

BEFORE PUBLIC LAW BOARD NO. 5902

UNITED TRANSPORTATION UNION  
YARDMASTERS DEPARTMENT

and

NORFOLK SOUTHERN RAILWAY COMPANY

Case No. 20

STATEMENT OF CLAIM:

Claim on behalf of Yardmaster J.M. O'Halloran for restoration to service and payment for all time lost. Dismissed for conduct unbecoming an employee involving falsification of payroll documents between June 30 and November 25, 2001. Carrier File No. AM-HSB-02-01.

FINDINGS:

At the time of the incident at issue, the Claimant was employed by the Carrier as a yardmaster at the Harrisburg Consolidated Terminal.

On December 4, 2001, the Claimant was notified to appear for a formal investigation and hearing on charges that he had engaged in conduct unbecoming an employee by allegedly falsifying payroll documents in order to receive compensation for dates on which he did not perform service for the Carrier, between June 30 and November 25, 2001. The investigation was conducted on December 19, 2001. As a result of the hearing, the Claimant was found guilty and dismissed from the Carrier's service.

The Organization filed a claim on Claimant's behalf, asserting that the Claimant was not afforded a fair and impartial hearing, and that his dismissal was based on unproven charges. The Carrier denied the claim.

The Carrier contends that it presented substantial, credible evidence proving that the

Claimant falsified payroll documents in order to receive compensation for dates on which he did not provide service to the Carrier. The payroll sheets show thirty-four separate dates on which the Claimant claimed and received eight hours of straight-time pay, fifteen minutes of turnover time, and twenty minutes of lunch compensation, all on Claimant's assigned rest days. The Carrier's witnesses, as well as Claimant himself, all testified that the Claimant did not work on the weekends/rest days for which he claimed and received compensation.

The Carrier points out that to divert management's attention, the Claimant cleverly sought the same amount of pay as most of the other yardmasters who actually were working, rather than pay at the time and one-half rate that normally applies when a yardmaster performs service on a rest day. The Carrier argues that this deceptive technique masked the Claimant's actions from detection until Wilson discovered the discrepancy.

The Carrier goes on to maintain that its computer records show that the Claimant did not log into the computer system on any of the dates in question. Yardmasters are required to log into the computer system at the beginning of each tour of duty in order to obtain instructions and bulletins pertinent to their work assignments. The Carrier emphasizes that the fact that the Claimant did not log into the computer system on the dates in question is strong evidence that he did not perform any service for the Carrier on these dates.

The Carrier then asserts that although Scacco and Streicher admitted that they made a serious mistake by allowing the Claimant to administer the payroll for yardmasters at the terminal, this does not mitigate the Claimant's responsibility. The Carrier contends that the Claimant had permission to submit payroll sheets, but he did not have permission to authorize fraudulent payments. The Carrier also points out that the Claimant did not admit to any

wrongdoing during the course of the investigation, but instead tried to shift the blame to Scacco for allegedly allowing the Claimant to receive the payments. The Claimant attempted to argue that even if the payments were fraudulent, he had permission from a Carrier officer to receive them. The Carrier asserts that even if a Carrier officer allowed this practice, which is not the case, this does not mitigate the fact that the Claimant knew he was claiming and receiving compensation for dates on which he did not perform any service for the Carrier.

The Carrier additionally argues that the Claimant's own testimony attests to his guilt. The Claimant admitted that he did not perform service for the Carrier on the rest days/weekends for which he received payment. The Claimant did not deny that he received payment for dates that he did not work. Moreover, Hostler's signed statement dated January 3, 2002, demonstrates that the Claimant falsified the contents of a document that he submitted as an exhibit during the Carrier's investigation. The Carrier maintains that an employee who would falsify a document for his own benefit at a hearing certainly is the kind of employee who would falsify a pay record for his own benefit. The Carrier argues that the evidence proves that the Claimant is guilty as charged.

The Carrier then asserts that the Claimant received a fair and impartial investigation in this matter. There is no showing that any Carrier official behaved in a prejudicial manner, nor has the Organization shown that there were any mitigating circumstances in this case. The Carrier argues that the Organization had ample opportunity to review the exhibits, including payroll records, at the hearing, and the Carrier was not required to provide these exhibits in advance of the investigation. The Carrier maintains that the applicable agreement does not contemplate the right to "pre-trial discovery." There has been no showing that any of the

witnesses requested but not provided by the Organization had pertinent information that was not disclosed by the witnesses called during the hearing. Moreover, the Organization has not shown any substantial inaccuracies in the transcript that would affect the outcome of this proceeding. The Carrier further asserts that there is no indication from the transcript that testimony was heard while one of the Claimant's representatives, Cardone, was out of the hearing room; the Organization did not complain or object at the time of the hearing. The Carrier additionally points out that the Claimant's primary representative, Mr. Cumby, was present throughout the hearing.

The Carrier then contends that the Organization's request for information and witnesses on the day before the hearing was an obvious last-minute attempt to create a procedural issue. The Carrier argues that it provided substantial records showing that the Claimant received compensation for rest days on which he did not perform service, and the payroll records of other employees have no bearing on the charges at issue. The Carrier emphasizes that the Organization did not show that these records would have mitigated the Claimant's responsibility.

The Carrier goes on to maintain that there is no foundation for the Organization's assertions that the Carrier continued to question witnesses after the close of the hearing but before issuing discipline, or that the hearing officer was prejudiced. The Carrier argues that the Organization raised these assertions without any factual basis. The Carrier points out that the Organization objected to the inclusion of certain statements that were read into the record at the hearing, and the hearing officer agreed that these statements would not be considered. The Carrier emphasizes that it did not consider these statements in determining the Claimant's guilt. The Carrier also argues that the transcript reveals that the Organization had ample opportunity to

question all of the witnesses and to develop its case on the Claimant's behalf.

