

PUBLIC LAW BOARD 1837

Case #10

AWD - 10

(MW-MUN-75-15B)

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees  
vs.  
Norfolk and Western Railway Company

STATEMENT OF CLAIM:

1. Carrier violated the effective Agreement of April 7, 1975, by suspending Claimant from service unfairly and unjustly. Under date of August 4, 1975, Carrier finalized this action by terminating Claimant from service.

2. Claimant J. L. Taylor shall be compensated for the time loss period 4-7-75 through 11-14-75. Also, all seniority and other rights during this time accruing to Claimant, and shall be returned unimpaired.

FINDINGS: This Board upon the whole record and all the evidence finds that:

The carrier and employee involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as amended.

This Board had jurisdiction over the dispute involved herein.

OPINION:

The events germane to this case occurred during the period of time between March 27 and April 7, 1975. The Claimant, a Section Laborer, with a little less than a year's service at that time, reported for work on March 27, 1975. The events of that day are in dispute and are important to the outcome of this case. According to the Claimant, he had an earache, but

reported to work anyway. Upon arrival he found that the gang would be replacing rail which would normally necessitate riding a motor car to the site and would entail working out in the weather. The Claimant contends he brought the circumstance of his earache to his foreman's attention, who advised him he (the Claimant) would be riding in his (the foreman's) personal car to the work site. The Claimant contends he still did not want to work, given the need to be out in the wind, advised the foreman of as much; the Claimant purports that his foreman acceded to his request to be excused from work. After loading tools in the foreman's car, the Claimant left the job site for home, but before doing so, he was asked by another employee of the reason for his leaving, whereupon the Claimant related his purported ear problem. This conversation was substantiated on the record by the other employee.

According to the foreman, the Claimant, upon reporting for work on March 27 and learning that the gang was to change out defective rail that day, at a work site somewhat distant from the reporting site, averred that he "was not going to ride the motor car that far." The foreman then offered to let the Claimant ride with him in his personal car, to which the Claimant purportedly said if the gang was going to change out rail that day, he was going home -- and did so.

The Claimant did not report back for work until April 7,

1975, at which time he brought a "Return to Work" statement from a physician dated April 1, 1975 that "[the Claimant] received treatment in my office today, April 1, 1975 and will be able to return to work April 7." He offered a copy of this statement to the foreman, who refused it, advising him he was (1) "being held out of service, pending investigation" (according to the foreman's testimony) or (2) he "was out of service" (according to the Claimant's testimony).

The Organization brought an objection to this action to the Carrier in a timely manner and was advised that the Carrier considered the Claimant as having "voluntarily quit," thereby foreclosing any obligation on its part for an investigation or a showing of justification for the Claimant's removal. The Carrier's initial position that the Claimant had voluntarily quit was eventually altered, and an investigation/hearing held on July 21, 1975. Thereafter, the Claimant was advised that the Carrier would uphold his out-of-service status. This position was modified in that the Claimant was reinstated, without back pay, on November 14, 1975. This case involves a claim for back pay and benefits from April 7 to November 14, 1975.

As with Case #9 (MW-MUN-75-15A -- Simpson) which has been disposed of by this Board, the Action of the Carrier and particularly the testimony of the Claimant's foreman makes manifest that the severing of the relationship between the Claimant and the Carrier was not actually construed as a voluntary quit,

based upon the eventual position of the Carrier. Thus, the case depends upon an assessment of the Claimant's actions on March 27 and thereafter to determine if a showing has been made that he did not meet his obligation to notify the Carrier to his claimed illness.

This Board cannot resolve contradictory assertions to events that occur where corroboration by competent witness is not possible. Under such conditions, circumstantial evidence may be found to carry at least some weight. Here, the record indicates -- by testimony of another employee (Rodriguez) -- that he queried the Claimant upon his departure from work on March 27, 1975 and was advised by the Claimant that he had an earache. This coupled with the Claimant's original disdain to ride the motor car gives credence -- circumstantial though it might be -- to his having a medical problem on March 27. In contrast, the Carrier produces no evidence to buttress its assertion that the Claimant arbitrarily refused to work that day due to the duties involved. It is also noted that the foreman's testimony that the Claimant made no effort to contact the Carrier past the March 27 incident until he returned on April 7, 1975 is raised to doubt; the Organization produced a record generated by the telephone company showing that a call was made from the Claimant's home to the Carrier offices prior to his start time on April 2, 1975. The fact that the foreman may not have been apprised of such call makes it no less a fact. Finally, the

Claimant produced a doctor's excuse upon reporting for work on April 7, 1975, which was refused by the foreman. The foreman asserts, on the record, that the doctor involved issues medical excuses even when no illness exists and thus the credibility of the Claimant's excuse was in question. It is not this Board's obligation or authority to pass judgment on the validity (or lack thereof) of doctor's statement; we are obliged to conclude that it was executed and presented according to procedure.

This Board also notes that the Carrier has charged the Claimant with being absent several days when, in point of fact, he would not have worked anyway. After his departure on March 27, the Claimant was charged with failure to work on March 28, 29 and 30 -- none of which were days when either work was performed and/or were regularly scheduled off-days for the Claimant. The Claimant normally would have worked March 31, but did not and did not call in. On April 1, according to the doctor's slip, he was examined and told to remain off work until April 7. On April 2, prior to the starting of his shift, the Claimant called the Carrier's facility. On April 7 he reported to work with the doctor's slip. It may be that the Claimant was lax in getting back in touch with the Carrier, after leaving work on March 27, but given that the next three days were "off-days" anyway, his failure to do so can hardly be considered a showing of a gross disinterest in his job. The Carrier contends that its actions in this case

are based upon the Claimant's poor record of attendance and the fact that he regularly laid off from his job. That is not the matter before this Board and must be dealt with by the Carrier in its own fashion; we are obliged to assess the circumstances for the period of March 27 to April 7, 1975. In so doing, we conclude that the Carrier erred in its handling of this matter and that the Claimant is entitled to compensation, in whole or part, for the period he was held out of service between April 7 and November 14, 1975. We remand the matter of the level of such compensation back to the parties for ninety (90) days for consideration and for them to attempt resolution of this matter. We direct that: (1) such deliberations consider whether or not the Claimant contributed to the problem by not contacting his employer on March 31 or April 1, 1975, relative to his condition; (2) any earnings or other compensation received by the Claimant during this period be used to offset monies he may be deemed to be deserving in this regard; and, (3) any such compensation will be computed at the regular rate for regular work hours in existence at that time.

AWARD:

Claim is affirmed as set out in the Opinion.

*James F. Scarce*

James F. Scarce  
Neutral Member

*G. C. Edwards*

G. C. Edwards  
Carrier Member

*Fred W. Wurpel, Jr.*

Fred Wurpel, Jr.  
Organization Member

Dated this 1 day of February, 1950 at Wilmington, Delaware