

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31627
Docket No. MW-31900
963-94-3-237**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The dismissal of Track Inspector B. Norman for alleged “. . . violation of Rule 570 of the Safety Rules and General Rules . . .” on March 11, 1992 was arbitrary, capricious and in violation of the Agreement (System File S-P-474-T/1MWB 92-08-14AG).

2. As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with seniority and all other rights unimpaired, his record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered....”

FINDINGS:

The Third 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 convicted of first degree manslaughter and sentenced to 41 months in jail. He was incarcerated beginning November 1991. On February 11, 1992, Carrier served notice on Claimant of an Investigation to be held on February 24, 1992, concerning, "your alleged failure *to* protect your assignment as Track Inspector at Parkwater, Washington, on February 10 and 11, 1992."

Claimant, though his attorney, requested that the Investigation be postponed. Carrier denied the request and held the Investigation, as scheduled. Claimant did not appear at the Investigation because he was incarcerated. However, he was represented by the Organization. On March 11, 1992, Claimant was dismissed from service.

The Organization contends that Claimant was denied a fair hearing because Carrier's denial of his postponement request precluded him from attending the Investigation. The Organization further contends that Claimant should have been granted a leave of absence and that dismissal was arbitrary and capricious.

Carrier contends that Claimant's incarceration was not a valid reason for postponing the Investigation. Carrier further argues that incarceration is not a valid reason for a leave of absence and does not justify an employee's failure to protect his assignment. Carrier contends that dismissal was appropriate under the circumstances.

The Board has examined the record carefully. Prior awards are clear and consistent that a Carrier is not required to grant a postponement and does not act improperly when it holds a hearing even though the charged employee is unable to attend because he is incarcerated. See, e.g., Third Division Award 27081; Second Division Awards 11201, and 11185; Public Law Board No. 5290, Award 1.

There is no dispute that Claimant failed to protect his assignment on February 11 and 12, 1992, and that the reason for his failure to do so was his incarceration. The evidence further showed that, due to incarceration, Claimant would probably not be at work for some time. Prior awards have consistently held that incarceration does not excuse an employee's failure to protect his job assignment. See, e.g., Third Division Award 25894; Public Law Board No. 2206, Award 3. It is also clearly established that a Carrier does not act improperly when it refuses to grant an employee a leave of absence for his period of incarceration. See, e.g., Second Division Award 11185.

Accordingly, we conclude that Carrier's decision to dismiss the Claimant is supported by substantial evidence and is not otherwise arbitrary, capricious or improper. The claim must be denied.

AWARD

Claim denied.

ORDER

This Board, **after** consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of August 1996.