

PUBLIC LAW BOARD NO. 6394

AWARD NO. 35

Parties to Dispute:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
(CONSOLIDATED AND PENNSYLVANIA FEDERATIONS)**

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of J. A. Scotti for reinstatement to service with seniority, vacation and all other rights unimpaired and pay for all time lost as a result of his dismissal from service following formal investigations held on May 2 and 30, 2008, for conduct unbecoming an employee when he provided false payroll information stating he worked eight hours on Friday, March 21, 2008, and eight hours on Saturday, March 22, 2008.

(Carrier File MW-DEAR-08-35-LM-178)

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this board is duly constituted by agreement and has jurisdiction of the parties and subject matter.

This award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

Claim disposed of as follows:

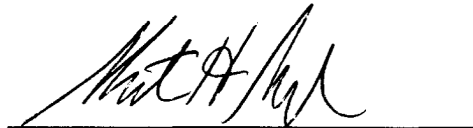
At the time of his dismissal, Claimant was working as an Assistant Foreman and was assigned to provide flagging protection to contractors installing fiber optic cable along Carrier's right of way. Claimant was paid eight hours of overtime, in addition to holiday pay for Good Friday, March 21, 2008, and eight hours for Saturday, March 22, 2008. Claimant was dismissed for providing false payroll information for the two dates.

The record reflects that Claimant provided his time to the Foreman who entered it into the computer. There is no dispute that Claimant performed no service on March 22, 2008. Claimant maintained that he told the Foreman to give him "eight plus eight," meaning eight hours overtime plus eight hours holiday pay for March 21, but that the Foreman evidently misinterpreted this to mean eight hours of overtime on March 21 and 22. However, the Foreman testified that Claimant was with him as he entered the time into the computer and that Claimant stated that he worked eight hours on Friday and Saturday. The Track Supervisor testified that when he interviewed Claimant on March 31, Claimant stated that he had worked eight hours on Friday and eight hours on Saturday. As an appellate body that does not observe the witnesses testify, we defer to the credibility determinations made on the property as long as they are reasonable. As explained below, not only was the decision on the property to credit the Foreman's testimony over Claimant's reasonable, the only reasonable conclusion supported by the record is that Claimant's testimony was not credible.

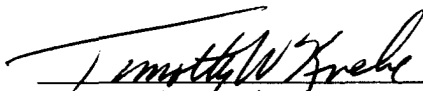
With respect to Friday, March 21, Claimant maintained that he received a call on his cell phone from one of the contractors at 9:00 a.m., advising that his flagging services were needed. Contractor records, however, revealed that the contractor did not arrive at the job site until 2:30 p.m. and Claimant did not appear until between 3:00 and 3:30 p.m. Moreover, Claimant's own cell phone records failed to corroborate his testimony about calls he claimed to have received from the contractors. Claimant maintained that the cell phone records he brought to the hearing on May 2 were incomplete. The hearing was recessed to allow Claimant to obtain further cell phone records. Yet when the hearing reconvened, despite having notice of the reconvened hearing, Claimant did not appear.

The Track Supervisor testified that Claimant called him at 11:00 a.m. on March 21 to request permission to work overtime that day. Claimant's cell phone records and the Track Supervisor's cell phone records show that Claimant did call the Supervisor at 10:59 a.m. Yet, if Claimant's story is to be believed, at the time he called for permission to work overtime, he already had been working for two hours. Moreover, Claimant's cell phone records reflect that between 10:50 a.m. and 12:50 p.m. he was continuously talking on his cell phone, activity that is completely inconsistent with his testimony that he was flagging for the contractor. All-in-all, the only reasonable conclusion that the record supports is the one reached on the property that Claimant's testimony was not credible.

We conclude that Carrier proved the charge by substantial evidence. The Agreement does not require Carrier to retain such a thief in its employ. The penalty of dismissal was not arbitrary, capricious or excessive. The claim is denied.



M. H. Malin
Chairman and Neutral Member


T. W. Kreke / 4-27-09
Organization Member
D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on April 10, 2009