

## PUBLIC LAW BOARD 1837

(MW-BVE-77-46)

Case No. 9

PARTIES TO DISPUTE:

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

STATEMENT OF CLAIM:

1. The carrier violated the effective Agreement dated February 1, 1951 when, on April 5, 1977, it unfairly and unjustly removed claimant Albert Burton from service.

2. The claimant be restored to service with seniority, vacation and all other rights unimpaired and that he be paid for all monies loss suffered by him, beginning April 5, 1977 and up to the date he has been reinstated.

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.

OPINION:

The record shows that the Claimant held "dual" or "overlapping" seniority in two seniority districts: the "Ft. Wayne" and "Lake Erie" districts. He was on furlough when, by letter of recall receipted March 18, 1977, by the Claimant, he was required to report to the R-3 Gang (Ft. Wayne Div.) within 10 days in order to comply with the provisions of Rule 5 (a) -

Retention of Seniority in Force Reduction -- reproduced,  
in pertinent part, as follows:

"...Employees failing ... to return to service within ten days for a regular bulletined position after having been notified in writing by their superior officers will forfeit all seniority unless a leave of absence is obtained under the provisions of this agreement."

The Claimant did not so report. The record also indicates that by letter dated March 25, 1977, the Carrier notified the Claimant to report to work to the T-5 Gang (Lake Erie), which he did within 10 days. He worked a day or so before being removed from service for failure to comply with the initial letter of recall.

According to the Carrier, the provisions of Rule 5(a), heretofore quoted, are "self-executing" and the Claimant essentially dismissed himself by failure to comply. According to the Organization, the Claimant was ill, under a doctors care and unable to comply with the initial recall letter, thus coming under the provisions of Rule 49 - Leave of Absence, Section (a): "During personal illness or physical disability employees will be granted leave of absence until able to return to work." There is no evidence on the record of a doctor's statement in that regard.

We find the Organization's asserted defense of the Claimant's illness or under a leave of absence unsupported

on the record. We are inclined, however, to give the Claimant the benefit of the doubt over the confusion raised by receipt of two recalls in which the 10-day reporting requirement overlapped. An argument could reasonably be made that the Carrier would know two such recalls were issued and, presumably, he had a choice.

While we shall not entertain a proposal for back pay in this case, we shall order that the Claimant be reinstated to his position with full seniority.

AWARD:

Claim is affirmed to the extent set out in the Opinion, to be effective within 10 days of receipt of a full executed AWARD.

James F. Scarce  
James F. Scarce, Neutral Member

G. C. Edwards  
G. C. Edwards, Carrier Member

W. E. LaRue  
W. E. LaRue, Organization  
Member

Dated at Atlanta, Ga this 12 day of Aug, 1980