

PUBLIC LAW BOARD NO. 2960

AWARD NO. 32

CASE NO. 11

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago & North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The sixty (60) day deferred suspension imposed upon Foreman Timothy Maguire for his alleged responsibility in connection with the derailment of Train Grain Extra on Saturday, May 3, 1980, was without just and sufficient cause and on the basis of unproven charges. (Carrier's File D-11-17-336)

(2) The thirty (30) day suspension and loss of foreman's rights assessed Foreman Timothy Maguire for alleged unauthorized absence on May 28, 29, 30, and June 2, 3, and 4, 1980, was without just and sufficient cause and unwarranted. (Carrier's File D-11-17-359)

(3) The dismissal of Foreman Timothy Maguire for alleged unauthorized absence on June 5, 6, 9, 10, 11, and 12, 1980, and subsequent dates was without just and sufficient cause, arbitrary and capricious and unwarranted. (Carrier's File D-11-17-347)

(4) Claimant Timothy Maguire shall be reinstated with seniority and all other rights unimpaired, have his record cleared of all charges and be compensated for all wage loss suffered.

OPINION OF THE BOARD:

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

This case represents three separate disciplinary actions. The Board will thus examine each disciplinary action separately.

The first action involves the Claimant's alleged "responsibility in connection with the derailment of Train Grain Extra on Saturday, May 3, 1980, at approximately 4:10 p.m." The hearing was held May 13, 1980, and subsequent to the hearing, the Claimant was assessed a 60-day deferred suspension. In respect to the 60-day deferred suspension, it is the employee's position that the testimony at the investigation does not sustain the Carrier's position that the Claimant was somehow responsible for the derailment. The employees note that although the Claimant was working on the track at the point of derailment the previous day, several witnesses testified that they inspected this track and were satisfied that it was in good shape. The employees note that the Carrier contended that the Claimant had responsibility for the derailment because he was aware that there were insufficient rail anchors. While the Claimant admits that there were insufficient anchors, it should also be noted that when cross ties were installed seven or eight days prior to the derailment, a request had been made to Roadmaster Schipper to furnish additional anchors. It is also noted that these anchors were not provided. In respect to this disciplinary action, the Carrier notes that the Engineering Department had determined the cause of the derailment was that the track had buckled under the movement of the train due to new ties being installed with insufficient rail anchors and poor ballast section. The Carrier notes that at the hearing the Claimant testified that he was aware that there were insufficient rail anchors but thought that the track was in good condition. He further acknowledged that he was aware that a slow order was being removed but took

no action to insure that the rail was properly anchored.

The Board notes that the derailment occurred on the mile post 7.1 section of track. It is clear that the Claimant had replaced ties in this area previous to the derailment and it is also clear that he admits to the fact that insufficient rail anchors had been installed. However, it is also noted that rail anchors had been requested and that the track had been inspected by various bargaining-unit and supervisory personnel. The Carrier does not dispute this but argues instead that the Claimant's responsibility in the incident relates to his failure to insure that the track was properly anchored before the slow order was removed. The Board agrees with the Carrier. There is enough evidence in the record to support the Carrier's finding that a 60-day deferred suspension was appropriate. The Claimant clearly testified that there were insufficient rail anchors in place at mile post 7.1, but yet, his testimony also reflects (page 10 and 12 of the transcript) that he determined that the track was in a condition good enough for the slow order to be removed. His concurrence with Mr. Hall that the slow order could be removed even though there were insufficient rail anchors installed was obviously an error and contributed to the derailment. Had the slow order not been removed, the derailment, in most probability, would not have occurred. The evidence on this is more than speculative as suggested by the Organization. The Carrier's finding is supported by substantial evidence. In arriving at this conclusion, the Board does not suggest that the Claimant was solely responsible for the derailment. This is far from the case. The record reflects many people had some responsibility in the derailment particularly those who inspected the track and failed to secure rail anchors once requested.

However, the fact that others may have had some responsibility doesn't distract or nullify the Claimant's responsibility and negligence. It is the conclusion of the Board that 60-day deferred suspension was proper.

The second disciplinary action relates to absenteeism. On June 5, 1980, the Carrier directed the Claimant to appear for a formal investigation. The notice of the investigation read, in pertinent part as follows:

"Your responsibility in connection with your violation of Rule 14 of the Chicago and North Western Transportation Company General Regulations and Safety Rules effective June 1, 1967, on May 28, 29, and 30 and June 2, 3, and 4, 1980."

The investigation was held on June 10 as scheduled. Subsequent to the investigation on the date of June 19, 1980, the Claimant was assessed 30 days actual suspension in connection with the June 10 investigation and required to serve the 60-day deferred suspension that he had previously received in connection with the derailment and he was also stripped of his foreman's rights.

