

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: (System Federation No. 7, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Electrical Workers)
(Burlington Northern Inc.

Dispute: Claim of Employee:

1. That in violation of the current working agreement, Crew Lineman Trainee D. P. Thomsen was unjustly dismissed from the service of Burlington Northern Inc., on June 29, 1977.
2. That accordingly, the Burlington Northern Inc., be ordered to return Crew Lineman Trainee D. P. Thomsen to its' service, that the record of investigation and subsequent dismissal be removed from Mr. Thomsen's personal record, that he be compensated for all time lost, in addition to restoration of any lost seniority, vacation time, lost holidays or sick days, hospitalization benefits, Railroad Retirement benefits and any other rights, privileges or benefits to which he may be entitled under Schedules, Rules, Agreements or laws.

Findings:

The Second 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 waived right of appearance at hearing thereon.

Claimant was directed to attend an investigation "for the purpose of ascertaining facts and determining your responsibility in not reporting to Mr. H. B. Tervey at Brainard, Minnesota, as instructed in my /Asst. Director, Communications/ letter to you of May 12, 1977".

Investigation was duly held, and Claimant appeared without a representative of the Organization.

Following the investigation, on June 29, 1977, Claimant was dismissed from service "for violation of Rules 702 and 702(B) of the Rules of the Maintenance of Way Department, Form 15125, by absenting yourself from duty

without authority, and by not complying with instructions from the proper authority as a result of your not reporting ... on May 15, 1977".

The Organization faults the procedure followed by the Carrier on two counts:

1. Claimant was not represented by the Organization at the hearing, nor was a specific inquiry made of him at the hearing as to whether he wished such representation.

2. The notice of investigation made no mention of Rules 702 and 702(B), although reference to them was made in the hearing and reliance on them was made in the notice of dismissal.

Rule 30(c) provides as follows:

"At least five (5) days' advance written notice of the investigation shall be given the employee and the appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative and for presence of necessary witnesses he may desire. The notice must specify the charge for which investigation is being held."

The notice of investigation also advised the Claimant of his rights to representation, and the Organization received a copy of the notice. The Board finds that the Carrier is not in violation of the applicable rule in failing to do more than inquire of the Claimant at the hearing if he had a representative; the rule calls for no more than this.

As to reference to rules in the hearing and in the dismissal notice, the rules cited are as follows, in part:

Rule 702: "Employees must report for duty at the designated time and place."

Rule 702 (B): "Employees must comply with instructions from the proper authority."

The Board finds the citation of the rules of employee conduct entirely in consonance with the specific charge in the notice of investigation. If the cited rules were for offenses different from those cited in the notice, the Organization would have firm ground on which to object. Any reasonable reading of the cited rules shows, however, that they are directly on point to the nature of the offense of which the Claimant was told he would be investigated. His defense was not impaired under these circumstances, and the Board finds no procedural irregularity.

As to the merits of the issue, the Claimant freely admitted that he did not report for work on the date and in the manner indicated. Taken by itself, the Board would find no reason to disturb the Carrier's disciplinary action. In this instance, there are circumstances which mitigate the gravity of the offense. The record shows that the Claimant was suffering from a psychological depression, as evidenced by letters from his doctor. He was going through bankruptcy proceedings. Further, and without regard to where the responsibility lies, he was the subject of a first investigation without benefit of experienced guidance therein. No record of previous disciplinary action was introduced. While the hearing officer cannot be expected to be either a medical expert or a financial expert, these factors are nevertheless worthy of consideration.

Under the circumstances, the Board will therefore find the penalty of dismissal inappropriate and will mitigate the penalty. The reinstatement which will be ordered, however, is subject to the Claimant filing with the Carrier medical assurance that he is able to resume his full duties.

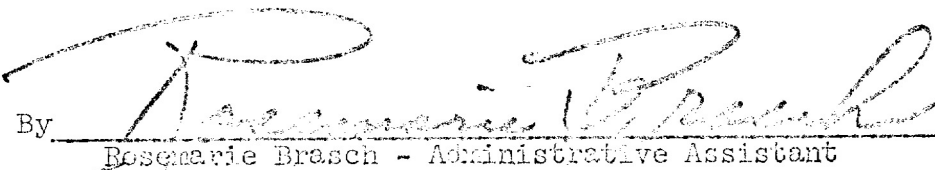
A W A R D

Claim sustained to the extent that the Claimant shall be reinstated to duty with seniority rights unimpaired but without back pay or other retro-active benefits, subject to the condition as indicated in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 10th day of January, 1979.