

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: { International Brotherhood of Electrical Workers
 { Burlington Northern Railroad Company

Dispute: Claim of Employees:

1. That in violation of the current agreement, Burlington Northern Inc., arbitrarily withheld Crew Lineman John M. Ward from service pending an investigation.
2. That in violation of the current agreement, Burlington Northern Inc., arbitrarily refused the valid request of the Employee Representative for a postponement of subject investigation.
3. That in violation of the current agreement, Burlington Northern Inc., arbitrarily, capriciously and unjustly severed Crew Lineman John M. Ward from it's service as of January 4, 1979.
4. That accordingly, Burlington Northern Inc., be ordered to return Crew Lineman John M. Ward to it's service, compensate him for all time lost, including overtime he would have worked had he remained a crew member, together with restoration of, or compensation for, lost vacation time, holidays, sick pay and/or hospital benefits and any other rights, benefits or privileges to which he may be entitled under schedules, rules, agreements or laws and that the entry of investigation and/or censure be removed from his personal record. Starting day of the claim is November 18, 1978, for eight (8) hours compensation at pro-rata rate and eight (8) hours for each working day thereafter that Claimant is withheld from service.

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.

At approximately 11:30 P.M. on Thursday, November 8, 1978, while on assignment in Alliance, Nebraska, Claimant, a student lineman assigned to the communication line gang headquartered at McCook, Nebraska, informed his foreman that he was "... sick with a cold ... and ... was going home". The Foreman

apparently granted this request, whereupon Claimant drove from Alliance to McCook (a distance of approximately 250 miles), arriving in McCook at approximately 3:30 A.M. on the morning of November 9, 1978. Claimant maintains that he "... called on Monday to the Wire Chief and left word at number 244 ..." and that he later "... came to the office and had the lady ring Alliance". At no time, however, did Claimant wire his foreman in McCook or D. Elliott, Supervisor of Communication in Lincoln, Nebraska, because he (Claimant) allegedly "... didn't know that was the way it went" (Supra), and further because he had always called previously in similar situations.

According to Supervisor Elliott, he received a wire from Claimant's foreman in McCook "... stating the dates ... (Claimant) ... had missed from November 1 on and said he didn't know where he (Claimant) was. He (Claimant) had left without saying anything to him".

Sometime in the middle of November (15th, 16th or 17th), Claimant contacted Supervisor Elliott and requested that his paycheck be mailed to him at his home in McCook. According to Mr. Elliott, he informed Claimant that because he had absented himself from duty, Claimant could either resign or it would be necessary to hold an investigation in the matter. Claimant allegedly informed Mr. Elliott that he would not resign but instead wanted to proceed with the investigation. Thereupon Claimant remained absent from his assignment and made no further attempt to contact his supervisor.

By Carrier letter dated December 7, 1978, Claimant was directed to attend an investigation on Monday, December 18, 1978, "... for the purpose of determining your responsibility for allegedly failing to protect your assignment as a student lineman ... on November 18th through the present date". Said hearing was conducted and, as a result thereof, Claimant was adjudged guilty as charged and he was dismissed from Carrier's service as of January 4, 1979.

Organization's basic contention in this dispute is that Claimant's absence from work for the period of November 18, 1978, to December 18, 1978, was caused by the fact that Supervisor Elliott had instructed him not to return to work but instead either to resign or to submit to an investigation of the matter. Thus Organization charges that rather than being absent, Claimant was improperly withheld from service during this period of time.

In addition to the foregoing Organization further asserts that Claimant was denied a fair and impartial investigation in this matter because: (1) Carrier failed to hold an investigation within 10 days of the time Claimant was initially withheld from service; (2) Carrier failed to notify Claimant of the precise reason for which he was being withheld from service; (3) Carrier Hearing Officer denied Employee Representative's timely request for a postponement of the investigatory hearing despite the fact that said request was for "good and sufficient cause" as contemplated in Rule 30(i); and (4) said Hearing Officer failed to attempt to develop all of the pertinent facts in this case.

Carrier's position in this dispute is that "... it complied fully with Rule 30 of the agreement and that the evidence adduced at the investigation to support its position was substantial and ... conclusive".

In support of this contention, Carrier asserts that at no time did Supervisor Elliott or any other Carrier representative ever instruct Claimant, either in writing or verbally, that he was being withheld from service. Accordingly, Carrier argues that Claimant's assertion to the contrary "defies logic" because: (1) such an action on Carrier's part would not have been a reasonable approach by which to solve the problem of Claimant's absence from his assignment; (2) an employee's decision or acquiescence to submit to an investigation is not a prerequisite for proceeding with same if so determined by Carrier; (3) Carrier would not have conveyed such a critical message -- the withholding of an employee from service -- through a fellow employee, but instead would notify the employee in writing, which was, in fact, Carrier's established practice; and (4) Carrier would not hold an employee out of service and then call an investigation to determine why that particular employee was not protecting his assignment.

