PUBLIC LAW BOARD 1837

(MW-MUN-76-14)

Case No. 40

PARTIES TO DISPUTE:

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

STATEMENT OF CLAIM:

1. The Carrier violated the effective Agreement dated February 1, 1951, when it withheld claimant James Kelly from service without a fair and impartial hearing.

2. For the above-cited viflation the Carrier now be required to compensate theclaimant for all time lost, between the period from June 21, 1976, until he was notified by the Carrier to report for duty on September 7, 1976.

FINDINGS:

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

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

This Board has jurisdiction over the dispute involved herein.

OPINION:

Beginning June 21, 1976, the Claimant, an Extra Gang Laborer, was away from duty. Such non-work status continued until September 7, 1976. As of that date, the Claimant was returned to

service after intervention by the Organization on his behalf.

Varying, conflicting renditions of the events that prompted the Claimant's departure prevail in this case: one such version (by the Claimant) was that he had sustained an on-the-job injury which necessitated his non-work status. Another version, by the Claimant or Organization, was to the effect that the Claimand and supervisor had a disagreement and he was taken out of service. The Carrier's version was that the Claimant left active duty on his own account without explanation.

None of these versions is fully satisfactory. If the Claimant sustained an on-the-job injury, the supervisor was obliged to complete necessary forms and report his status to higher authority. Conversely, the Claimant should have been able to substantiate such an injury. If, in reference to version two, the Carrier had suspended or dismissed the Claimant, he should have been able to produce some proof of such action; or, assuming such formal action was not taken, it was incumbent upon the Claimant to protest such action through the grievance procedure. (The Organization contends error on the Carrier's part for not having scheduled a formal hearing within ten days from June 21, 1976; this presumes a disciplinary action was taken -- which the Carrier denied.) If, on the other hand, version three (as asserted by the Carrier) prevailed, why the delay on its part

in ascertaining the Claimant's status?

On a review of the record as a whole, this Board finds no support for the contention that the Claimant was removed. We are less convinced that his withdrawal was voluntary and without some motivation, however. If it can be demonstrated that the Claimant suffered an on-the-job injury, which prevented his performance and for which he was required to receive treatment, then a claim for compensation for that time during which the Claimant could have worked after treatment would be meritorious and necessary to comply with applicable Regulations. The burden must issue to the Claimant/Organization to establish such a basis, however.

This Board remands this matter back to the parties for consideration. If such action is not commenced within thirty days from receipt of this Opinion and Award, it shall be held null and void.

AWARD:

The claim is denied except where a showing can be made of non-compliance with applicable Regulations insofar as on-the-job injury is concerned.

James F. Scearce
Neutral Member

G.C. Edwards
Carrier Member

W. E. LaRue
Organization Member

Dated at _____ this ___ day of _____

AMENDMENT TO

Case Number 40

(MW-MUN 76-14)

This case was remanded back to the parties for consideration but, despite efforts to reconcile differences on the Claimant's status, the parties were unable to reach such accord and now asks this Board to dispose of this matter.

On review of this case, we find that sufficient doubt exists that the Claimant willingly left duty without some compulsion to do so. On the other hand, we find no proof that a disciplinary action was involved. In sum, we conclude that the Claimant's uncertainty of status was predicated upon incomplete communication on both his and the supervisor's part. Under such circumstances we order compensation for the Claimant from August 17, 1976 until his return to duty in September of 1976 at appropriate straight-time rate at that time. The August date represents the date when a positive step was taken to determine the Claimant's status.

James F. Scearce
Neutral Member

E. N. Jacobs, Jr.
Carrier Member

William E. LaRue 3/8/82
William E. LaRue
Employee Member

Dated 4/24/82 at Atlanta, Ga

AWD 40-1837