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NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25240
Docket No. 44915
01-1-00-1-U-2144

The First Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

(Brotherhood of Locomotive Engineers)
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim in behalf of Engineer J. M. Uhlich, SS No. 318-46-4287, Chicago Freight Terminal for reinstatement to service with vacation and seniority right unimpaired, compensated for any and all lost time spent out of service due to this investigation, compensated for any and all medical expenses incurred while claimant's insurance had lapsed, and this incident be removed from claimant's personal record and he be removed from the Union Pacific Discipline System known as Upgrade, when Engineer J. M. Uhlich, hereafter, referred to as claimant was investigated on the following charge:

'your allegedly submitted a fraudulent time claim, claim receipt no. 00867193, for eight hour penalty payment for allegedly being denied a meal period by MTO T. J. Richards on the date of December 27, 1998.

You are charged with responsibility that may involve a possible violation of GCOR as follows: Rule 1.3.1 Rules, Regulations and Instructions. 'Explanation: Employees must ask their supervisor for an explanation of any rule, regulation, or instruction they are unsure of.' Rule 1.4 Carrying Out Rules and Reporting Violations: 'Employees must cooperate and assist in carrying out the rules and instructions. They must promptly report any violations to the proper supervisor. They must also report any misconduct or negligence that may affect the interest of the railroad.' Rule 1.6 Conduct: Employees must not be...4. Dishonest...' General Notice No. GN088 effective May 10, 1999."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On December 28, 1998 and March 21, 1999, the Claimant was working in the Chicago Terminal at Global 1, an Intermodal yard, as engineer on an extra yard engine. Upon reporting for duty, the Claimant alleges that Conductor Bonate in December and Conductor Singleton in March both received instructions for the day stating that they were denied a meal period. Conductor Bonate and Conductor Singleton allegedly told the Claimant that the crew was denied a meal period from MTO Richards at Proviso Command Center on both occasions. The Claimant entered his time slip on both dates for eight hour's penalty due to being denied a meal period per T. J. Richards MTO on duty. The claim worked its way through the handling process and timekeeping. MTO Richards was asked to verify the authorization and he reported he was not on duty December 28, 1998 or March 21, 1999. On September 1, 1999, the Claimant was removed from service and cited to a formal Investigation for allegedly violating GCOR Rules 1.3.1, 1.4 and 1.6 for submitting fraudulent time cards.

Based on the findings of the Investigation, the Claimant was dismissed from service on September 10, 1999. The Organization appealed the decision to the Manager of Labor Relations. In a letter dated November 19, 1999, Mr. Nash raised new evidence of Conductor Bonate and Conductor Singleton's time slips in which the MYO listed differed from the Claimant's MTO listed. This compelled Mr. Nash to deny the Claimant's appeal.

The Organization first contends that the claim must be sustained in its entirety because of various procedural violations relating to notice and timing of the Investigation and the Claimant's right to a fair Hearing. More specifically, the Organization argues that the claim must be sustained because the holding of the Investigation was clearly beyond the

time limits set forth in the 1996 System Discipline Agreement and that 248 days had passed from the date of the December 28, 1998 incident and 164 days had passed from the date of the alleged March 21, 1999 incident. The Organization further argues that the time lapse resulted in the witnesses no longer having a clear recollection of the events at the Hearing, that the Carrier failed to call the appropriate witnesses especially the Conductors, and that the evidence regarding the Conductor's time slips was not presented, resulting in an unfair Hearing.

The Board finds that the Organization's claim should be sustained based on procedural errors made by the Carrier. An employee has the right under the current Agreement to be notified of an Investigation in a timely manner and allowed a fair and impartial Hearing in which all evidence surrounding the incident is presented. The purpose of an Investigation is to develop the facts in a particular case. The Carrier bears the burden of proving through the presentation of substantial evidence that the misconduct for which the employee was disciplined occurred. Furthermore, it is not the responsibility of the Claimant to gather the appropriate witnesses and evidence to build his own prosecution. The Board cites First Division Award 5248 where Referee Simmons discusses the role of material evidence in an impartial hearing as follows:

"...The Article contemplates an impartial hearing at which time 'all evidence,' both for and against the accused, shall be presented. The hearing is conducted by and is under the control of the carrier. It is the carrier's duty to present at that hearing all material evidence of which it has knowledge bearing upon the question under investigation."

In this case, the administrative procedure for the review of time slips allowed for an inordinate amount of time to elapse between the date of the incident and the gathering of evidence and facts. Even if, arguendo, the Carrier did not have sure knowledge of the Claimant's alleged misrepresentation until the lengthy time lapse, the fact of the delay essentially precluded any witnesses from having a reasonable recollection of the events at issue. It is common practice in the railroad industry for the Engineer to rely on the Conductor's word for safe handling and operation of the train including receiving the daily assignment and requesting the meal period. The receipt of the instructions is a crucial issue in this case, and the Carrier failed to call the Conductors in both instances to testify about the circumstances regarding the incident. The burden was also on the Carrier to present the Conductors' time slips at the Hearing and to have them testify that they in fact entered the data into the computer. This was key evidence that the Carrier had at its disposal and

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chose not to offer until the appellate process. Such failure to produce essential evidence must be construed against the Carrier.

Furthermore, the Carrier chose to base both cases on one witness, the MYO who had no first-hand knowledge of the incident. The MYOs each received notice of the incident through a fax more than six months after the alleged violations. Thus, they could testify only to the fact that it was not their order to deny the meal period. They could not testify about any mistaken communication that may have occurred at the time in question. Nor could they reasonably assess sufficient salient facts to determine whether the Claimant's actions were merely a mistake or willful intents to defraud. Moreover, it is not unreasonable that the Claimant himself recalled no details of dates so far in the past. A clear memory of incidents so far removed from the present would, in fact, call the Claimant's credibility into question. To summarize, such cavernous lacunae in the normal investigatory and judicial processes of the disciplinary mechanisms must be viewed as constituting fatal procedural errors on the Carrier's part.

Similar conclusions have been drawn in numerous Awards including First Division Awards 24296, 23942, 20466, 20094, 19910 and Public Law Board No. 5383, Award 586. In light of the foregoing, the Board orders that this claim be sustained in full and the Claimant be made whole for time lost.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 10th day of July, 2001.