

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States
and Canada
{ Burlington Northern Inc.

Dispute: Claim of Employees:

1. That Carman D. A. Wilson, Havelock Shop, Lincoln, Nebraska, was unjustly treated and the provisions of the current Agreement were violated when he was not allowed to work his assigned position on January 15, 1979. Such action violated Rule 35(a) of the current Agreement.
2. That accordingly, the Burlington Northern, Inc. be ordered to compensate the above named carman eight (8) hours for January 15, 1979.

Findings:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

The claimant is employed as a Welder at the Carrier's Havelock Shop. His assigned hours of service at the time of this claim were 7:00 a.m. through 3:00 p.m., Monday through Friday. Saturday and Sunday were rest days. On Friday morning, January 12, 1979, the Claimant called his supervisor and reported that he would be late for work because he was experiencing car trouble. When the Claimant called in, the Carrier contends that he was effectively told that 1) if he would be unable to get to work at all that day (January 12) he should call back and so advise the supervisor and 2) that he had to call back on the 12th and advise if he would report for work on Monday the 15th of January per the requirements of Rule 16 (f) which reads:

"An employee returning to work shall report during the working hours of his regular shift the day previous to his return."

The organization disputes whether either instruction was given to the Claimant. They contend the Claimant advised the supervisor that if he got the car fixed he would be in and if he didn't wouldn't. This notification was all that was required of the Claimant by the contract, specifically Rule 16(e).

It is undisputed, however, that the Claimant did not call back or report for work during his shift on the 12th. It is further undisputed that when the Claimant reported for work on Monday, January 15th, he was not allowed to work and received no pay for that day.

It is the time lost on that day which is the subject of this dispute. The organization fundamentally argues that the denial of work on the 15th constituted a disciplinary action which was not preceded by a hearing as required by Rule 35(a), which states:

"An employee in service more than sixty (60) days will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than thirty (30) days from the date of the occurrence, except that personal conduct cases will be subject to the thirty (30) day limit from the date information is obtained by an officer of the Carrier and except as provided in (b) hereof."

The carrier fundamentally argues that the Claimant effectively forfeited his right to work on the 15th. The Carrier contends that an employee, after an absence, is not entitled to work, unless he has notified the Carrier that he will return to work during the hours of his shift the day previous to his return. This argument has its foundation in Rule 16 (f) cited previously.

The arguments of the parties deserve to be examined in more detail. The organization's most pertinent argument is their contention that the fact Mr. Wilson was sent home on the 15th had nothing to do with his alleged failure to comply with Rule 16 (f). The Carrier's 16 (f) defense was an afterthought, they contend. The Carrier's real motivation in sending the Claimant home on Monday was explained in the first and second declinations. They read these declinations as indicating he was sent home because he failed to comply with instructions to call back regarding his attendance for the remainder of Friday, the 12th. Nothing was indicated in these letters that the Claimant was sent home on the 15th for anything but his failure to call back and advise if he could work the 12th. The argument implies the letters do not even remotely suggest that he was sent home because he failed to notify the carrier regarding his attendance on the 15th or in other words for his alleged failure to comply with 16 (f). The 16 (f) defense wasn't even raised until the final declination. Further the organization asserts that, the contention in the carrier's final declination that the supervisor "specifically reminded Claimant of the requirements of Rule 16 (f) of the Agreement, advising Claimant that if he found he could not report for work at all that day he should again call in to notify the Carrier so that he could return to work on his next workday," is unsupported. There are no written statements in the record from the foreman, for instance. No weight, they suggest, should be given to unsupported allegations. They conclude this line of argument by stating that the Carrier's behavior constituted a disciplinary action because their motivation in sending the Claimant home on the 15th was a result of having failed to comply with instructions to call back on the 12th regarding his attendance for the remainder of that day. An employee's failure to comply with instructions is normally a disciplinary matter. The Carrier's motivation at the time was not based on the enforcement of Rule 16 (f). As a result of being deprived of one day's pay without a hearing, Rule 35(a)

was violated, they argue. Further, even if the Carrier had sent Wilson home in an attempt to enforce 16 (f), they vigorously argue, doesn't apply to absences of one day.

The Carrier's argument is relatively simple and straightforward. Rule 16 (f) is clear and unambiguous according to the Carrier. It applies to any absence including one-day absences such as this. The intent of the parties in this regard is clear by virtue of the language and because other agreements with similar provisions make a distinction between one-day absences and others. If 16 (f) were not intended to apply to one-day absences a similar exception would have been written into this agreement. The facts as viewed in context of this interpretation of 16 (f) would support the idea that Mr. Wilson was properly held from service. Their actions were not disciplinary but a result of the application of the express provisions of the agreement.

