the close of the hearing that some time line discrepancies existed, again recalled the trainmaster to ask one question, namely: "When you arrived at work on the morning of October 3rd, what time did you get here to the best of your recollection?" The trainmaster replied: "It was between 6:00 and 6:10, somewhere right along in there."

There is no question that testimony of the trainmaster and the assistant trainmaster leave something to be desired. However, it is likewise evident in study of the record that Claimant, his brakeman and his engineer exhibited a selective recall or lapse of memory involving a chronology of times as to when they detrained, where they left their engine, whether they walked or drove to the yard office, when they went to the shanty, and the precise time they left work. This purported inability to recall specific times notwithstanding that Claimant would assert that he completed the time slip from notes that he had made of reportable actions. Claimant's notes were not, however, produced at the hearing. Asked as to the time that he had left company property on the morning of the date at issue, Claimant, in part, said: "I'm not even for sure of that exactly. I know that we showed off duty at 6:10 so I'm gonna say that if I came down here and went to the shanty . . . I didn't write down each one of those times."

Testimony of Claimant also supports a finding that the tie up time for the crew was a guesstimate. Claimant stated that he completed the time slip after his arrival at home, saying, he usually allows himself ten to twenty minutes for filling out a time slip whether he does it at work or at home. As concerns the date at issue, Claimant said that before he left company property that he said to his brakeman: "I'm sure I told him what time that we were gonna tie up and I made a note of it, which would be 6:35, and then he left." This statement suggests that there was no recording of the time at which Claimant and his brakeman completed compensatory work, but instead a time arbitrarily determined by Claimant for subsequent placement on the time slip when he arrived home.

The Board also finds it noteworthy in study of the record that Claimant and the engineer offered testimony that additional duties assigned a train crew, for example, PICLing, often result in crews not marking off as a unit. This was offered as the reason the engineer of Claimant's train left work earlier than Claimant and the brakeman. While no rebuttal testimony was offered by Carrier witnesses concerning the claimed additional work, it seems to the Board that such a contention on the part of Claimant raises a question as to why, if the engineer left earlier, that Claimant proceeded to list the engineer to have tied up and worked the same amount of overtime as both he and the brakeman in submission of the time slip that Claimant had prepared.

In the opinion of the Board, although some facts are ambiguous, it remains obvious from Claimant's own testimony that he submitted a time slip of a highly irregular nature. That Claimant may have followed an unchallenged practice of calling in a tie up time and completing a time slip at home, or an unknown practice of placement of an arbitrary amount of time for preparation of a time slip, does not overcome the right of the Carrier to administer discipline upon its becoming knowledgeable of such matters. Thus, while it remains questionable as to whether substantial testimony was presented to justify the conclusion that the time slip falls within the purview of what is generally recognized to be a premeditated or proven falsification of time, the fact remains that Claimant subjected himself to a disciplinary sanction. In making this observation the Board does not imply that the claiming of pay for time not worked based upon, as in the instant case, guesstimates of time on duty, can be lightly dismissed. It is an offense that warrants severe discipline in a recognition that employees have a responsibility to certify that all time claimed is for work that was, in fact, performed or to which they are entitled under rules of the collective bargaining agreement.

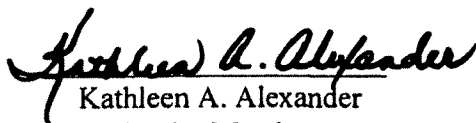
Claimant has been in the employ of the Carrier for 27 years. In the absence of any reference to a discipline record, it must be presumed that Claimant has in the past been a good and efficient employee. Accordingly, in the particular circumstances of record the Board finds the penalty of dismissal to be harsh and unreasonable. A more appropriate penalty is a suspension from service in the amount of time that Claimant has been out of service. The Board will, therefore, direct that Claimant be reinstated to service with seniority and other benefits unimpaired, but without payment for time lost.

AWARD:

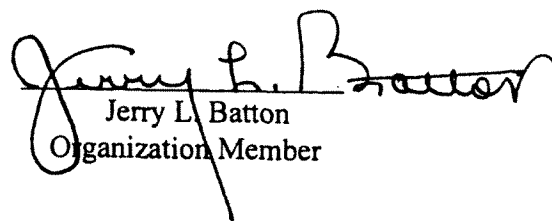
Claim sustained to the extent set forth in the above Findings.



Robert E. Peterson
Chair & Neutral Member



Kathleen A. Alexander
Carrier Member



Jerry L. Batton
Organization Member

Kansas City, MO

Dated: 5-13-03