

PUBLIC LAW BOARD 1837

Case #9

(MW-MUN-75-15A)

AWD-9

PARTIES TO DISPUTE:

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

STATEMENT OF CLAIM:

1. Carrier violated the effective Agreement, on September 12, 1974, by suspending Claimant from service, account of excessive absenteeism. This suspension was made final under date of August 4, 1975.

2. Claimant B. D. Simpson shall be reinstated to Carrier service, be compensated for all lost wages, and have all seniority and other rights returned unimpaired.

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 had jurisdiction over the dispute involved herein.

OPINION:

The Claimant was a Section Laborer with a hire-in date of August 1, 1973. According to the Carrier, he failed to report for duty from September 10 through 13, 1974, and did not furnish any acceptable evidence of excuse. On September 14, 1974, the Claimant was advised by his foreman that he was considered a "voluntary quit." According to the Claimant, he contends he wrote the Carrier a letter a few days thereafter requesting an investigation in this regard; the Carrier alleges

no such letter in his files. The Claimant also asserts, according to the record, that he apprised the Organization of the Carrier's actions at the same time and asked it to intercede on his behalf. In any case, no further action is indicated in this matter until April 17, 1975 -- some seven (7) months later -- when a formal request for an investigation was raised by the Organization. After further exchanges of correspondence and discussion, the Carrier acceded to the request for an investigation, which was held on July 21, 1975. While the Carrier initially affirmed its decision to remove the Claimant, it eventually reinstated him on November 17, 1975 without back pay. The claim herein involves the Carrier's liability, if any, for back pay and benefits from September 14, 1974 to November 17, 1975.

After initially contending that the Claimant's departure from employment was self-initiated, i.e. he abandoned his position or voluntarily quit, the Carrier altered this position claiming it removed him for being absent without approval and for an unacceptable attendance record over the previous ten (10) months and particularly the last month or so before his discharge. The Carrier asserts a procedural error on the part of the Organization in that it did not present a claim or grievance "within 60 days from the date of the occurrence on which the claim or grievance is based" as required under Article V of the

August 21, 1954 Agreement between the parties. Instead, the Carrier points to the receipt of a letter on April 17, 1975, some six (6) months after the events of September 14, 1975 as the initial action in this regard.

The Organization contends that the Claimant was improperly held to be absent without approval for the September 10-13, 1974, period because he was ill or physically disabled on such dates. The record indicates that the Organization offered into evidence at the July, 1975 hearing a "Disability Certificate" for the September 10-13, 1974 period, executed by a physician and dated September 13, 1974. It points to Rule 49 - Leaves of Absence - of the applicable Agreement to support its claim that the Carrier is obliged to approve absences due to illness or physical disability:

"(a) During personal illness or physical disability employees will be granted leave of absence until able to return to work."

The Organization also cites Rule 22 - Discipline and Appeal (a) which states(in pertinent part):

"An employe who has been in service more than 30 days shall not be disciplined or dismissed without fair and impartial investigation, at which investigation he may be assisted by representatives of his choice. He may, however, be held out of service pending such investigation, and such holding from service shall not be deemed a violation of the principle of fair and impartial investigation and appeal. The date for the investigation shall be fixed within ten days after the date charged with the offense or held from service...." ...


in its assertion that the Carrier erroneously withdrew the Claimant from service without affording him an investigation and hearing guaranteed under this provision.


At the outset, it should be noted that the record of this case does not support the Carrier's contention that it acted on the basis of a resignation by the Claimant -- presumed or otherwise. Testimony by the Claimant's immediate supervisor leaves little doubt that he considered the Claimant as "removed" for failure to meet his employment obligations. On the other hand, the record does not give credence to the Claimant's assertion that he presented to the Carrier a letter dated September 23, 1974 requesting a hearing on his being held out of service. Since the Carrier denies receipt of this letter, the burden is upon the Organization or Claimant to substantiate the contention that this letter was submitted to the Carrier in a timely manner. Likewise, the Claimant must do more than merely state on the record that he apprised the Organization of his circumstance and asked it to intervene on or about September 23, 1974. Both claims require a showing of proof: assertions unsupported by corroborating testimony where viewed in the light of succeeding events, which also raise a doubt, must be held to a stern test of credibility. The Organization made a clear showing that the Carrier committed a procedural error by not conducting an investigation as required under Rule 22.

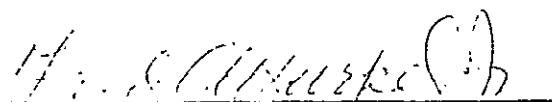
Failure on the part of the Carrier to conduct such a proceeding is not the controlling circumstance here, however. There is nothing in the applicable provision which makes an error of this sort self-executing in its relief: the Claimant or Organization must utilize the provisions of the Agreement which sets forth how and when a grievance must be initiated and executed. To find otherwise would be to invite an error such as here to be allowed to extend over a protracted period of time and then be raised with a demand for back pay for the entire period involved. We do not conclude that this is the intent of the applicable Rule. What appears to be most apparent is that the Claimant failed to either act on his own motion or to advise the Organization in a timely manner necessary to ensure his rights under the Agreement.. Consequently, the claim herein is defeated on the procedural flaw of time limits, even though it might be argued that the Carrier committed the initial error of not affording the obligatory investigation/hearing. While we find that this matter is properly disposed of based upon the untimely processing of the grievance under the applicable Agreement, we must also conclude that Rule 49 ascribes some burden upon the absent employee to alert the Carrier of the occurrence, basis and reason for an absence, and to do so in a time period reasonably related to the absence.

AWARD:

Claim is denied.


James F. Searce
Neutral Member


G. C. Edwards
Carrier Member


Fred Wurlpel, Jr.
Organization Member

Dated this 1st day of Feb. 1980 at Cleveland, O