

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5735
John C. Fletcher, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
Richard A. Hobbs, Carrier Member

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LABOR RELATIONS
AND PERSONNEL

Brotherhood of Maintenance of Way Employees

and

Indiana Harbor Belt Railroad Company

Case No. 1
Award No. 1

*Date of Hearing - September 6, 1995
Date of Award - March 6, 1995*

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The dismissal of Track Foreman J. F. Orozco for his alleged falsification of payroll records on March 15, 16, 17, 18 and 29, 1994 was without just and sufficient cause on an unproven charge and arbitrary (Carrier's File MW-94-009).
2. Claimant J. F. Orozco shall now be reinstated to service with seniority and he shall be compensated for all wage loss suffered beginning March 31, 1994.

FINDINGS:

Public Law Board No. 5735, upon the whole record and all of the evidence, finds and holds that the Employee(s) and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the disputes(s) herein; and, that the parties to the dispute(s) were given due notice of the hearing thereon and did participate therein.

Claimant and employee with 41-years service, while working as a track foreman, was cited to attend an investigation on a charge that he falsified payroll records for himself and his subordinates, when on five dates in March 1994, he reported overtime worked when he and the subordinates were actually off the property. Following an investigation into the incident, Claimant was dismissed.

The Board has reviewed the transcript of the investigation, and concludes that Carrier supported the charge with adequate evidence. Video tapes and work reports reflecting the activities of Claimant and his subordinates were introduced at his investigation. This evidence clearly established that Claimant was not performing work during the times that overtime was claimed on the relevant dates. The evidence is conclusive that Claimant fraudulently sought payment of six hours and forty-six minutes of overtime that he did not work.

Claimant's defense at his investigation and before this Board is that Carrier encouraged a practice of reporting overtime not worked in exchange for other considerations. Further, that the punishment of dismissal for the infraction is excessive and harsh for an employee with 41-years service with Carrier.

The Board is not disposed to disturb the discipline assessed. Adequate and conclusive evidence is available to support a showing that Claimant was indeed guilty of claiming overtime that he did not work. This is obviously theft, and is no less serious than theft of money or material. Further, the Board is not persuaded that the overtime was being claimed in exchange for other considerations and was actually condoned by Carrier. Moreover, Claimant is not entitled to mitigation of the penalty of dismissal on the basis of his long service record with Carrier, as this record indicates that he had recently been dismissed for theft of Company gasoline, but was reinstated approximately a year before this most recent incident, under a "Last Opportunity - Reinstatement Agreement."

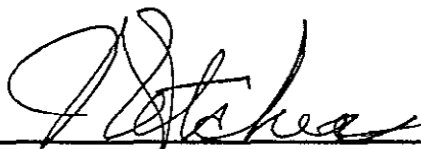
In reaching this result the Board notes that it is aware that the Fourth Division of the NRAB, in Award 4976, on September 1, 1995, modified the dismissal of one of the individuals involved in the "overtime scheme" to a 15-day suspension. In effecting this modification, the NRAB noted that:

"Claimant is a long term employee with a good service record."

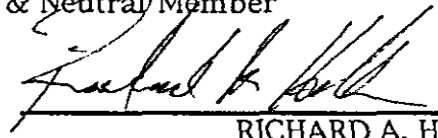
This is not the situation this Board is faced with here, Mr. Orozco, had recently been reinstated under a last chance agreement for theft of Company gasoline. Further there are other entries that conclusively indicate that he does not possess a good service record. Accordingly, it has not been established to our satisfaction that he should be afforded any further considerations for reinstatement. His claim will be denied.

A W A R D

Claim denied.


John C. FLETCHER, Chairman & Neutral Member


D.D. BARTHOLOMAY
Employee Member


RICHARD A. HOBBS
Carrier Member

Dated at Mount Prospect, Illinois, March 6, 1996