The task of the Board, as we see it, is to determine first the Carrier's intent and motivation in withholding the Claimant from service on Monday, January 15. If he was sent home only because he failed to call back on the 12th regarding his attendance on that date then the action must necessarily be considered disciplinary in nature. The claim in this event would be sustained because Rule 35 (a) prohibits such precipitous action without the benefit of a hearing. If, on the other hand, the Carrier's reason for preventing Mr. Wilson from working the 15th was because he failed to call in the 12th relative to work on the 15th, thereby failing to comply with 16 (f), the Board must interpret 16 (f). An inquiry would be necessary to determine if 16 (f) applied to absences of one day such as the one in the instant case.

In considering the competing positions, it is the conclusion of the Board that the Organization's position, that the Carrier's motivation in withholding Mr. Wilson from work was disciplinary rather than out of deference to Rule 16 (f), is the more reasonable conclusion upon thorough reading of the record. In arriving at this conclusion we give significant weight to the organization's argument that the Carrier's 16 (f) defense was an afterthought to the Carrier's initial action, having been argued for the first time in the final declination by the Carrier's highest officer designated to handle claims. When the handling of the claim in the first two steps is reviewed there is indeed no indication that non-compliance with 16 (f) was the reason for withholding the Claimant from service on January 15. Rule 16 (f) wasn't even tacitly referred to, nor was anything mentioned to the slightest degree that would indicate the Claimant was withheld because he didn't call back the 12th relative to his attendance on the 15th. The initial claim on the property as submitted by the local chairman indicated the following:

"Mr. Wilson reported for work on his assigned position on January 15, 1979, and was sent home for not calling back in telling the Carrier he would not be in the rest of the day." (Emphasis added)

In the Carrier's reply by the Shop Superintendent, no exception was taken to the above quoted statement. On the contrary, it emphasized and cited, as the primary and sole reason for sending Mr. Wilson home, his failure to call regarding his attendance on the 12th. Nothing was mentioned about Rule 16 (f) or calling back on the 12th regarding the 15th. The letter is quoted below:

'Dear Sir:

This will acknowledge your letter of January 21, 1979, presenting claim on behalf of Carman D. A. Wilson, for eight hours pay at pro-rata rate of his position for January 15, 1979, account he was sent home on that date because he failed to call in and advise he would not make it in.

Mr. Wilson did call and advise he would be late due to his car not starting, but he was advised to call back and further advise the General Foreman if he would not be in at all and this he failed to do.

Surely, had Mr. Wilson been truly concerned about his job at the shops, he would have made arrangements to get his car repaired and then utilized public transportation which is readily accessible, to get to work.

Therefore, since Mr. Wilson did not call back and advise he would not be in at all on January 12, 1979, he was properly sent home on January 15, 1979, and your claim for 8 hours pay is without merit and is respectfully declined."
(Emphasis added)

The Board also notes the second step denial by the Assistant Vice President - Mechanical. This denial is also lacking in reference to 16 (f) or reporting for the 15th. It reads as follows:

"Dear Sir:

Please refer to your letter of March 21, 1979, concerning the claim of Carman Welder D. A. Wilson of the Havelock Shop.

It is true that Mr. Wilson did call in to indicate that he had car trouble on January 12, 1979, but he also indicated that he would only be late and would still report in for duty on January 12, 1979. Mr. Wilson did not report in for duty on January 12, 1979.

Mr. Wilson was also advised that if he found it was impossible for him to make it in to work January 12, 1979, he should call the office and so inform them. Mr. Wilson saw fit to ignore this reasonable request altogether.

Mr. Wilson's claim for eight hours pay is without basis and, therefore, is declined in its entirety." (Emphasis added)

The Board also finds significant the lack of evidence to support the Carrier's 11th hour contention that the Claimant was specifically reminded of the requirements of 16 (f). Had the Carrier been able to produce a statement from the supervisor who talked to Mr. Wilson on the 12th that indicated that he had in

fact reminded Wilson to call back relative to his attendance on Monday, we would not have given such decisive weight to the Organization's arguments.

The record contains more evidence to support the idea that Mr. Wilson was sent home on Monday (the 15th) because he failed to comply with instructions to call back relative to his attendance on the 12th than because of his alleged failure to comply with Rule 16 (f). As such, it is not necessary to interpret Rule 16 (f) as whether it applies to absences of one day.

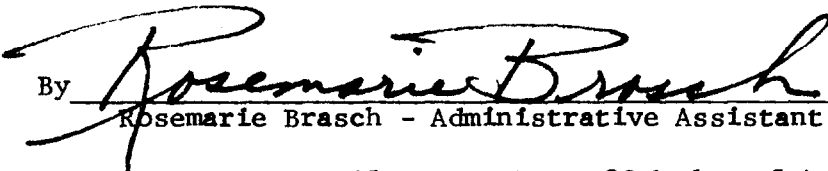
In summary, it is concluded that the withholding of Mr. Wilson was disciplinary in nature, as a result of failing to comply with instructions, and not as a result of the execution of Rule 16 (f). Rule 35 (a) is clear. Discipline must be preceded by a fair and impartial hearing. Since one was not granted the claim will be sustained.

A W A R D

Claim sustained.

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 29th day of April, 1981.