Award No. 73
Case No. 73

PUBLIC LAW BOARD NO. 7120

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYES DIVISION
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(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated March 9, 2010, R. R. Taylor, Engineer Track, instructed M. A. Waddy ("the Claimant") to attend a formal Investigation to be held on March 22, 2010, in the Roadmaster's office in Fredericksburg, Virginia, "to determine the facts and place your responsibility, if any, in connection with information that I received on Thursday, March 4, 2010 from Roadmaster G. A. Brooks that you may have been involved with falsifying payroll documentation on the date of February 22, 2010." In connection therewith he was charged by the Engineer Track "with conduct unbecoming an employee of CSX Transportation and possible violations of but not necessarily limited to, CSX Transportation Operating Rules - General Regulations GR-2, Part 4 as well as, the CSX Code of Ethics." The hearing was postponed at the Organization's request to March 31, 2010.

FINDINGS:

Public Law Board No. 7120, 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.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Glenn Brooks, Roadmaster, testified that he was approving time sheets and noticed that the Claimant had entered five hours of overtime work for his rest day of Monday, February 22, 2010. The Roadmaster testified that he asked the Claimant about the entry, and the Claimant told him that he did not work that day but that the time was owed to him.

It is not normal, the Roadmaster testified, to enter time on the payroll for a day that was not worked. If there is time omitted from a time sheet, he stated, "I have a corrected time sheet form process that we go through in the computer and we submit that."

Warren Smith, Track Inspector, works in the same force with the Claimant. He testified that he told the Claimant that he needed to talk to Roadmaster Brooks about his February 22nd time entry in the payroll system and that the Roadmaster might have to send in a corrected time sheet. Mr. Smith stated that at the time he had his conversation with the Claimant, the Claimant had already put in the time for February 22nd for work from the week before that wasn't put in. The Claimant was on vacation the week before, Mr. Smith stated, and had come out on two calls. He had the conversation with the Claimant, Mr. Smith stated, about 8:00 a.m. on Tuesday, February 23rd, when the Claimant came back to work from vacation.

In his testimony the Claimant acknowledged that he did not work on February 22, 2010, but entered time in the payroll system for that date. He stated that on the evening of February 8th, around 9:00 o'clock, he received a call that there was a track light between XR and Milford on number 3 track. He answered the call and inspected the track between XR and Milford, he testified, but didn't find anything. He attempted to call Roadmaster Brooks to let him know what happened, the Claimant testified, but the

Roadmaster's mailbox was full.

The next morning, according to the Claimant, on February 9th, the Roadmaster asked him if he had answered the phone the previous night, and the Claimant said yes. The Roadmaster, the Claimant testified, asked him why he did not say anything to the Roadmaster about it. He told the Roadmaster, the Claimant stated, that it was because his voice mailbox was full. "That was the end of it as far as my mind was concerned," the Claimant testified, "I was going on vacation after that[.] Saturday [February 13] was my last day to work before I went on vacation. Didn't really pay that much attention to the time sheet, I probably should have."

He came back from vacation, according to the Claimant's testimony, on Tuesday, February 23, and worked that week. On Saturday of that week [February 27], the Claimant stated, he did his time sheet for the week of the 22nd, and it was at that time that he discovered that he had not previously entered the five hours that he worked on February 8 and decided to put the five hours in for February 22nd. The following was the Claimant's testimony to explain his reasoning:

> When I came back that Tuesday, worked that week, it was actually that Saturday when I was actually doing my, my time sheet for the week of the 22nd which I guess would end, I am not sure of the date that followed, that Saturday, it was on my time and I looked back and I noticed that, just to check over my vacation on the week before, so everything was put in right, and I noticed that the 5 hours that I worked on that Monday, February 8th had not been put in. At that point I decided to put it in, corrected Monday the 22nd, as a Track Inspection code or whatever, but I figured okay, if there's any problems, Glenn [the Roadmaster] will come to me or I will talk to him about it, if there's any problems or whatever he would say something to me. (Tr. 23-24).

On Tuesday, March 2, the Claimant testified, nothing was said to him about his February 22nd time entry. The next day, March 3, however, Roadmaster Brooks asked the Claimant if he worked on February 22nd. He told Brooks, the Claimant stated, that he did

not work that day, but explained that the five hours were the call-out that he answered on February 8th the week before he went on vacation.

