

PUBLIC LAW BOARD NUMBER 3530

Award Number: 32
Case Number: 32

PARTIES TO DISPUTE:

NORFOLK AND WESTERN RAILWAY COMPANY

AND

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

STATEMENT OF CLAIM:

Claim of L.O. Marcum for reinstatement, pay for all time lost, and vacation and seniority rights unimpaired.

FINDINGS

This dispute involves the conduct of the Claimant, a Roadway Repairman with the R-4 Rail Gang, on October 31, 1982. The Claimant, along with Mr. B.G. Marcum and Mr. Christian (both who are also Roadway Repairman) was notified to appear at a hearing, which was held on January 28, 1983. The hearing was conducted to investigate the three men's claim for time on October 31, 1982, when unloading th R-4 Rail Gang in Roanoke, Virginia".

At the hearing, the timesheet for the three men, covering from October 20 to October 31 was introduced into evidence. The timesheet was completed and signed by Mr. B.G. Marcum, but both the Claimant and Mr. Christian had examined it, and were aware of what appeared on it. The timesheet claimed ten hours of pay at the overtime rate for working from 9:00 AM to 7:00 PM on

Sunday, October 31, 1982.

However, the testimony at the hearing revealed that Mr. Christian did not begin working on October 31 until 1:30 PM. Mr. Marcum and the Claimant arrived in Roanoke at 2:00 PM, but were unable to find the actual workplace, and did not begin unloading equipment until 3:30 PM. Mr. Christian, Mr. Marcum and the Claimant all worked until approximately 7:00 PM.

Mr. Marcum testified that he had claimed the extra time on October 31 to make up for time the three men had worked, but not claimed on October 22 and 23. Mr. Marcum stated that Mr. Reed, an Assistant Equipment Engineer, approached him on October 21, and told him that he needed the Rail Gang's winter overhaul completed by October 25. Mr. Marcum testified that he told Mr. Reed that he would probably have to work over the weekend to complete the task. Mr. Marcum stated that he, Mr. Christian and the Claimant worked six hours on October 22 and two hours on October 23 to finish the winter overhaul.

Mr. Marcum testified that he did not put down those eight hours on the timesheet on October 22 and 23 because Mr. Ahern, his supervisor, was not aware that the three men had worked. Mr. Marcum, Mr. Christian and the

Claimant all testified that it was customary that when an employee was unable to claim time he had worked, he should add it on the timesheet when he worked unloading equipment. The Claimant and Mr. Christian both testified that this incident marked the first time they had ever needed to add make-up time to their unloading time.

Mr. Reed testified that he spoke with Mr. Marcum on October 20, and told him that he needed the winter overhaul as soon as possible. He stated that he received the winter overhaul on October 26. He also stated that when he spoke with Mr. Marcum on October 20, he was aware that Mr. Marcum would probably have to work on the weekend to do the job. However, he testified that it should not have taken three men eight hours to complete the task.

The prior disciplinary records of the three men should be noted. On March 28, 1977, the Claimant was dismissed from service for being absent without authority. He was reinstated on May 13, 1977 on a leniency basis. Neither Mr. Marcum or Mr. Christian had been dismissed for disciplinary reasons prior to this incident.

On February 9, 1983, Mr. Marcum, Mr. Christian and the Claimant were dismissed. On March 16, 1983, the Organization filed a claim on behalf of the three men. On July 20, 1983, Mr. Marcum and Mr. Christian were reinstated on

a leniency basis. The Claimant was not reinstated. The Organization appealed this decision, and on October 7, 1983, the appeal was denied by Mr. Steele, Assistant Vice President - Labor Relations.

The issue in this dispute is whether the Claimant's dismissal was for just cause.

The position of the Organization is that the Claimant had not done anything wrong, because the usual custom was to claim this make-up time when he unloaded equipment. The Organization also argues that it was unfair to reinstate Mr. Christian and Mr. Marcum, but not the Claimant.

The position of the Carrier is that the Claimant received a fair hearing, during which it was shown that the timesheet he submitted had false information for October 31. The Carrier maintains that the Claimant was not reinstated because his disciplinary record included a prior dismissal, while Mr. Christian's and Mr. Marcum's records did not.

The Claimant was entitled to at least three and one-half hours of pay for unloading equipment on October 31. But this date does not necessarily mean that he was trying to deliberately defraud the Carrier. The evidence reveals that he was only trying to claim pay for the eight hours that he had worked on

October 22 and 23.

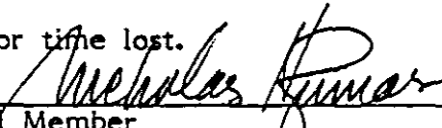
The Claimant did not have official approval to claim pay for the eight hours that he worked on October 22 and 23. He acted under the mistaken belief that it was permissible to claim the pay of a later date, when he unloaded equipment.

It should be noted that Mr. Marcum and Mr. Christian who committed the same offense that the Claimant did, were reinstated. The Board recognizes that the Claimant's prior disciplinary record included a dismissal, while the records of the other two men did not. Nonetheless, the Board finds the disparate treatment to be unfair.


The penalty of dismissal is quite severe for an employee who was only trying to recover pay for time that he had worked. It is the opinion of this Board that the Claimant should be reinstated.

AWARD

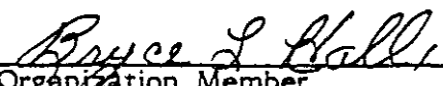
The Claimant shall be reinstated to his position as a Roadway Repairman, with seniority unimpaired, but with no pay for time lost.



Neutral Member



Carrier Member



Organization Member

DATE:

1/13/86