

PUBLIC LAW BOARD NUMBER 3445

Award Number: 35

Case Number: 35

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM

Track Laborer, B. L. Crook, P. O. Box 1302, Skyland, NC 28704, was dismissed from service on September 11, 1984 for allegedly failing to protect his assignment. Claim was handled on the property in accordance with Railway Labor act and agreement provisions. Employees request reinstatement with back pay for all lost time and all other rights unimpaired.

FINDINGS

Claimant, at the time of the dispute in question, was employed as a laborer at Canton, North Carolina. By letter dated September 7, 1984, Claimant was notified to attend an investigation concerning charges that he failed to protect his assignment between August 1, 1984 and September 7, 1984, and that he misrepresented the extent of an injury allegedly suffered on July 11, 1984. An investigation was held on September 11, 1984. By letter dated September 14, 1984, Claimant was dismissed from service.

The issue to be decided in this dispute is whether Claimant was dismissed for just cause under the Agreement.

The position of the Organization is that Claimant was dismissed without cause by Carrier, contending that Claimant has been, in effect, dismissed merely for sustaining an injury while on duty. The Organization cites the fact that Carrier was informed of Claimant's injury at the time of its occurrence, and that Carrier was aware of Claimant's need to recuperate from August 1, 1984 to the time of the charge letter. The Organization further cites a report from an orthopedic doctor, Dr. Lemack, indicating that Claimant was physically unable to work until further notice. The Organization maintains that credible medical evidence was relayed to Carrier indicating that Claimant was physically unable to protect his assignment, and that Carrier's dismissal of Claimant on the basis of his failure to protect assignment was therefore improper.

The position of the Carrier is that Claimant was properly dismissed on the basis of his misrepresentation regarding and injury allegedly suffered on July 11, 1984.

Carrier contends that Claimant's injury, suffered on July 11, 1984, was not of the serious nature Claimant represented it to be. Carrier cites the testimony of several witnesses who indicated seeing Claimant walk and perform in a normal manner during the period of time in which he was allegedly injured. Carrier cites the testimony of Track Supervisor Ward that he witnessed Claimant walking normally on July 16, 1984, and that

Claimant only appeared in discomfort when he was approached by Ward. Carrier further cites the testimony of Dr. Stone, a Carrier physician, who observed Claimant walk normally out of his office on two occasions after initially exhibiting signs of injury upon entering the doctor's office. Finally, Carrier cites the report of Special Agent L. R. Cline that he observed Claimant dancing vigorously at a dance hall on August 30, 1984, at a time when Claimant was allegedly still unable to walk. Carrier asserts that the overwhelming weight of evidence suggests that Claimant's injury was either wholly fabricated or misrepresented to a large extent. Carrier further maintains that Claimant therefore had no legitimate excuse for not protecting his assignment and was therefore guilty of failure to protect assignment between August 1, 1984 and September 7, 1984.

Finally, Carrier maintains that the discipline imposed was reasonable. Carrier contends that Claimant's actions constituted both willful dishonesty and a failure to protect employment, both dismissible offenses. Carrier further contends that Claimant's poor prior disciplinary record serves as additional justification for the dismissal.

After review of the record, the Board finds that the claim must be denied.

It is not the purpose of this Board to rehear an investigation that Carrier held but only to determine if the discipline imposed was arbitrary, capricious or an abuse of discretion.

We find that Carrier has sustained the charges brought against Claimant through substantial evidence. Claimant removed himself from service on the basis of an alleged injury suffered while on duty, and remained out of service on the basis that he was physically unable to perform his duties. Carrier has produced persuasive evidence from several independent witnesses that Claimant was walking and functioning normally, even to the point of vigorous dancing. The testimony of those witnesses also suggest that Claimant purposely feigned discomfort when he knew Carrier officials were watching him. The evidence as a whole clearly indicates that Claimant was capable, during the period in question, of performing work for Carrier. His representations to the contrary constitute both dishonesty and a failure to protect employment without legitimate excuse. Under the circumstances, and in light of Claimant's poor prior record, we find that Carrier acted within its discretion in dismissing Claimant. Accordingly the claim must be denied.

AWARD

Claim denied.

Nicholas Rymes
Neutral Member
Stewart J.
Carrier Member
Bruce L. Hall
Organization Member

DATE: Oct. 1, 1987