On Tuesday, March 2nd, the Claimant testified, Mr. Smith asked him what was going on with the five hours. He explained to him what had happened, the Claimant stated, and Mr. Smith told him, "Well, you know, you got to run that time by Mr. Brooks." He responded, the Claimant stated, "Yeah, I better go and check with Mr. Brooks," but during the course of the day it slipped his mind because he became involved in a matter with an FRA Inspector. His conversation with Mr. Smith, the Claimant testified, took place on Tuesday, March 2nd, and not Tuesday, February 23rd, as Smith testified. As of February 23rd, according to the Claimant, he had not even filled in his time sheet for anybody to know that he was claiming five hours for the 22nd.

The Claimant testified that "in hindsight" he recognized that he did not follow the correct procedure. "At the time," he stated, "I didn't see a problem with it. Like I said it wasn't money . . . that I didn't work, it wasn't time that I didn't work. It was just a question of what day it was."

The hearing officer recalled Roadmaster Brooks as a witness and asked, "When you talked to Mr. Waddy about the time that he submitted on February 22nd, did he tell you that he worked a specific day or any time previous that he earned that time for?" Mr. Brooks answered, "No, he did not. . . . he just told me that time was owed to him."

Roadmaster Brooks identified handwritten time logs for the period January 30 through March 5, 2010, except for the period February 20 through February 26, 2010, which was covered by an earlier exhibit. He described the pages as "forms . . . that my men sign everyday and at the end of the day, they put their time in, from . . . Saturday through Friday, they cover a span of a week, every week there's a different sheet put in, a

blank sheet they put in their time." On the time sheet that included February 8, 2010, the Claimant had entered a 5 by hand in the box for February 8, indicating that he had worked 5 hours on that date.

The Roadmaster also identified a separate multi-page document showing the straight-time and overtime hours worked that were entered into the payroll system by computer by the Roadmaster's employees, including the Claimant, and approved by the Roadmaster for the same period of time. The payroll sheet for the week including February 8, 2010, shows that no wages were paid to Claimant Waddy for February 8, 2010. The Organization representative asked the Roadmaster if money was owed to the Claimant for February 8th. He answered, "I don't know whether it's owed or not, I can't validate that Mr. Waddy worked." The Organization representative then asked the Roadmaster, "Okay. So you're saying that Mr. Waddy did not work on that day?" The Roadmaster answered, "I'm not saying that he did not work; I'm saying I can't validate that."

The Organization representative asked the Roadmaster if he remembered a conversation with the Claimant on the morning of February 9th in regard to him being called out the night before. The Roadmaster answered that he did not remember the conversation. "When I asked Mr. Waddy about the time, he said it was just owed to him," the Roadmaster testified. "Mr. Waddy could not give me any specifics." The Organization Representative asked the Roadmaster, "If Mr. Waddy was called out and worked the night of February the 8th, would there be any documentation to that effect?" He answered, "I'm sure there would be." After more questioning of the Roadmaster at the hearing in an effort to determine whether there was a record of whether or not Claimant Waddy was called out to work on February 8th, the Organization Representative

declared: ". . . If Mr. Waddy did not work on February the 8th, I think that this hearing is got some validity to it. So we need to determine right now, how to prove whether Mr. Waddy worked on this date." At that point the hearing officer interposed and stated (Tr. 34):

> Mr. Griffith, I want to stop you here for just a second, this hearing is not about whether or not Mr. Waddy worked on February 8th or not, this hearing is about whether Mr. Waddy worked on February 22nd or not. And it's been as far as I'm concerned, when Mr. Waddy has already admitted and you admitted that he admitted it, its been proven he did not work on February 22nd. And both Mr. Waddy and Mr. Brooks admitted in this testimony that they had conversations about the work on February 22nd. Whether Mr. Waddy worked on the 8th or not is irrelevant to whether he put time in on the 22nd or not. So, you can question Mr. Brooks on his conversations with Mr. Waddy related to the 22nd, but avoid badgering him about that question on the 8th please.

