

**PUBLIC LAW BOARD NO. 6237**

**AWARD No. 9  
CASE No. 9**

**PARTIES TO  
THE DISPUTE:** Brotherhood of Maintenance of Way Employees

**vs.**

Union Pacific Railroad Company

**ARBITRATOR:** Gerald E. Wallin

**DECISION:** Claim sustained

**DATE:** April 19, 2002

**DESCRIPTION OF CLAIM:**

By notice dated March 28, 2001, Claimant R. L. Faw was found to have falsified his time records during the period from December 4 through 21, 2000 and was dismissed from all service. Claimant worked by himself as a flagman during the subject time frame. Although the record establishes without dispute that he performed several tasks in this capacity, Claimant's primary duty was to protect outside contractors from train movements as they performed rehabilitation work at Carrier's Seattle Yard. At the time of his dismissal, Claimant had some twenty years of service with the Carrier. His employment history contains no previous discipline of a similar nature.

The Claim seeks to overturn the discipline.

**FINDINGS OF THE BOARD:**

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

According to the record, Claimant's supervisor reviewed time records on December 15<sup>th</sup> or 16<sup>th</sup> for the first half of the month. He noted that Claimant had claimed pay time for no lunch on all workdays from December 4<sup>th</sup> through the 15<sup>th</sup> as well as several hours of overtime on most of the same days. Despite his concern about the legitimacy of the extra hours claimed, the supervisor did not ask Claimant any questions about his time records nor did he give Claimant any guidance about claiming his time. Instead, he left a voice mail message for the project manager to alert him about the content of the time records.

The project manager was on vacation the second half of December and was replaced by a new project manager in January. The new manager obtained some time reports from some of the contractors who worked during the subject time frame. The new project manager relayed this information to Claimant's supervisor by fax on January 26, 2001. Claimant's supervisor admitted that he had first knowledge of the possible falsification on that date. Nonetheless, an investigation hearing was not scheduled until February 28, 2001. It was postponed until March 12, 2001 for reasons not explained in the record.

The Carrier's evidence contained no first-hand testimony about the number of hours worked on each day by the contractors during the subject period. Its case, in this regard, rested entirely on three documents: A letter from Scarsella Bros., Inc. showing the hours and days its crew worked (its

Leadman worked 1-2 hours more than the crew on six of the days); a tabulation from Icon Materials showing the hours worked by one of its employees, Bruce Hatten (this employee allegedly had the greatest total number of project hours of all the Icon crew members); and a letter from Dixon Cable Corporation showing the days and hours worked by its employees.

Although Claimant admitted to mistakenly transposing his hours from December 1<sup>st</sup> and 2<sup>nd</sup> with December 4<sup>th</sup> and 5<sup>th</sup>, when he flagged for Dixon Cable, he denied falsifying any time claims. The Dixon letter shows that its employees did work 12 hours per day on December 1<sup>st</sup> and 2<sup>nd</sup>. Claimant's time records show that he did not claim more than 12 hours on these days although other undisputed evidence, to be noted later due to his 6:00 a.m. starting time, would have allowed him to claim 13 hours for each day.

In support of his position, Claimant provided a number of project records - including time records from Icon Materials showing the hours and days worked by its Leadman, Les McGill, its Oiler, Brett McRae, and another one of its employees, Ken Jones. These records showed that McGill commonly was present at the project site several hours more per day than the crew. Claimant's testimony regarding Oiler McRae was to the effect that he often spent several hours performing equipment maintenance at the end of each day after the equipment was parked and the crew had departed. On a daily basis, the combined hours of McGill and McRae were usually greater than the hours of employee Bruce Hatten. In addition, the Icon time records for Ken Jones showed that some days Bruce Hatten did not work the greatest number of hours. For example, Exhibit 11, page 1 shows Jones worked 10 hours on December 5<sup>th</sup> versus only 8.5 hours for Hatten.

In addition, Claimant described how he performed extra duties, such as opening and closing the Sugar Spur for train movements. Claimant named Carrier's Trainmaster Ken Kubich as a person who would verify the Sugar Spur activities. Nevertheless, the Carrier did not produce Kubich as a witness nor did the hearing officer take any steps to recess the hearing to obtain his testimony.

Despite the appearance of conflicting evidence, the record herein establishes that certain important facts are undisputed. First, Claimant's starting time each day was 6:00 a.m. while the contractor personnel did not normally begin until 7:00 a.m. As a result, Claimant's time records would be expected to exceed the contractor hours by at least one hour per day.

Second, Claimant testified, at page 36, that Carrier rules precluded flagmen from leaving for lunch. Carrier produced no contrary rule language or testimony to refute this. Therefore, there is no basis in the record for finding that Claimant's "no-lunch" claims were improper.

