

PUBLIC LAW BOARD NO. 1838

Award No. 79

Case No. 79

Carrier File MW-RO-82-4

Parties Brotherhood of Maintenance of Way Employees

to and

Dispute Norfolk and Western Railway Company

Statement Claim on behalf of H. Smith for reinstatement with pay for all
of time lost, seniority and vacation unimpaired.
Claim

Findings: The Board, after hearing upon the whole record and all evidence, finds 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 hearing held.

Claimant, with a seniority date of July 17, 1981, was working on June 2, 1982, with Section Gang #1 in the vicinity of Park Street, Roanoke. Claimant left the property at approximately 3:30 PM. Under date of June 4th Claimant was given notice by letter dismissing him from Carrier's service for leaving his assignment without permission.

Claimant, through his representative requested an investigation, and said investigation was scheduled for and held on June 15, 1982. As a result of the investigation Claimant was notified under date of June 29, 1982, that his dismissal was reaffirmed.

Organization advances the appeal on behalf of Claimant on the premise that the discipline should be rendered void because it was founded upon the uncorroborated testimony of one witness. In support

thereof Organization refers to Award 39 of SBA 374 which, in pertinent part held:

"We will sustain this claim for one reason: No man should be found guilty of a disciplinary charge solely on the unsubstantiated evidence of a sole witness."

And Award No. 18551 (O'Brien) which, in pertinent part, held:

"We are forced to conclude that the dismissal of Claimant was not supported by substantive evidence. The dismissal was based on testimony totally uncorroborated. The decision stemmed from nothing more than surmise and speculation and cannot be allowed to stand."

Carrier, in support of its case, points to the uncontradicted testimony of Terminal Supervisor Steele, who testified that he first noticed Claimant Smith's absence at approximately 3:30 PM. Supervisor Steele then contacted Claimant's two immediate supervisors, Assistant Foremen Twine and Abbott, and inquired of Claimant's whereabouts. Neither of the foremen knew where Claimant had gone.

The circumstances surrounding the inquiry concerning Claimant's whereabouts arose when it was determined that the gang would have to work overtime in order to complete a particular work assignment. It appeared from Claimant's own testimony that Claimant had other, more pressing plans.

During the hearing Claimant testified, in pertinent part:

"Q. Mr. Smith, did you have permission to leave at 3:30?

A. Well, hadn't nobodywell, I didn't have exactly what you would say permission to leave at 3:30, but I had something to do after I got off work, you see. It looked like to me if he wanted me to work over when I came by and waved my hand indicating that I was leaving. He had time then to tell me we were going to work over instead of letting me leave and then when I came back and tell me I am fired."

Q. Mr. Smith, did you tell anyone you were leaving?

A. No sir. That's normal procedure.

Q. Mr. Smith, did anyone say that the work you were doing was completed?

A. There didn't nobody say the work was completed.

* * *

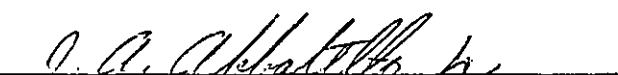
In view of Claimant's own admissions, the Board must conclude that sufficient credible testimony was adduced at the hearing to support Carrier's conclusion. We deem it appropriate to conclude that no reasonable minds may differ that Claimant's self-serving testimony that he walked by Supervisor Steel when Steel was in the middle of an important telephone call and preoccupied therewith, waving to him without saying anything, while Claimant was coming from the men's room and exiting the building, did not constitute permission to leave early.

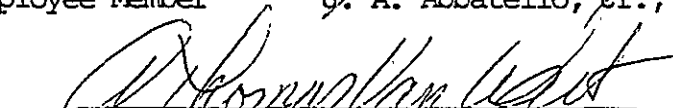
Claimant had approximately eleven (11) months of seniority. During that time he accumulated no discipline record. In view of the length of time that Claimant has been separated from service we are satisfied that the discipline has served its purpose to both punish Claimant for his offensive behavior, and put other employees on notice that like behavior will be dealt with promptly and firmly. Accordingly, we will direct that Claimant be returned to service, but without pay, subject to return to service physical. Further, we direct that Claimant meet with his union representative and his supervisor to have the circumstances of his restoration to service carefully explained to him so that he clearly understands his responsibility to comply with Carrier's rules.

AWARD: Claim disposed of as per findings.

ORDER: Carrier is directed to make this Award effective within thirty
(30) days of date of issuance shown below.


Bryce Hall, Employee Member


J. A. Abbateello, Jr., Carrier Member


A. Thomas Van Wart, Chairman
and Neutral Member

Issued at Salem, New Jersey, March 2, 1984.