

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5735**

JOHN C. FLETCHER, CHAIRMAN & NEUTRAL MEMBER
JOSEPH A. MARKASE, CARRIER MEMBER
D. D. BARTHOLOMAY, ORGANIZATION MEMBER

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

INDIANA HARBOR BELT RAILROAD COMPANY

Award No. 12
Case No. 12
Everardo Ortiz - Track Foreman

*Date of Hearing - August 23, 1999
Date of Award - September 30, 1999*

Statement of Claim:

Claim of the System Committee of the Brotherhood that:

- 1 The dismissal of I&R Foreman Everardo Ortiz for alleged falsification of his time sheet and insubordination on February 16, 1999 was without just and sufficient cause, based on unproved charges, excessive and harsh punishment. (Carrier's File MW-99-005.)
2. I&R Foreman Everardo Ortiz shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

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 dispute(s) herein; and, that the parties to the dispute(s) were given due notice of the hearing thereon and did participate therein.

On February 16, 1999, Claimant returned to his headquarters early. His supervisor, upon learning of the "early quit" instructed Claimant to "cut his time" accordingly. Claimant remained on the property until quitting time, but refused to enter his quitting time on his work report as the time he had returned to headquarters, as he had been instructed to do. On the report he left the quitting time blank. The next day, upon reporting for work, Claimant retrieved the work report from his Supervisor's desk, and entered the quitting time as his normal quitting time, not the actual time he had returned to the office. A discussion ensued with his Supervisor, at which time Claimant was held out of service on an allegation that he had falsified his time report and that he was insubordinate when he did not report his time accurately, as he had been instructed to do. An investigation was held on these charges on April 30, 1999. At the conclusion of the hearing, Claimant was notified that he was dismissed from service. The discipline of

dismissal was handled as required under the parties agreement, remained unresolved, and was timely docked with this Board.

Before the Board the Organization has presented a plethora of defenses. It first notes that Claimant was working with another Foreman on February 17, 1999, and this Foreman decided to take the entire gang in early so that one member could pick up a delayed paycheck. In these circumstances Claimant had no control over his quitting time. When Claimant tried to explain to his Supervisor that he should not be penalized with a loss of time in a situation over which he had no control, the Supervisor became irritated. The next day the Supervisor accosted Claimant when he was completing the time report. The Supervisor has exhibited animus and bias toward Claimant, the Organization asserts, and Claimant should not be placed in a situation where he is fired over a legitimate discussion over proper time reporting.

Parenthetically, the Organization notes, that the other employees that were instructed to cut their time when they returned early on February 16th, ended up being paid for the time after filing a grievance. This demonstrates that the order to cut the time was not appropriate, and that Grievant was being harassed by his Supervisor.

The investigation was neither fair nor impartial, the Organization asserts. The Officer that conducted the investigation was the department head, as such he was actually the charging officer, the Union states. Moreover, as the hearing officer has exhibited prejudgment in this matter, the Organization contends that procedural flaw is present.

Finally, the Organization stresses that insufficient evidence exists in this record to support discipline of discharge. In the totality of the circumstances present, discharge was grossly excessive, it is argued.

Carrier responds with the argument that the record is conclusive that Claimant received a direct order to record his quitting time as the time he returned to the office, not the time his shift would normally have ended. Claimant did not do this, instead he persisted in insubordinate conduct. Even if the order given Claimant was wrong, and it is not admitted that it was, he had an obligation to follow the order, and if it was to be challenged it could have been challenged through the grievance procedure, not in open defiance, the way Grievant responded.

This is not the first instance of insubordination, nor is it Grievant's first instance of discipline, Carrier notes. On June 8, 1998, Claimant was given a five day suspension for insubordination. On August 28, 1998, Claimant was given a five day suspension for improper operation of equipment. On December 18, 1998, Claimant was given an 18 day suspension for interrupting a meeting. Additionally he has been given several letters of caution concerning safety and work performance. Discipline short of discharge simply has had no effect on Claimant's attitude and behavior, it is noted.

On the point that those that did cut their time were eventually paid, Carrier notes that this merely proves up the adage that one must "obey now and grieve later." In this instance, had grievant followed the dictates of this well defined, universal, rule, he would still have his job and would have been paid for the time he was told to cut. Instead, he became argumentative, disobedient, and insubordinate, as he has repeatedly done in the past. Carrier has a need for qualified track employees, it says that it does not take discharge lightly, and will go the extra mile to correct aberrant behavior. However, in

Everardo Ortiz - Track Foreman

Claimant's situation, he has demonstrated that he is incorrigible, unwilling to follow directions, therefore, it has reluctantly concluded that discipline of dismissal is appropriate.

After review of the entire record, the Board is compelled to agree with Carrier. In Claimant's relatively short employment history he has been involved in several serious instances of discipline. As a matter of fact, this is the third time he has been before this Board seeking to have discipline assessed modified (See our Awards 9 and 11). In this case, Claimant was told to show his ending time as the time that he returned to the office, approximately an hour before his normal quitting time. Instead of following this simple instruction, and filing a grievance if he believed that the request was wrong, Claimant, as he has done in the past, became insubordinate. Carrier has attempted to correct this attitude through disciplinary suspensions. These efforts, it is apparent, were not successful. There is a limit to the extent that a Carrier need to go to correct behavior. In this matter, the Board concludes that that limit has been reached. The discipline of dismissal will not be disturbed.

The grievance is without merit. It will be denied.

A W A R D

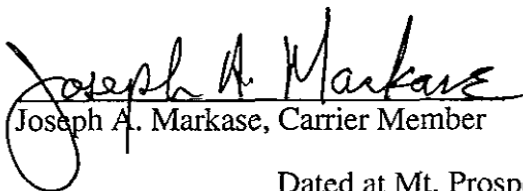
Claim denied.

O R D E R

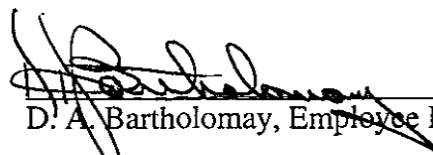
An award favorable to Claimant will not be issued.



John C. Fletcher, Chairman & Neutral Member



Joseph A. Markase, Carrier Member



D. A. Bartholomay, Employee Member

Dated at Mt. Prospect, Illinois., September 30, 1999