Roger R. Taylor, Engineer of Track, Baltimore, Maryland, and the charging officer in this case, was asked by the hearing officer how someone could falsify payroll. He answered, "By putting time down that they didn't actually having coming to them for that day." He was asked if that would include a situation where the employee believed that he had time coming from an earlier period that should have been reported then but was reported in a later period. He answered, "Absolutely." He stated that falsifying a payroll could be the same as theft.

Engineer of Track Taylor cited the following rules as here pertinent:

GR-2. All employees must behave in a civil and courteous manner when dealing with customers, fellow employees and the public. Employees must not: . . . 4. Be disloyal, dishonest, insubordinate, immoral, quarrelsome, vicious, careless, or incompetent. . . .

GR-15. Time or wages must not be claimed on payroll, except for work actually performed:

1. By the person whose name appears on the roll.

2. In accordance with agreed-to rules.

* * *

Mr. Taylor testified that Claimant Waddy violated the CSX Code of Ethics "[b]y being an employee who is trying to put time down and being dishonest with his time. We like to have employees," Mr. Taylor added, "that, up front, [are] truthful, and honest." Asked by the hearing officer how the Claimant's actions amounted to conduct unbecoming a CSX employee, Mr. Taylor stated, "By being dishonest and not being truthful with the payroll."

On cross-examination Engineer of Track Taylor acknowledged that he drafted his charge letter based on information provided to him by Roadmaster Brooks. He was asked whether the Roadmaster told him that the Claimant "perhaps may have worked a day, the 5 hours' overtime on one day and placed his time on another." He answered, "He stated he said that he was owed time. He never said he stated it was for another day." Asked whether he was denying that Claimant Waddy worked on February 8th, Mr. Taylor stated, "I can't deny it or say yes or no."

Mr. Taylor expressed the opinion that it would be dishonest to claim pay for a day one did not work because one forgot to claim the hours on the day one actually worked. If one forgot, Mr. Taylor stated, there are channels to go through such as submitting an amended time sheet, in which case there would be no dishonesty.

The Organization raises the procedural objection that the Carrier failed to grant its request made by letter dated March 19, 2010, to the charging officer to be "provided with all exhibits, documents, and any other items the Carrier plans to introduce at the hearing so they can have the proper and necessary time to review and analyze these items." The failure to provide the requested documentation prior to the hearing is viewed by the Organization as a due process violation on the Carrier's part requiring reversal of its disciplinary action.

On the merits, the Organization takes the position that the Claimant has not been dishonest. This is not a case, the Organization contends, where the Claimant placed time on the payroll that he was not entitled to. The Claimant, the Organization notes, testified that he performed five hours of work on February 8, 2010. Although the Roadmaster testified that he was not aware of whether the Claimant worked on February 8th, the Organization argues, the

matter could easily have been verified. Rather than dishonestly padding the payroll, the Organization contends, the Claimant "simply did not input the time on the proper day." Since the work for which the Claimant claimed time was actually performed by him, the Organization maintains, the appropriate way for the Carrier to have proceeded would have been corrective action pursuant to the Carrier's IDPAP. The Organization contends that the Carrier has not met its burden of proof and requests that the Claimant be exonerated of the charges against him and that the charge letter and all matters related to the charge be removed from his personal file.

Following the close of the hearing, the Carrier, by G. Wilhite, Division Engineer, in a letter dated April 14, 2010, notified the Claimant that he was "found guilty of all charges" and that "the discipline assessed is 30 days overhead suspension . . . effective for a period of 1 year commencing April 14, 2010 and remaining in effect until April 14, 2011."

The Organization raises the procedural objection that documentation requested by it prior to the hearing was not provided and that therefore the Claimant did not have a fair hearing. That same argument was made by the Organization in Award No. 3 and Award No. 27 before this Board. It was also made in Public Law Board No. 7008, Awards Nos. 16 and 25. The Organization's position was rejected in all of the prior cases, and it was found that the failure of the Carrier to provide the materials requested prior to hearing was not a due process violation requiring reversal of the discipline imposed. In the absence of the negotiation of new contract language or citation of contrary authority the Board will not make a different ruling on the procedural issue in this case. The Board finds in this case as in the earlier ones before it that "there was nothing in the documentation of a surprising nature, or so complex in nature, that the Organization or the Claimant was prejudiced by not having the material available for perusal prior to the hearing." The discipline imposed in this case will not be disturbed on the basis that the requested documents were not provided prior to the hearing.