Third, the testimony of Claimant's supervisor, on pages 15-17, shows that the supervisor had essentially no knowledge about what Claimant's flagging duties required on the project. He did not know there were several more than two contractors and subcontractors on the project. He did not know what days the tracks were spiked out of service. He did not know when the project began nor how long it lasted. He did not know when Claimant was assigned the flagging position. Finally, he did not know about train movements through the project area.

Fourth, at page 15, lines 28-30, the supervisor did confirm that Claimant's assignment, "... first and foremost ...", was to protect the contractors and that "... whatever hours the contractors work, basically are his hours." Accordingly, Claimant was justified in remaining on duty so long as a contractor employee was present on the job site. The record contains no testimony or rule language to the contrary.

Fifth, the testimony of Carrier official King (the new project manager), on pages 66-67, corroborates Claimant's testimony regarding the hours worked by Icon employees McGill and

McRae. King's conversation with McGill confirmed that McGill worked more hours than Hatten and that McRae showed up at quitting time or even later. Thus, Claimant was justified in claiming more work hours than just those attributed to Hatten.

Sixth, a careful examination of the aggregate daily hours of McGill and McRae, when added to the extra hour for Claimant's 6:00 a.m. starting time and the half hour for no lunch period, reflects a strong correlation between the hours Claimant did claim and the hours the evidence shows he was entitled to claim.

Finally, on several days, Claimant did not claim as many hours for himself as the hours of McGill and McRae would have allowed him to do. See, for examples, December 7<sup>th</sup> (13 hours vs. Claimant's 12.5), December 8<sup>th</sup> (14 vs. Claimant's 12.5), December 14<sup>th</sup> (14 vs. Claimant's 8), and December 18<sup>th</sup> (14.5 vs. Claimant's 12). This shows that Claimant did not take advantage of opportunities to claim extra hours.

The circumstances of this dispute confronted the hearing officer with the need to assess the credibility of the evidence and weigh it. Although his decision letter is silent about his assessment of credibility, he had to have resolved the issue against the Claimant to make the determination of guilt that he did.

In disciplinary matters of this kind, it is the Board's role - indeed, its responsibility - to review the record to ensure that the hearing officer's findings are supported by substantial evidence and to sustain the discipline if it is so supported.

It is also well settled that the hearing officer is in the best position to assess credibility and weigh evidence because he saw the witnesses and could gauge their demeanor as well as other facets of their testimony.

Despite this deference, however, hearing officer determinations are not immune from review. Credibility assessments, like any other finding of fact, must be supported by substantial evidence in the record to be valid. If not so supported, the findings are subject to being set aside.

For the Board to fulfill its reviewing role, it must be able to ascertain, without speculating, what the hearing officer's rationale was for the findings made. This is especially important in this case because the hearing officer frequently signaled that he was confused by the evidence. See, for example, page 37, line 36 and page 66, line 1.

In the usual case, the underlying rationale for the hearing officer's findings is readily apparent from the record. In such cases, it is not necessary to explain the decisional basis in detail for our review. However, where, as here, the rationale is not apparent from the record, then it must be adequately explained by the decision-maker. Recognizing that the hearing officer is a Carrier official, our role as appellate reviewers requires that we ensure that the findings are properly made and do not flow from bias and pre-judgment.

The hearing officer's decision letter in this case states only his conclusion that "... more than a substantial degree of evidence was presented to warrant sustaining all charges ..." It does not explain why or in what manner he was able to reconcile the considerable amount of evidence favorable to Claimant. The hearing officer's decision provides no proper explanation for discounting or ignoring such evidence.

Moreover, because Trainmaster Kubich was a Carrier official and was presumably under Carrier's control, Claimant is entitled to the adverse inference that Kubich would have corroborated Claimant's testimony regarding certain extra duties he said he performed.

Given the considerable amount of evidence tending to exculpate Claimant, which was


corroborated in significant respects by Carrier's project manager, and the absence of a proper supporting rationale to explain this evidence away, we are compelled to find that the hearing officer's findings are not supported by substantial evidence in the record. It follows, therefore, that Carrier's disciplinary action must be set aside.

Accordingly, Carrier is directed to offer Claimant reinstatement to his former employment, with seniority and other rights of employment unimpaired, and to make Claimant whole for all losses *resulting from his wrongful removal from service until he is restored to service*. Carrier is further directed to comply with this Award within thirty days of the date hereof.

In addition to our review of the merits of the Claim, we also note that the hearing in this matter was not held within the thirty day time limit established by Rule 48 (a). The record provides no evidence of a proper extension of this time limit.

**AWARD:**

The Claim is sustained.

  
Gerald E. Wallin, Chairman  
and Neutral Member