PUBLIC LAW BOARD NO. 2960

AWARD NO. 100
CASE NO. 135

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employes

and

Chicago & North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The discipline of loss of track inspector, foreman and assistant foreman's seniority and thirty (30) day suspension assessed T. H. Halvorson for alleged insubordination and for failing to perform your job was without just and sufficient cause, capricious and arbitrary. (Organization File 2D-4269; Carrier File 81-84-78-D).

(2) The Carrier violated the Agreement when it unilaterally postponed the investigation and thereafter held the investigation outside the time limits specified in Rule 19(a).

(3) T. H. Halvorson shall be allowed the remedy prescribed in Rule 19(d).

OPINION OF THE BOARD

This Board, upon the whole record and all of the evidence, finds and holds that the Employe and Carrier involved in this dispute are respectively Employe and Carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute involved herein.

On November 10, 1983, the Carrier directed the Claimant to attend an investigation to be held on November 15, 1983, on the following charge:

> "Your responsibility in connection with your failure to do your job as instructed by Assistant Roadmaster Corcoran and your insubordination to Assistant Roadmaster Corcoran on Tuesday, November 8, 1983."

On the same date, the Carrier issued a postponement notice moving the hearing back until November 30, 1983. Subsequent to the hearing, the Claimant was assessed the discipline now on appeal before the Board.

The Organization first raises a procedural issue. They argue that Rule 19(a) was violated because the postponement was unilaterally granted. They note that the investigation can be postponed at the "request" of either party. They assert that there was no request. On the merits, they contend that the Carrier has not sustained their burden of proof.

The Carrier argues that the charge is supported by (1) substantial evidence showing that the Claimant failed to properly distribute the material in accordance with instructions he had received from Corcoran, and (2) the fact that when the Claimant was called upon to explain his performance, he became uncooperative and argumentative toward his Supervisor.

First, with respect to the procedural issue, we note that the pertinent portion of Rule 19(a), as it relates to this case, was discussed in Award 41 of PLB 1844. It was stated with respect to postponements:

"But the claim comes to us on the procedural/jurisdictional complaint that Carrier violated Rule 19(a) which reads in pertinent part as follows:

> 'The investigation will be postponed for good and sufficient reasons on request of either party.'

"The crux of this claim, as presented and pursued on the property, is that Carrier did not 'request' but rather just unilaterally presumed to postpone the hearing originally scheduled for September 2, 1977. On the property Carrier defended against that complaint by asserting that there were 'good and sufficient reasons' for postponement, and also by pointing out that the Organization requested and was granted several postponements by Carrier before the hearing actually was held. At our hearing Carrier asserted for the first time that then Vice Chairman Jorde was 'told' about the necessity of a postponement prior to August 30, 1977. The Organization articulated its objection regarding that postponement on the record at the hearing and pursued this objection diligently on the property. At no time prior to our Board Hearing did Carrier raise this latter defense. It comes too late now to be legitimately raised and considered.

"There is no doubt on this record concerning the 'good and sufficient reasons' why Carrier wanted a postponement. The only question is whether Carrier complied with the clear contractual requirement that it 'request' such postponement from the other party to that agreement. To 'tell' is not the same as to 'request.' We must assume that the parties to the Agreement knew the meaning of the words which they used. Irrespective of the bona fides or the justification for a postponement, Carrier violated Rule 19(a) when instead of requesting a postponement it unilaterally granted itself a postponement and merely informed the Organization of that fait accompli. It should be noted that each party is required to grant the other a postponement under Rule 19(a) when requested to do so for good and sufficient reasons. If Carrier had requested that particular postponement and the Organization had refused, we would have a different case. But Carrier's fatal error herein was in failing altogether to make the request and in acting unilaterally."

Thus, the test is bifold: (1) was there a "request", and (2) was it for "good and sufficient reason".

In this case, it is the finding of the Board that there was no violation of Rule 19(a), because the Carrier did, in fact, "request" a postponement. One only need look at the first appeal of the discipline by the Union. It contained the following statement:

> "On November 10, 1983, I returned Division Engineer Arter's telephone call and he requested a postponement of the investigation because of Assistant Roadmaster Corcoran was going on vacation during the scheduled date of November 15, 1983".

The only remaining question is whether the "request" was for "good and sufficient reasons". There are competing assertions about when, in other cases, the Carrier has denied or granted postponements due to vacations. However, the propriety of the Carrier's actions in those cases are not before this Board. Based on the individual circumstances before us, there was "good and sufficient reason" for the postponement. Therefore, the rule was not violated when the hearing was postponed.

With respect to the merits, the Carrier argues that the discipline was warranted because (1) the job was not done as instructed, and (2) because of insubordination. Regarding the first portion of the charge, even Corcoran, the Carrier's main witness against the Claimant, admitted there was not much evidence on this point. Sufficiently conclusive of this is the following testimony:

> Q. "Mr. Corcoran, do you feel that Mr. Halvorson failed to to follow previous instructions regarding the distribution of material in this specific area?

A. "Uh, it's not so much that he failed to foresee uh, carry out the orders, or whatever decisions that were made, it was that his nature or his way of dealing, or communicating and establishing how it was gonna be done, which was non-existent at the time I approached him on November, or on the 8th, Tuesday, November the 8th.

Q. "Did you feel confident of Mr. Halvorson's authority to perform his duties as foreman on the material gang on and before the 8th of November?

A. "I felt the job was getting done somewhat adequately, yes."

Noteably, the witness failed, when directly asked, to state that the Claimant failed to perform the job as instructed. Accordingly, while there were material shortages, these were not wholly out of the ordinary or unexplicable. Thus, the evidence is insufficient concerning the first portion of the charge.

As indicated by Corcoran's testimony, most of the evidence related to the charge of insubordination. With respect to the charges of insubordination, it is the opinion of the Board that there is not enough evidence to justify a 30-day suspension. Moreover, it is not serious enough to justify the termination of his seniority rights as a track inspector, assistant foreman, and foreman. There are varying degrees of insubordination and this was a mild form. Thus, while we can accept that he was "uncooperative", his behavior beyond this was not particualrly quarrelsome or vicious.

In view that there was insufficient evidence on the first charge, and in view that the seriousness of the insubordination was somewhat limited, the penalty will be reduced to a 10-day suspension, and the Claimant should be compensated for all lost wages as the result of the suspension. It is also noted that the

Claimant's seniority rights had been previously restored. Therefore, there is no need to order them reinstated. However, because termination of these rights was unjustified, the Claimant should be made whole for the loss of these rights between the time of the discipline and the point at which the rights were restored.

AWARD:

The Claim is sustained to the extent indicated in the opinion.

G. T. Vernon, Chairman

H. G. Harper, Employe Member

Barry E. Simon, Carrier Member

Dated: October 8, 1985