

PUBLIC LAW BOARD NO. 1760

Award No. 8

Docket No. DET-75-4

Parties Brotherhood of Maintenance of Way Employees

to and

Dispute Norfolk and Western Railway Company

Statement of Claim: Claim on behalf of Extra Gang Laborer Dwain L. Marshall that the 45-day disciplinary suspension assessed against him for failure to perform and complete his assigned duties on September 4, 1975, be removed from his record and that he be paid for time lost beginning September 5, 1975, through September 12, 1975, when he became furloughed.

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 was working as an Extra Gang Laborer attached to Rail Force 4 on September 4, 1975. He was assigned a work task to perform by his Supervisor, Assistant to Division Engineer, Ralph Zonno. Said Supervisor apparently concluded that the manner in which the work assigned was carried out and a subsequent action of Claimant gave Mr. Zonno cause to dismiss Claimant from Carrier's service on September 4, 1975.

Claimant's General Chairman, on September 8, wrote to the Division Engineer "on behalf of Dwain Lamont Marshall....we are requesting a hearing under Rule 30..., who was dismissed from service on September 4, 1975, by Ralph Zonno...without just and reasonable cause and was not notified at the time why he was being dismissed..."

Claimant received the following notice which, in pertinent part, read: "You are hereby notified to report to..., for a hearing at your request to determine your responsibility and circumstances concerning your dismissal..."

Claimant, as a result of the hearing held on October 1, 1975, was notified that "For your responsibility in failing to perform and complete assigned duties as a Laborer, you are hereby assessed forty-five (45) days actual suspension beginning September 4, 1975, through October 18, 1975."

The Employees allege that Rule 20 was violated and interposed several procedural objections, such as that Claimant was never advised of a reason for his dismissal on September 4, 1975, that Claimant was never charged for purposes of the investigation, that a fair and impartial hearing was not held, that prejudicial data and irrelevant evidence was admitted over objection and that Carrier not only failed to prove its case but alleged that Claimant had been insubordinate which allegation had never been charged or even discussed in the investigation.

Rule 20 - "Discipline and Grievances" in part provides:

(a) An employee who is disciplined or dismissed without first being given a fair and impartial hearing will, on written request (made either in person or through a duly authorized representative of the Brotherhood of Maintenance of Way Employees) to the immediate supervisor, made within ten (10) calendar days of advice of discipline or dismissal, be given a fair and impartial hearing within ten (10) calendar days after receipt by the supervisor of such request...

(c)...Employees disciplined or dismissed will be advised of the action in writing if requested.

The Board finds that the record supports the conclusion that Rule 20 was indeed violated. Implicit in Carrier's right to discipline or dismiss an employee under Rule 20 without first being given a hearing, is that just cause exist and that such disciplinary action be predicated thereon. Further, that the employee affected thereby is to be given the reason therefore. However, it is to be noted that such reason need not be in writing unless so requested. The causal connection between the disciplinary action undertaken and the subsequent hearing, contemplated under Rule 20, requires that the basic tenets for a fair and impartial hearing be observed if a hearing is requested. Such was not done in the instant case.

The record herein supports the conclusion that reasonable doubt exists as to whether Claimant was given the reason on September 4, 1975, for his dismissal from service. It is clear that Claimant was not put on notice by reason of the investigation notice sent him as to what he had to defend against. Said notice was too vague and indefinite as to permit Claimant proper preparation as well as a determination as to what witnesses, if any, that may have been necessary to his defense.

Such error acts as a bar to Carrier's right to discipline and negates any discipline imposed.

The transcript reflects that Claimant, a laborer with some three (3) months actual service, was for the two weeks preceeding the date of incident herein, attached to Rail Force 4, a track gang. He was assigned, among other duties, to set spikes which required placing track spikes in the pre-drilled holes in a tie and thereafter tapping same with a hammer in a sufficient distance to permit an automatic spiking machine to hammer same down into the track and tie plate.

Central to Claimant's dismissal on September 4 is the following:

Q. 28 "Mr. Zonno, will you please state what Mr. Marshall done to prompt you to remove him from service?

A. In the process of setting these spikes, he took no effort in setting them straight repeatedly been (sic) instructed to do so to no avail. He then left his position, went to a weeded area and returned hammerless. He then proceeded to the head of the column or gang which I followed when I caught up with him he was standing doing nothing and I asked him why he had left his assigned position. He told me that a fellow worker had taken his hammer. I did not witness any co-worker in the area that he had left. I then told him I thought he had better go in or I think I said you are fired, go in."

Q. 33. "Mr. Zonno, have you had problems with Mr. Marshall performing his assigned duties prior to this?

A. Yes, Sir."

Q. 35 "Mr. Zonno, had you had trouble in the AM of September 4 with Mr. Marshall performing his assigned function?

A. Yes, Sir."

Q. 36 "Mr. Zonno, will you please state what circumstances surrounding this problem?

A. The process of setting the track spikes for the air spikes they were set crooked not deep enough or not at all."

Q. 37. "Mr. Zonno, I note on Form G35 which is employee status report indicating Mr. Marshall was recalled from furlough on August 18, 1975. Had between the period of August 18, 1975, and September 4, 1975, Mr. Marshall been setting spikes?

A. Yes, Sir, he had various duties and I had seen he didn't fit in most any job that I gave him."

Q. 65

A. "Maybe fit is not the word to use, it seemed that he left most of the duties I gave him. He never would refuse any of the orders but seemed that he couldn't stay in position."

Q. 76

A. In the manner in which he left any given duty, I would agree with you he left definitely most jobs I gave him without permission."

Q. 85 "Mr. Zonno,...was Mr. Marshall given every opportunity to improve his quality of work and his work habits?

A. Mr. Hammons early in the investigation stated that he could only be concerned with the actual day of firing. If he does not have any objection, I did talk to Mr. Marshall twice before the actual day of firing to no avail."

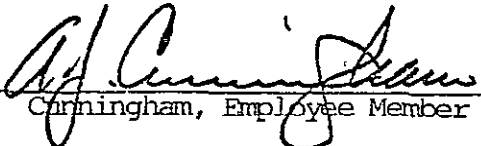
Claimant's testimony completely contradicted his accuser. It appears to the Board that Claimant was deemed to have been a poor worker with bad work habits, having a tendency towards not working and who, because he failed to correct such work habits, was considered incorrigible. Carrier summarized such a view of Claimant, after the investigation, with "failing to perform and complete assigned duties as a laborer." Unfortunately, Supervisor Zonno failed to express such a view to Claimant when he dismissed Claimant from service. Nor was such a view expressed to Claimant as a purpose of the October 1, 1975 hearing when Carrier gave him its Notice of Investigation. Consequently, the merits of the investigation become meaningless to pass upon.

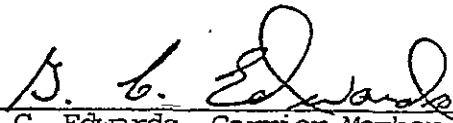
The introduction of a police record concerning an incident involving Claimant which occurred back in 1974, at a time when he was furloughed served to clutter the record with irrelevant, immaterial and incompetent evidence. It also served to point up the forgotten maxim that evidence is weighed and not weighted. That evidence undoubtedly misled one reviewing officer to conclude that Claimant had been insubordinate.

The Board, in the circumstances, is impelled to sustain the claim.

Award: Claim sustained.

Order: Carrier shall 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.