With regard to the merits, it was certainly wrong of the Claimant to put 5 hours on the payroll document for February 22, 2010, for work that he allegedly performed on a call-out on

February 8, 2010, but forgot to enter on the payroll form that included that date. There is no evidence of any practice or custom to rectify inadvertently omitted payroll entries by claiming the time on a subsequent payroll form for a date when the work was not actually performed. It is not disputed in the record that the appropriate way to claim payment for hours worked but omitted from the payroll document for the date in question is by submitting an amended payroll form to the payroll department.

The charge letter in this case accused the Claimant of possible violations of General Regulations GR-2 part 4 and the CSX Code of Ethics. The references to GR-2 part 4 and the Code of Ethics plus testimony by the Carrier witnesses at the hearing show that the Carrier charged the Claimant with dishonesty in connection with the 5 hour entry on his payroll sheet for February 22, 2010. The decision letter of April 14, 2010, found the Claimant "guilty of all charges," which, on the record in this case, means that it found him guilty of dishonesty. In addition the Employee History documentation in the record for Claimant Waddy states "Charge Major" with respect to the February 22, 2010, incident. That is further indication that the Claimant was considered to have acted dishonestly with regard to the incident.

The Claimant's action can be viewed in two distinct lights. The 5 hour entry on the payroll form for February 22, 2010, can be regarded as an incorrect way for the Claimant to request compensation for work performed by him on February 8, 2010, that he neglected to report on the appropriate weekly payroll that included that date. No dishonesty would be involved in that case because the work, in fact, would have been performed and payment owed, although the method of requesting payment for the 5 hours would have violated correct procedures for payroll reporting of hours worked. On the other hand the 5 hour entry for February 22 can be viewed as an attempt by the Claimant to obtain 5 hours' pay (at overtime rate) for work never performed by him. The latter case would clearly involve dishonesty and a violation of the CSX Code of Ethics.

Roadmaster Brooks's own testimony shows a recognition on his part of the difference

between the Claimant's putting down 5 hours in the payroll for February 22 without having worked on February 8 and claiming the 5 hours after having worked on February 8 without reporting it in the payroll for that week. Thus the Roadmaster testified, "I don't think it's my responsibility . . . to prove that he worked. . . . [I]f Mr. Waddy had proven that to me, when I approached him about this, we wouldn't be having this conversation." (Tr. 33) (emphasis added). That is clear testimony by the Roadmaster that the present charges would not have been issued against the Claimant if he had proved that he worked on February 8, 2010.

It is critical therefore in order to determine whether or not the Claimant was dishonest with respect to his claim for 5 hours' pay to find out whether or not he worked on February 8, 2010. The Organization representing the Claimant in the Investigation attempted to do just that at the hearing. Thus the Organization spokesman declared:

> If Mr. Waddy did not work on February the 8th, I think that this hearing is got some validity to it. So we need to determine right now, how to prove whether Mr. Waddy worked on this date. (Tr. 34).

The Organization spokesman was correct. The case of dishonesty and a breach of the Code of Ethics against the Claimant turns on whether he worked on February 8 or not. The hearing officer, however, prevented the Organization from pursuing that point when he ruled that "this hearing is not about whether or not Mr. Waddy worked on February 8th or not, this hearing is about whether Mr. Waddy worked on February 22nd or not." (Tr. 34). He then instructed the Organization representative that he could question the Roadmaster about February 22nd but that he should avoid doing so about February 8th. That was error on the hearing officer's part because it prevented the Organization from establishing whether or not the Claimant acted dishonestly in this case.

The evidence indicates, moreover, that there would have been documentation available to show whether or not Claimant Waddy was called out to work on February 8, 2010, as he claimed. Thus the Organization spokesman asked Roadmaster Brooks at the hearing, "If Mr. Waddy was

called out and worked the night of February the 8th, would there be any documentation to that effect?" The Roadmaster answered, "I'm sure there would be." (Tr. 32). When asked how we would go about proving whether or not the Claimant was called, Roadmaster Brooks testified, "There's got to be documentation somewhere in the system." (Tr. 32).