In addition to its "defying logic", Carrier further contends that Claimant's testimony regarding his being withheld from service is "vague", "confused", and "weak", and, therefore, is not credible. Moreover, Carrier posits that "... it is not (Board's) province to rule on questions of witness credibility ..." and that "... it is singularly within the province of the hearing officer to determine which testimony to credit where inconsistent testimony is given at the investigation" (Second Division Award No. 6408).

Turning next to the various procedural considerations which were raised by Organization, Carrier contends that insofar as Claimant was not withheld from service by his Supervisor as Claimant alleges, then those cited portions of Rule 30 have been satisfied. As to Organization's assertion that Carrier improperly denied Organization representative's request for a hearing postponement, Carrier maintains that said denial was proper because: (1) both Claimant and his representative had more than the contractually prescribed five days in which to arrange for necessary witnesses and to prepare their case; and (2) postponement is not a matter of "right" but is circumscribed by Rule 30 paragraph (i) of the parties' agreement which requires that the party requesting such a postponement must give "reasonable notice" and must "show good and sufficient cause" for same, and, Carrier maintains, that neither of these obligations were met by Organization in the instant dispute.

As its final major area of argumentation, Carrier posits that Claimant's previous attendance record was considered only in determining the degree of penalty to be assessed, and not to determine Claimant's guilt for the particular infraction as charged. Such an assessment, according to Carrier, was proper since "Carrier is obligated to consider an employee's past record in assessing discipline".

The Board has carefully read and studied the complete record which has been presented in the instant case and can find no good reason, either procedurally or merit-wise, which would warrant a rescission of the penalty which has been imposed.

Since it is undisputed that Claimant was absent from work for the period of November 18, 1978 through December 18, 1978, there are only two (2) questions which are at issue herein and which are of concern to this Board. These questions are: (1) did Carrier violate Claimant's due process rights in the processing of this matter as specified in Rule 30 of the parties' controlling Agreement; and (2) was Claimant withheld from service or led to believe that he was being withheld from service by his Supervisor, D. Elliott. Obviously, an affirmative finding regarding the first of these two questions will negate any further determination on the second since such a finding would be sufficient to sustain the general contention that Claimant was discharged improperly.

Regarding the various procedural questions which have been alleged by Organization, the Board is unpersuaded that there have been any such violations. In reaching this conclusion the Board notes that not only are Organization's arguments somewhat contradictory (Claimant's hearing was not held within ten days from his allegedly being withheld from service, yet Carrier did not grant Organization's request for a hearing postponement) but, in addition, Carrier's consideration of Claimant's previous attendance record was limited only to the question of the degree of discipline which was to be administered as a result of this final incident; and, as will be developed later in greater detail, Claimant's absence from service from November 18, 1978, to December 18, 1978, was caused by his own action and not as a result of any action taken by Carrier. Insofar as the postponement of the hearing is concerned, suffice it to say that: (1) Carrier was well in compliance with the five day notification period which is prescribed by Rule 30; (2) said language of Rule 30 (1) does specify that "... an investigation may be postponed if mutually agreed to" by the parties (emphasis added by Board); (3) Claimant and his Organization failed to "show good and sufficient cause" as to why such a postponement was warranted; and (4) Organization's request for postponement when given at the very beginning of the investigation hearing itself certainly does not comply with the "reasonable notice requirement" which is obviously contemplated in said paragraph.

Turning next to the second of the two critical questions which form the focus of this analysis, the Board concludes that, despite Claimant's contentions to the contrary, Claimant was neither withheld from service by Supervisor Elliott nor, given the evidence of record, was there any good reason for Claimant to make such an erroneous assumption. Claimant did not receive any formal, written notice indicating that such action had been taken; the assertions that Supervisor Elliott informally related such critical information to Claimant over the telephone or casually entrusted same to be delivered to Claimant by a fellow employe by word of mouth, are entirely at odds with the parties' Rules and are contrary to Carrier's standard operating procedures; and, even more interestingly, Claimant's own version of this particular aspect of the case ("... Elliott was instructing me not to report to work until I agreed to resign or appear at an investigation") suggests to the Board that Claimant himself was aware that he had not been withheld from service at that point and the matter had not yet been foreclosed but rather was still pending and Claimant was fully expected to return to his assignment (emphasis added by Board).

Given the foregoing, it is determined that Claimant was not improperly withheld from service by Carrier as alleged, and that any such assumption which may have been made by Claimant was erroneous and unwarranted, and, therefore, was made at his own peril.

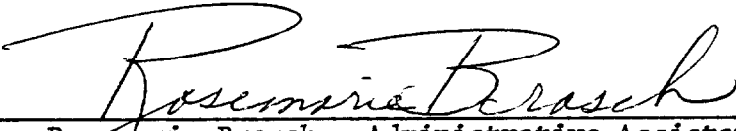
A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of April, 1982.