PUBLIC LAW BOARD NO. 2420

AWARD NO. 5

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

CONSOLIDATED RAIL CORPORATION

DOCKET NO. 413

STATEMENT OF CLAIM:

a. The Carrier violated the Rules Agreement, effective December 16, 1945, as amended, particularly Rules 5-A-1, 5-C-1, 5-E-1 and the Absenteeism Agreement of January 26, 1973, when it assessed discipline of dismissal on M.W. Repairman Robert J. Patterson, November 22, 1978.

b. Claimant Patterson's record be cleared of the charge brought against him on October 12, 1978.

c. Claimant Patterson be restored to service with seniority and all other rights unimpaired and be compensated for wage loss sustained in accordance with the provisions of Rule 6-A-1(d), with benefits restored.

OPINION OF BOARD:

Claimant was tried on, found guilty of, and disciplined by discharge for the following charges:

1. Failure to report for duty on your regular assignment at 7:00 AM on September 28 and September 29, 1978.

2. Engaging, abetting and participating in an unauthorized work stoppage at Canton MW Shop at 4:05 PM and at 6:00 PM on September 29, 1978.

The instant disciplinary termination was imposed on Claimant because of his alleged participation in an illegal and unauthorized strike on September 28 and 29, 1978 by members of the Brotherhood of Maintenance of Way Employees, Local 350, employed at Carrier's Maintenance of Way Shop at Canton, Ohio.

We have described the general circumstances of this strike and picketing situation revealed at the hearings thereon in our previous Award No. 1, as well as stated our opinions on certain procedural and substantive questions raised by Organization there as well as here.

In respect to the nature and extent of guilt of instant Claimant in these strike activities, we find from the trial record:

1. September 28 and 29, 1978 were regularly scheduled work days for Claimant Patterson for his usual tour of duty 7:00 AM to 3:30 PM. He did not appear for work on both these days.

2. On September 28th, Claimant phoned before 7:00 AM and informed the plant office that he had a flat tire and would be a "little late."

3. When he got to the plant entrance at about 7:30 or 7:45 AM, he did not proceed through the entrance. The reason given

by Claimant at the trial was "because the men were outside. My safety was involved and I was not sure it would be safe working conditions." He acknowledges that he did not call the plant office to tell them that he would or could not be at work or for any other reason that day, subsequent to his phone call before 7:00 AM that he would be late.

4. Testimony was given by Shop Engineer R. Campitella and Equipment Engineer E. E. Waggoner that at approximately 6:00 PM, September 29, 1978, Claimant was one of two of the MW employees who desisted from work on September 28th and 29th and stationed themselves at the so-called "YMCA" entrance to the plant (described by Campitella as on Company property; Waggoner stated: "I couldn't say for sure"). At the site was a sign propped on a support, stating that the plant was on strike.

5. Claimant does not deny his presence at that time and place, but explained at the trial, "I went to see if I was able to work and what was going on." He further stated that he stayed in this area for only about 15 minutes "watching trains."

We conclude from the foregoing, (a) although Claimant was correctly held to have been a striker on the two days in question, there is no proof that he was a picketer on September 28th, (b)

consideration should also be given to the fact that Claimant was not claimed to be or shown to be one of those who had been verbally ordered back to work while the strike and picketing was in progress, but (c) account should be taken of Claimant's apparent picketing roles at two different entrances, one of them 2½ hours after the end of his usual shift.

We conclude that equitable rights, obligations and standards will probably be better served in this instance by amending the discharge to a reinstatement without payment of back wages.

A W A R D

Claimant shall be reinstated to his former position without payment of earnings lost since his discharge. Said reinstatement is to take place within thirty (30) days.

LOUIS YAGODA, CHAIRMAN & NEUTRAL

FRED WURPEL, JR., ORGANIZATION MEMBER

N.M. BERNER, CARRIER MEMBER

DATED August 30, 1979