The Carrier contends that it has shown that the previous arrangement, under which Claimant had permission to receive payment for his rest days in exchange for performing "special duties," no longer was in effect. Moreover, the "special duty" that Claimant previously performed involved pay for service performed in a trainmaster capacity and not pay for staying at home. Scacco's testimony confirms that there was no "deal" between him and the Claimant.

The Carrier goes on to argue that the fact that the Claimant lied to Look and Wilson when confronted about these payments is evidence that the Claimant had been hiding his fraudulent activity. If the Claimant actually had permission to receive compensation for his rest days, he would have told Look and Wilson that this was the case. The Carrier asserts that the fact is that the Claimant did not have permission to pay himself for his rest days as if he were working, and the Claimant knew he had been authorizing unwarranted and unapproved pay for himself.

The Carrier contends that in view of the Claimant's responsibility for authorizing payment for himself on dates that he did not work, there can be no other discipline short of dismissal. The Claimant cleverly hid his fraudulent activities in a blatant attempt to receive pay for dates on which he performed no services for the Carrier. The Carrier maintains that prior arbitral decisions support its dismissal of the Claimant. The Carrier therefore contends that the claim should be denied in its entirety.

The Organization contends that during the period from November 25 through December 19, 2001, the Claimant merely was performing the duties assigned to him by his immediate supervisor for the agreed-to compensation. The Organization argues that the Carrier has failed to prove its charges with evidence of probative value to support the ultimate penalty of discharge.

The Organization maintains that the hearing transcript demonstrates that the Claimant was not afforded a fair and impartial investigation. The Organization argues that the Claimant's representatives arbitrarily were denied information that was requested well in advance of the hearing. The Carrier either denied or ignored the Organization's requests for information. The Organization maintains that if the Carrier had supplied the requested information, it would have proven that "deals" and/or "arrangements" were common at the Harrisburg Terminal, and that Carrier management had knowledge of and condoned this practice.

In addition, the Organization asserts that the hearing transcript does not constitute a true and accurate account of the hearing, and the Carrier continued the investigation and questioning of Organization witnesses after the close of the official investigation. The Organization points out that the transcript contains fifty-one entries of statements from someone identified as "unknown." The Carrier's decision to dismiss the Claimant based on a transcript containing so many errors cannot withstand scrutiny on either factual or legal grounds. In addition, the Carrier's questioning of Organization witnesses after the close of the official hearing violated the Claimant's right to fairness, impartiality and equity, as encompassed in the "right to due process." The Organization maintains that there is no excuse for the Carrier's sloppy, slipshod handling of this matter.

The Organization further contends that the hearing officer was prejudiced, and testimony was entered into the record while Representative Cardone was absent from the hearing room. The Organization argues that because the hearing officer had prior knowledge and was biased toward the Claimant, the hearing officer continually made improper attempts to place himself in the role of witness. The transcript clearly demonstrates that the hearing officer culled the

testimony and framed the questions so that the transcript would contain only the most damaging statements. The Organization argues that the hearing officer expressed his own opinion in the form of questions to Carrier witnesses. In addition, the hearing officer improperly allowed testimony to be entered into the record while Representative Cardone was absent from the hearing room.

The Organization asserts that based on these procedural errors alone, the Claimant should be restored to service immediately with payment for all time lost.

The Organization then contends that there are mitigating circumstances present in this matter. Had the Carrier supplied the requested payroll records, the Organization argues that these records would have confirmed the fact that the arrangement with the Claimant was not the only "deal" at the Harrisburg Terminal. The Organization contends that the claim should be sustained, and the Claimant should be restored to service with compensation for all time lost.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the procedural arguments raised by the Organization, and we find them to be without merit. The Claimant was afforded a fair and impartial hearing with all of his due process rights protected.

This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant engaged in conduct unbecoming an employee, which involved some falsification of payroll documents between June 30 and November 25, 2001. The record is clear that the Claimant received payment for time that he did not work and that he filed documents that led to that payment.

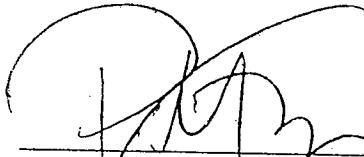
Once this Board has determined that there is sufficient evidence in the record to support

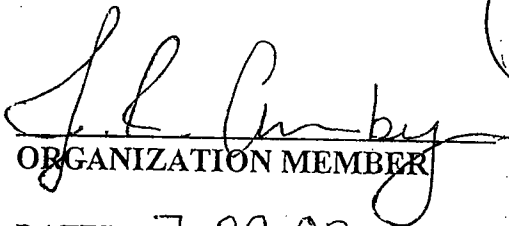
the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

Given the thirty-one and one-half years of seniority of this Claimant, plus the fact that there are some "deals" that take place at the Harrisburg location, this Board must find that the action taken by the Carrier in terminating the Claimant was unreasonable and arbitrary. The Claimant did engage in activity for which he deserved discipline, but discharge was too severe under the circumstances. Consequently, this Board orders that the Claimant shall be reinstated to service, but without back pay. The period of time that the Claimant was off shall be considered a lengthy disciplinary suspension.

**AWARD:**

The claim is sustained in part and denied in part. The Claimant shall be reinstated to service, but without back pay. The period that the Claimant was off shall be considered a lengthy disciplinary suspension.

  
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PETER R. MEYERS  
Neutral Member

  
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ORGANIZATION MEMBER

DATED: 7-29-02

  
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CARRIER MEMBER

DATED: 7-29-02