

PUBLIC LAW BOARD NO. 1838

Award No. 1

Case No. MW-BL-76-100

Parties Brotherhood of Maintenance of Way Employees
to and
Dispute Norfolk and Western Railway Company

Statement of Claim: 1. Carrier violated the effective Agreement when it unfairly and without just cause dismissed Section Laborer R. E. Walker from Carrier's service on June 29, 1976.
2. Claimant shall be reinstated with pay for all time lost and with seniority and vacation rights unimpaired.

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 March 1, 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 had been employed as a Section Laborer for four (4) years prior to his dismissal, June 28, 1976, by Roadmaster McGinnis Hale. The Roadmaster confirmed such dismissal July 2, 1976, specifying the reasons therefor as:

1. Unauthorized absence from duty the afternoon of June 25, 1976
2. Acts of insubordinate conduct June 28, 1976, in threatening bodily harm, intimidated and used profane and obscene language towards Roadmaster Hale.

An investigation, as requested, was held in connection therewith and Claimant was advised, August 23, 1976, by the Division Engineer-Maintenance, that he was dismissed for violation of Rule 26 and his insubordinate actions of June 28, 1976.

During the appellate process of this claim Carrier's highest designated officer offered in November 1976 to reinstate Claimant on a leniency basis without pay subject to his satisfactorily passing a return to

work physical examination. Carrier thought the Brotherhood understood that any question on "time lost" could be further handled. The Brotherhood, in any event, would not accept such offer. Carrier offered, December 8, 1976, to mitigate the discipline imposed without pay subject to claimant's passing the return to service physical examination. Carrier thereafter wrote Claimant, December 21, 1976, advising him that the discipline had been mitigated, that he was to return to work without pay and that he was to report for a physical examination on December 29, 1976.

An attorney wrote Carrier, but not the Brotherhood, on December 27, 1976, alleging therein that Claimant had "consulted" with him concerning Claimant's dismissal. Said attorney advised, among other things, that Claimant "will return to work at anytime so long as it is understood that Mr. Walker will not lose his right to maintain his claim for what we consider a wrongful discharge." Carrier advised said attorney, January 21, 1977, that there was some misunderstanding on his part, that the decision to mitigate did not preclude Claimant or his duly authorized representative from handling the claim of time lost up to the date that Claimant Walker was instructed to report for a physical examination.

Rules 426-427 are Carrier's conduct rules, while Rule 26 -- "Detained from Work" -- is a contract rule which requires, among other things, that an employee will obtain permission from his foreman to be absent.

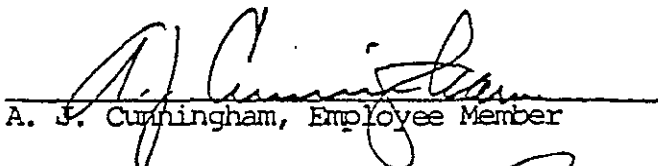
The majority of the Board, as to the incident of June 25, 1976, is impelled to conclude that the evidence in connection therewith is more clearly persuasive of the view that Claimant was at least entitled to the benefit of doubt as to whether he specifically had told his acting foreman, Ben Smith, that he, Claimant, was going to the dentist about an ulcerated tooth, than the view that Claimant had not told him. Claimant states unequivocally that he had, while the foreman expressed doubt as to whether he had. Additionally, Claimant's actions, supported by the testimony of the remaining members of his gang (two), provides the more credible basis for reasonably concluding that Claimant had been given tacit permission by Acting Foreman Smith.

The causes given for the second basis of discharge appear to impinge primarily upon the Roadmaster's allegation that, on June 28, 1976, Claimant "ran to his truck getting a pistol out of the front seat, then laid the pistol back in the seat, jumped in his truck and left." Clearly, such an irreponsible, foolhardy and dangerous act, if true, would represent an assault upon another. If proven, such an act, which represents a threat to one's safety and well being, is punishable by civil as well as industrial authority. However, this record does not provide the necessary support for concluding that such a serious act had, in fact, occurred. Claimant's presence on the property on June 28, after being off with permission to have a tooth extracted, resulted from the request of his immediate Supervisor, Foreman Muncey. The profanity, which is held to be not obscene, was initiated by the catalyst in the incident, Roadmaster Hale. The testimony of witnesses, other than that of the Roadmaster, precludes the acceptance of such as a reasonable basis for discipline. The Board thus finds that Carrier's conclusion as to Claimant's culpability represents an abuse of its discretionary right. In the circumstances here involved, such is reversed.

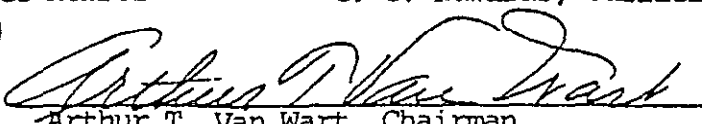
The Board finds, as to the pay for time lost aspect of the herein claim, that liability therefor is limited to the period ending December 29, 1976. Claimant's discipline was mitigated December 8. However, in view of any possible misunderstanding that may have ensued as to Claimant's right to clarify same and to permit him to pursue the question of pay for time lost, the Board finds that Claimant was constructively restored to service and instructed to report thereto on December 29, 1976. Consequently, any time lost thereafter is held to be by Claimant's choice and was at his own peril.

Award: Claim sustained as per findings.

Order: Carrier is directed to make this Award effective on or before June 1, 1978.


A. J. Cunningham, Employee Member


G. C. Edwards, Carrier Member


Arthur T. Van Wart, Chairman
and Neutral Member

Issued at Wilmington, DE, May 1, 1978.