

PUBLIC LAW BOARD NO. 2535

Joseph Lazar, Referee

AWARD NO. 6
CASE NO. 6

PARTIES)
) TO)
DISPUTE)
) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
 VS.
 JOINT TEXAS DIVISION OF CHICAGO, ROCK ISLAND AND
 PACIFIC RAILROAD COMPANY AND FORT WORTH AND DENVER
 RAILWAY COMPANY

STATEMENT
OF CLAIM:

1. That the Carrier violated the Agreement when, as a result of an investigation conducted August 4, 1980, they dismissed Trackman James E. Morgan, said dismissal being without just and sufficient cause.
2. That Claimant J. E. Morgan be reinstated to the service with seniority, vacation and all other rights unimpaired and, additionally, be compensated for loss of earnings suffered account the Carrier's wrongful action.

FINDINGS: By reason of the Memorandum of Agreement signed November 16, 1979, and upon the whole record and all the evidence, the Board finds that the parties herein are employee and carrier within the meaning of the Railway Labor Act, as amended, and that it has jurisdiction.

On August 14, 1980, Claimant J. E. Morgan was dismissed from the service of the Carrier "for violation of Rule 665 of Burlington Northern Safety Rules in connection with absenting himself from duty without permission from proper authority on July 8, 1980 and July 21, 1980 while employed as a trackman assigned to Section No. 10, Streetman, Texas as evidenced by formal investigation afforded him at Teague, Texas" on July 28 and August 4, 1980.

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On July 28, 1980, at the outset of the investigation, Claimant and his representative stated that notice of the investigation had not been received, and due to short notice requested postponement to allow reasonable time for preparation, with August 4, 1980 as date for reconvening. In the circumstances, such recess was not in violation of Rule 26 of Agreement.

Rule 665 of the Burlington Northern Safety Rules reads:

"Employees must report for duty at the designated time and place. They must be alert, attentive and devote themselves exclusively to the Company's service while on duty. They must not absent themselves from duty, exchange duties with or substitute others in their place without proper authority."

The transcript of investigation, p. 6, reports the questioning by the Conducting Officer (Assistant Trainmaster) and the answers of Claimant, relating to the July 8, 1980 incident:

- "Q. On July 8, 1980 did you report for duties at the appointed time for your position as trackman, Section No. 10?
A. Yes, I did.
- Q. Did you remain on that position during your entire tour of duty?
A. No, I didn't.
- Q. Approximately what time did you leave your position?
A. It was approximately 6:10, something like that.
- Q. What was the starting time for work on July 8, 1980?
A. Six a.m.
- Q. Then, you were only with the gang ten minutes. Is that correct?
A. This was during the time I was trying to get permission to leave. I had tore up my truck and I was trying to gain permission to leave.
- Q. In that ten minutes you were there you were seeking permission from your foreman to be absent?
A. That is correct.
- Q. Did your foreman give you permission to be absent that day?
A. No."

Further, the Transcript records:

- "Q. Did you absent yourself from the job that day?
A. Well, I asked for permission. That was an emergency. He was short of help and did not grant me the permission.
- Q. The emergency you referred to had to do with getting your truck in operating condition again?
A. Yes.
- Q. Was the nature of your trouble with the truck such that you could not have attended to it after the end of your tour of duty that day?
A. Yes, it was.
- Q. Please explain.
A. Only it could be done -- the problem was I couldn't have it fixed any other time. I couldn't because of my fellow riders because we were car pooling.
- Q. After seeking permission to be absent from your foreman, and his declining to give you permission to be absent, you did leave the job site. Is that correct?
A. That is correct."

With respect to the absence of July 21, 1980, the Transcript records Claimant's answers to the Conducting Officer's questioning: (page 7)

- "Q. On Monday, July 21, 1980, did you report for duties on your position as trackman of Section No. 10, Streetman?
A. No, I didn't.
- Q. Did you have permission from your foreman to be absent from duties that day?
A. No, I didn't.
- Q. Did you attempt to secure permission from your foreman to be absent?
A. Yes, I attempted to but it was too late to catch him at home so I sent him word.

"Q. What word did you send him?

A. I just sent him word that I would try to be at work as soon as possible.

Q. Did you report for duty any time during the day on July 21, 1980?

A. No, I was unable to make it."

In answer to questioning by Claimant's representative concerning Claimant's absence on July 21, Claimant stated, in part: "...I was having some problems, problems with the tax people", ***"tax problems and also family problems that had to be taken care of right away."

A careful reading of the transcript compels the determination that Claimant was in violation of Rule 665 on the dates of July 8 and July 21, 1980. Although circumstances of possible mitigation may be present, the Claimant's Personal Record (Carrier's Exhibit B) is also a matter which Carrier may consider in assessing the measure of discipline. The granting of leniency, of course, is a prerogative of the Carrier and not of the Board.

A W A R D

1. The Carrier is not in violation of the Agreement.
2. The claim of Trackman James E. Morgan is denied.

Joseph Lazar
JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER

S. E. Fleming
S. E. FLEMING, EMPLOYEE MEMBER

B. J. Mason
B. J. MASON, CARRIER MEMBER

DATED: Dec. 16, 1980