The employees note that due to a severe ear infection which had caused the Claimant to lose his hearing, he was absent from duty commencing May 28, 1980. They assert that he had contacted the Carrier on May 28 and on June 2 and 3, but even though he had called in and had permission to be absent three of the six days and although the Carrier was well aware of the reasons for his absence, he was assessed a 30-day actual suspension and stripped of his foreman rights. In connection with his alleged unauthorized absence on May 28, 29, 30, and June 2, 3, and 4, 1980, the employees point out that the Claimant did receive permission to be absent. They direct attention to the testimony of the Assistant Roadmaster Alfonso Elizondo. Mr. Elizondo testified that on May 28 Mr. Maguire contacted the Roadmaster's office and requested permission to be absent. He also testified that on June 2 Mr. Maguire

contacted him and indicated that he was under doctor's care and would be back to work Wednesday, June 4, and that it was o.k. with him as long as he brought some kind of proof from the doctor. Thus, Mr. Elizondo testified that the Claimant had permission to be absent May 28, June 2, and June 3. The Organization also directs attention to a copy of the Claimant's phone bill which clearly indicates the Claimant did contact the Roadmaster's office on May 29, 1980, May 30, 1980, and on June 2, 1980.

The Carrier argues that in respect to his absences, there is no dispute that the Claimant did not report for work. The testimony by the Assistant Roadmaster shows that the Claimant called in on only two of those days. The second time he called in, he was instructed to bring a doctor's note which was never produced. The Carrier asserts that the Claimant's testimony that he called the Roadmaster on June 4, 1980, lacks credibility, as it was determined that the Roadmaster was on vacation that day. Subsequent to the hearing, the Claimant offered a printout furnished by the phone company which shows the calls he made. It is noted by the Carrier that no call was made on June 4. While all the other dates show that the Carrier's phone numbers were called, there is no evidence that the Claimant spoke with anyone with authority to allow him to be off. The Carrier believes that the evidence supports their findings regarding this disciplinary action.

The Board concludes that there is little doubt in light of Elizondo's testimony that the Claimant had permission to be off May 28, June 2, and June 3. However, the evidence regarding May 29, 30, and June 4 is conflicting. The Claimant asserts that he called in and he provides a copy of his phone record to substantiate that he called the Carrier's Proviso yard number or the main switchboard number on May 29 and 30. On the other hand, Elizondo testified that

to his knowledge there was not call from Mr. Maguire nor was his name recorded in the logbook which is kept for the purpose of recording the calls of the employees who report off. Regarding June 4, Elizondo testified that there was no call from Maguire and that Maguire failed to show up as previously agreed. Maguire initially claims that he called and talked to Mr. McHugh; however, he later changed his testimony when it was brought out that Mr. McHugh was on vacation on June 4. This affects the Claimant's credibility; thus, it cannot be concluded that Maguire called in on June 4. Regarding June 4, it is the conclusion of the Board that although the evidence is conflicting, it is substantial enough to support the Carrier's findings. The Claimant's phone record does not indicate that he called the Carrier's offices June 4. A lack of a record of a call on June 4 combined with the Claimant's testimony that he talked with McHugh on that date, which was impossible, clearly supports the conclusion that he was absent without permission on this date. Regarding May 29 and 30, the Claimant asserts that he called and the phone records support this. However, the Carrier chose to believe Elizondo's testimony concluding instead that if the Claimant had called, he failed to talk to anyone in charge. There is substantial evidence to support the Carrier's conclusion in this regard based on Elizondo's testimony and the phone records themselves. The phone record indicates that on May 29 the Claimant made two calls to the Carrier within five minutes prior to 7 a.m. The phone record also indicates that on May 30 he made six calls to the Carrier between 6:55 a.m. and 7:11 a.m. The fact that he made repeated calls could lead to a conclusion that he called and had to call back because the person with authority to let him off was not in or unavailable. This isn't a conclusion beyond a reasonable doubt, but when

combined with Elizondo's testimony, would constitute substantial evidence. The Board will uphold the Carrier's conclusion regarding the evidence and will uphold the 30-day suspension; however, the stripping of the foreman's rights was excessive in light of the offense.

The next disciplinary action was related to the following charge:

"Your responsibility concerning your absenting yourself from duty without proper authority on June 5, 6, 9, 10, 11, and 12, 1980, and subsequent days."

The notice was issued to the Claimant on June 12, 1980, and scheduled an investigation for the following day. At the request of the Claimant's representative, this investigation was postponed until June 19, 1980. Because the Claimant did not appear for that date, the investigation was postponed until June 25, 1980. Subsequent to the investigation, the Claimant was dismissed from service. On April 29, 1981, the General Chairman was advised by the Carrier that they were reinstating the Claimant without pay and without prejudice to his right to handle the claim for time lost. The Claimant's reinstatement was with Trackman's seniority rights only.