The Roadmaster testified that he did not think that it was his responsibility to prove that Claimant Waddy worked on February 8th. However, the burden of proof in a discipline case is on the Carrier. The Claimant testified that he did work on February 8, 2010, by way of a call-out and showed an entry of 5 hours on the non-payroll time sheet for that date after his name. Aside from the normal burden of proof in a discipline case, if it wished to prove that the Claimant was dishonest, certainly it was the Carrier's burden to produce evidence that the Claimant was not called out to work on February 8th to counter the Claimant's affirmative testimony and time sheet showing that he did work on that date. The Carrier, however, made no effort to do so, not even producing the records that would show who, if anybody, from the Roadmaster's inspection team was called out to work the night of February 8th. As a result the Claimant's testimony, backed up by his time sheet, that he was called out to work 5 hours on February 8 is unrebutted in the record.

From the foregoing discussion it is clear that the Carrier has not established in this case that the Claimant acted dishonestly in connection with his entry of 5 hours in the payroll records for February 22, 2010. The evidence shows that the Claimant entered the time into the payroll for February 22nd in order to receive pay for 5 hours that he worked on February 8, 2010, but neglected to enter in the payroll for that date. The Claimant's action was a violation of the proper procedure for receiving payment for hours worked inadvertently omitted from a previous payroll. The proper procedure would have been to report the omission to his supervisor and request the submission of an amended payroll report. However, because he was not attempting to get paid for work not performed, the Claimant did not act dishonestly with regard to the February 22 payroll entry of 5 hours. See Second Division Award No. 9056 (1982) (30 day

suspension reduced to 15 days on falsification of payroll charge because "It is clear that there was no intention on the part of claimant to defraud company."; Second Division Award No. 13093 (1996) (dismissal for falsification of his time card reduced to 30 day suspension because "carrier has not shown that claimant was guilty of intentionally falsifying his time card. . . ."

According to the Employee History in the record for Claimant Waddy, as of March 9, 2010, the date of the charge letter, he had no prior discipline of record. The Carrier's Individual Development & Personal Accountability Policy ("IDPAP") contains the guidelines for issuing discipline to employees. The IDPAP defines "Minor Offenses" as "All rule infractions that do not result in a derailment, or damages to equipment, or a personal injury, except as specified under Serious/Major" and "All at fault vehicle accidents that do not meet the criteria of a Serious Offense."

The Carrier had the discretion to treat the present incident as a Minor Offense according to the definition given above. The Board has perused the specific violations listed in the sections of the IDPAP under Serious Offenses and Major Offenses, and, in the absence of dishonesty, the Claimant's conduct in this case did not fall within any of the specific rule infractions or accidents listed in the Definition part of Serious Offenses or Major Offenses. There is, however, a general category for Serious Offenses under which the Claimant's conduct could reasonably fall. The Board is referring to the part of the Definition of Serious Offenses which states "Other violations deemed serious by Assistant Chief Engineer."

The Board believes that the Carrier may reasonably view conduct of the kind here involved as a serious violation. When it comes to reporting time worked, the Carrier has the right to expect strict compliance with payroll procedures. The applicable procedure where an employee neglects to report hours worked at the proper time is to submit an amended payroll form. In the present case Inspector Smith specifically informed the Claimant that he should check with the Roadmaster before submitting the payroll with the 5 hours credited to February 22. The Claimant failed to heed that advice. Even without such advice he should have sought

guidance from a supervisor before listing hours worked on the wrong date. Common sense would raise a red flag about doing such a thing on one's own. For these reasons it would be proper to treat the Claimant's conduct as a serious offense.

The IDPAP progression for a first serious violation is "Time Out with up to 5 days overhead record suspension." It is the Board's finding that this should have been the discipline issued for the offense in the present case. The Carrier shall reduce the discipline assessed in the Division Engineer's letter of April 14, 2010, to a Time Out with 5 days' overhead record suspension starting April 14, 2010, and continuing through April 13, 2011. The Employee History and any other documentation of record regarding the incident shall show that the payroll entry was "for time worked on a previous day" rather than "for time not worked." The Claimant shall be made whole for any loss incurred as a result of the assessment of more than 5 days' overhead record suspension for the present incident.

## AWARD

Claim sustained in accordance with the findings.

## ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the date the signed Award is transmitted to the parties.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
July 6, 2010