

PUBLIC LAW BOARD NO. 1760

Award No. 7

Case No. 7

File No. MW-MPR-76-2

Parties Brotherhood of Maintenance of Way Employees

to and

Dispute Norfolk and Western Railway Company

Statement of Claim: 1. Carrier improperly and unfairly assessed Section Laborer D. P. Hernandez seven days' suspension because of his absence from work on Monday, February 2, 1976, in violation of Rule 20 of the effective Agreement.

2. Carrier shall now reimburse Claimant Hernandez for the time lost due to this unfair and improper suspension referred to in Part 1 of this Claim.

Findings: The Board finds, after hearing upon the whole record and all evidence, that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated February 2, 1976, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearings held.

Claimant Laborer was suspended from service for seven (7) days for his absence from service on Monday, February 2, 1976, and his failure to comply with verbal instruction given him on Wednesday, February 4, 1976.

The requested formal investigation held on March 9 resulted in the discipline imposed being sustained.

The Board finds no procedural error attaching to this investigation. Claimant was accorded due process. The absence of an alleged witness rests solely with Claimant. Raising such an issue at the end of the investigation, particularly after having failed to request such witness prior to the investigation, or when it opened, provides the basis for concluding that Claimant waived any right thereto.

The record supports the conclusion that Carrier acted arbitrarily. It chose to believe Claimant's Foreman. Foreman Shoemaker's testimony was vague and indefinite as to testimony concerning conversation between he

and Claimant. Such was best expressed by "I don't remember." However, said Foreman's testimony was clear and precise as to testimony on the conversation between him and his Supervisor, Roadmaster Stewart. Claimant testified that he received permission from said Foreman on January 30th, to be off the afternoon February 2. This conversation and permission was corroborated by Claimant's fellow worker, witness Haydon. Thus, it is more credible to believe that Claimant was given permission to be off the afternoon of February 2 than to believe he had no authority whatsoever, as was alleged.

Consequently, although the notice was three months old, and it was the first one issued despite other employees being absent without authority, it is somewhat understandable why Claimant refused to sign the notice which provides:

"NOTICE

"Date _____

"

Name

"It is noted that you were absent from work on _____ without gaining permission from or otherwise notifying your superior or other proper authority.

"Any further absenteeism may result in disciplinary action.

Supervisor

At best, such is a Notice of Warning. Any need to sign same remains dubious as to why. However, Carrier, if there be a real need, is within its right to so require. In the circumstance, Claimant's refusal, because he had permission, cannot be construed to be other than a technical insubordinate act. He refused to sign something he believed to be wrong to so do.

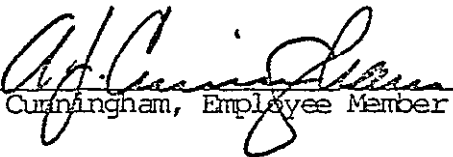
Yet, the record shows that Claimant failed to report for work the morning of February 2. He was therefore off without authority during that time. The Board holds that Claimant had a duty that when he knows that he is, or will be, detained from work to contact his supervisor as soon as possible. Here, he failed to so do.

In the circumstances, we believe that the discipline imposed should be


reduced to two days.

Award: Claim disposed of per findings.

Order: Carrier is directed to make this Award effective within thirty (30) days of date of issuance shown below.


A. J. Cunningham, Employee Member


G. C. Edwards, Carrier Member


Arthur T. Van Wart, Chairman
and Neutral Member

Issued at Atlanta, Georgia, May 25, 1977.