The employee contends that the second investigation regarding the same series of absences was arbitrary, capricious, unwarranted, and an abuse of discretion. It is particularly true in light of the fact that the Carrier had been notified of the Claimant's reason for absence and notwithstanding the fact that the Carrier had held an investigation on June 10, 1980, and was informed again of the reason for the Claimant's absence.

It is the position of the Carrier that the charge against the Claimant was proven and the discipline assessed was warranted. The evidence at the investigation, according to the Carrier, showed the Claimant did not protect

his assignment by either reporting for duty or calling in to obtain permission to be absent. Consequently, the Carrier believes that the Claimant was in clear violation of Rule 14 which reads as follows:

"Employees must report for duty at 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."

In light of the Claimant's previous record, the Carrier believes that the dismissal was appropriate. The Carrier does not believe that it was improper to prefer charges and hold the June 25 investigation even though the Claimant had been subjected to discipline for his absences on the dates immediately prior to the dates covered by the June 25 investigation. The Carrier asserts that while it is not unusual for employers to treat a continuing absence as a single offense, it may at its discretion charge an employee with his responsibility for his absence on each individual date and subject him to discipline for each absence. The first investigation was scheduled to cover the dates prior to June 4. When the Claimant failed to report as promised, the second investigation was scheduled. The Claimant was not deprived of his rights under the Agreement as the result of the scheduling of two investigations.

Regarding the Claimant's dismissal from service, it is the Board's conclusion that while some discipline was appropriate for the absences under investigation at the June 25 hearing, dismissal was excessive. The Board recognized that other tribunals have granted Carriers the right to prefer separate charges and hold separate investigations on continuing absences. Moreover, there is some reason to believe that the incidences in these cases could be logically treated as separate.



The Claimant had called in and indicated he would be returning on June 4, 1980. His failure to do so can be thought of as being a separate action from his failure to call and report off for June 5 or subsequent dates. However, dismissal based on the record as it relates to the June 25 investigation cannot be upheld for two reasons. First, it cannot be concluded that the Claimant was absent without permission after June 10, 1980. In this respect, the charges are not as serious in as much as he was not absent for all the days for which he was charged. It cannot be considered that he was absent without notice after June 10 in as much as the Claimant testified during the hearing held on June 10 that he was under doctor's care due to an ear infection, that he could not return to work until released to do so by the doctor, and that he had all doctor's statements with him and available for the Carrier's consideration (see transcript Page 8).

Second, dismissal for the Claimant's absences from June 5 to June 10 cannot be upheld because of the lack of any meaningful progressive discipline. Dismissal for absenteeism usually is not upheld unless there is evidence of progressive discipline aimed at correction and evidence that those efforts aimed at correction have failed. The Board doesn't dispute the Carrier's right to prefer separate charges on a continuing absence, and it is noted in some cases issuing separate disciplines has been upheld by other tribunals. However, in this case, the Carrier's attempt to justify discharge based on a prior record of previous suspensions, which were developed based on one continuing absence offense, cannot be sustained. The concept of progressive discipline would require a period after suspensions and before discharge that would enable an employee to demonstrate that he had learned his lesson and was not incorrigible. The most discipline the Carrier could justify based on the record of the June 25 investigation would be a 45-day suspension.

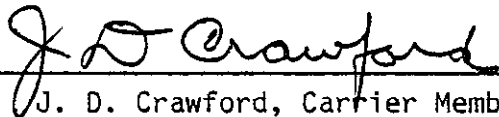
In reviewing the separate investigations as a whole, it is clear that the Claimant was properly suspended from May 28, 1980, to June 26, 1980, as a result of the June 10 investigation. It is also clear that he was properly suspended from June 27, 1980, to August 25, 1980, in connection with the 60-day deferred suspension. It is also clear that a 45-day suspension would have been appropriate for the period of August 26, 1980, to October 29, 1980. It is also noted that the Board determined that the Claimant was unjustly deprived of his foreman seniority rights. Therefore, the Claimant is entitled to all time lost at the foreman's rate of pay between October 29, 1980, and the date of the Carrier's offer to reinstate. The Claimant is also entitled to reinstatement of his foreman's seniority rights.

AWARD

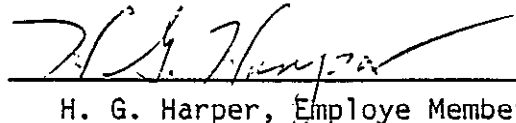
Claim sustained to the extent indicated in the opinion. Carrier is ordered to comply within 30 days.



Gil Vernon, Chairman



J. D. Crawford, Carrier Member



H. G. Harper, Employee Member

Date: Feb. 15, 1983