

PUBLIC LAW BOARD NO. 3460

Award No. 39
Case No. 39

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employes
and
Burlington Northern Railway Company

STATEMENT
OF CLAIM

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of B&B Second Class Carpenter J. L. Williams was without just and sufficient cause and wholly disproportionate to the alleged offense.
- (2) That B&B Carpenter J. W. Williams be reinstated with seniority unimpaired; the discipline be stricken from his record and be paid for all time lost, including straight time, overtime and holiday pay until return to work."

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant was involved in an investigation held on August 28, 1980, with respect to his alleged absences from duty without proper authority. In the course of that investigation claimant testified that he had injured his back on August 6, 1980. In that proceeding he testified:

".... something happened on the job over a year ago and it just gave out on me and I have been in constant pain."

Subsequently, on September 5, 1980, claimant filled out a personal injury form which stated that he had injured his back on August 6, 1980, while loading a truck with broken pieces of concrete. Based on this sequence of events, claimant was issued a notice of investigation dated September 5 to attend an investigation with respect to his alleged failure to make prompt report of injury and falsification of a personal injury report concerning the August 6 alleged accident. On

the morning of the investigation, September 12, 1980, claimant called Carrier and indicated that he not be able to make the investigation. Carrier proceeded on an ex parte basis with the investigation with neither the claimant nor his Union representative being present. Following the investigation, Carrier issued a letter of finding claimant guilty of the charges and dismissed him from service.

Petitioner maintains that claimant notified his supervisor on August 15 at the Minneapolis Junction Headquarters that he had been off because he had problems with his back. Claimant had come in to pick up his check on that date, therefore petitioner argues that Carrier had been put on notice that claimant had sustained an injury and the timeliness of the notice of investigation and charge was improper on Carrier's part. Petitioner insists that the charge against claimant was late and the investigation was not held until 27 days after claimant had notified Carrier of his back problem. Additionally, petitioner insists that Carrier arbitrarily failed to reschedule the investigation after claimant had telephoned his inability to attend that session. From the data submitted, petitioner maintains that Carrier failed to abide by the agreement and also failed to sustain its burden of proof in this matter.

Carrier argues that the first evidence of the injury in fact was the report filed on September 5, 1980. Furthermore, Carrier raises questions as to whether, indeed, there was an injury in the first instance. This concern on Carrier's part is bolstered by the fact that payroll records show that claimant's last day worked was July 31, 1980. Therefore, he did not work on August 6 or any day in August of 1980. Based on these facts, which have not been denied, Carrier maintains that claimant's conduct constituted a failure to promptly report an injury and also falsification of a personal injury report.

The Board notes that the first procedural issue raised by petitioner was the fact that Carrier held the hearing after receiving a telephone call from claimant that he would be unable to attend the session. The Board believes that it is significant to note that no request for a postponement was made by claimant or his representative. Furthermore, he was adequately informed in timely fashion of the scheduled investigation. Carrier was under no obligation to unilaterally postpone the investigation at the eleventh hour in view of the last-minute appeal or without request for postponement by petitioner. It is the Board's view, which is well supported by past award, that claimant's absence from the investigation was at

his peril. He was notified in timely fashion of the hearing and did not attend based on his own problems, without request for postponement. There was no deprivation of claimant's contractual rights under those circumstances.

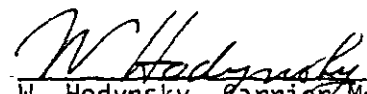
With respect to the merits, it is apparent that claimant was guilty based on substantial evidence in the transcript of the investigation. First, it is clear that there is significant question as to whether there was any injury to claimant on August 6 since he was not working during the month of August. Second, if he were indeed injured on or about that date, he failed to file an injury report until September 5, 1980. His rationale, expressed at the August 28, 1980, hearing that he had had an injury in the past and was under the impression that he did not have to file any further injury report with respect to his back is belied by the fact that he did, indeed, file such a report on September 5. Based on the entire record, there is no doubt that Carrier has established by substantial evidence proof of claimant's violation of the rules. The claim must be denied.

AWARD

Claim denied.



I. M. Lieberman, Neutral-Chairman


F. H. Funk, Employee Member
W. Hodynsky, Carrier Member

St. Paul, Minnesota

March 13, 1986