PUBLIC LAW BOARD NO. 3460

Award No. 42
Case No. 42

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 Crossing Watchman Orville W. Ratley, October 27, 1980, was unwarranted and without just and sufficient cause.

(2) Crossing Watchman Orville W. Ratley be returned to service with seniority rights unimpaired and claimant be paid for all time lost from his work assignment, including straight time, overtime and holiday pay."

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.

At the time of his dismissal, claimant had been working for Carrier as a relief crossing watchman in the Minneapolis-St. Paul area. He had been employed by Carrier for some 23 years prior to his dismissal. He was also a protected employee under the terms of the merger agreement of January 26, 1968.

By letter dated October 1, 1980, claimant was asked to attend an investigation "for the purpose of ascertaining the facts and determining your responsibility in connection with your alleged absence from duty without proper authority and alleged failure to comply with instructions from proper authority on September 29 and 30 and October 1, 1980." Claimant's representative requested a postponement of the investigation and it was rescheduled for October 13, 1980. Following the investigation, at which claimant did not appear, Carrier found him guilty of the

charges and in violation of Rule 702 for his failure to report for duty at a designated time and place and being absent without authority on the three days and, further, for violation of Rule 700 for failure to comply with instructions by not requesting a leave of absence and for failing to furnish a doctor's statement when it was known that he would be off work for an excessive length of time. For these infractions, claimant was dismissed from service effective October 27, 1980. Claimant had not worked since September 2, 1980, when he was off due to illness. Rule 15C of the agreement provides as follows:

> "A request for a leave of absence in excess of fifteen (15) calendar days must be made in writing by the employee to his immediate supervisor."

Petitioner makes a number of arguments in support of its position. First, it is alleged that Carrier was unreasonable in completing the hearing on October 13, 1980, without the presence of claimant. Claimant arrived at the scene approximately one-half hour after the hearing was to have been started, about 9:30, and found that it had been concluded. The reason for his tardiness was claimant's allegation that his eyes were troubling him and he was having problems reading and thought the hearing was to start at 10:00 A.M. Petitioner argues that Carrier, in view of the importance of claimant's testimony, should have rescheduled another hearing to hear from him.

In addition, petitioner argues that claimant called Carrier's timekeeper on September 26 to inform him that he was under doctor's care for an eye problem and was unable to work. Additionally, it is argued that other employees in similar situations to claimant's have not been required to secure leaves of absence for absences of 15 days or more. As a further point it is noted that claimant was charged with absence for three days and not for an absence of 15 days, as specified in the rule. For that reason, he did not need a written leave of absence to account for his lack of presence at work. Furthermore, claimant had no reason to believe that a written leave of absence was required to account for his absence. The Organization argues that claimant was off work due to a serious illness. This fact is not in dispute. He was filling an incapacitated employee's position under the rules and was conducting himself, due to his illness, in the same manner as he had in the past and in the same manner as other incapacitated crossing watchmen had done also. There was no evidence introduced, according to petitioner, to establish

that there was a written instruction to crossing watchmen concerning leaves of absence or time off because of illness. There was no showing that claimant had any reason to believe a written leave of absence was necessary. The Organization notes that the roadmaster involved had full knowledge that claimant had serious eye problems and was off due to illness and there was no excuse for the excessive discipline accorded claimant in this instance.

Carrier maintains that the roadmaster had repeatedly instructed claimant to secure a written leave of absence, together with a doctor's note to authenticate his absences. Carrier acknowledged the fact that claimant was ill and incapacitated but the leave of absence was required for the particular absences. Additionally Carrier maintains that claimant was afforded a fair and impartial investigation and it was at his own peril that he did not appear at the investigation, nor did his representative. No request for a postponement was ever made with respect to the October 13 date.

Carrier argues that the evidence at the hearing indicated that the absence was in excess of 15 days and that claimant had failed to follow instructions to supply a written leave of absence request. Claimant clearly violated Rule 700 by this failure. Carrier argues that claimant was charged with and found responsible for being absent without proper authority on the three days following the 27th of September. Additionally, the roadmaster testified clearly that the claimant did not call in to report his absences and had no permission for those absences. Thus, there was a violation of Rule 702 as well.

This dispute is replete with inconsistencies and incomplete information. First, there is no procedural flaw as alleged by petitioner with respect to the hearing being conducted without the presence of claimant. He did not appear at the hearing even though fully aware of the time and place which had been furnished to him. The fact that he had successfully sought and obtained a postponement from the original date is ample evidence that he was able to understand the specifics for that hearing. His absence, as indicated by Carrier, was at his own peril and there was no need for Carrier to reconvene the hearing following his tardy arrival. It is also noted that Carrier waited 15 minutes to start the hearing with the hope that claimant would appear. He did not do so. The hearing was completed by the time that claimant arrived at the scene. This was not a procedural flaw and cannot so be found.

Claimant's allegations with respect to a past practice are unsupported in the record. One or two examples of an employee not having applied for a leave of absence (refuted by Carrier's evidence) would not make a practice in any event.

With respect to the notification which Carrier received of claimant's impending absence, there is considerable confusion. Since the information supplied by petitioner was following the investigation, it changed in a number of respects over the processing of this claim on the property. Whether claimant spoke to Roadmaster Hovland or the timekeeper is not clear. The specific date on which this conversation allegedly took place is also not clear. Nevertheless, the telephone call was never alleged to have taken place after September 26. Claimant's absences were on September 29, 30 and October 1. For that reason, the telephone conversation on September 26 is not relevant in any event.

From the testimony it appears that the claimant last worked on September 2, 1980. However, his absenteeism without leave of absence was charged to cover just three days, September 29, 30 and October 1. Carrier's position in this regard appears to be contradictory. If claimant were required by the rules to secure a leave of absence for absences of more than 15 days, this is inconsistent with the charge of his absence without such authorization for a three-day period. Petitioner correctly indicates that for a three-day absence a verbal authority from the immediate supervisor is all that is required, not a written leave of absence. On the other hand, Carrier asserts that claimant had been absent from September 2 on and, thus, a leave of absence is required. This inconsistency is not resolved. Additionally, the roadmaster's testimony at the investigation indicates that he had conveyed to claimant on a number of occasions the necessity for his filing a formal request for a leave of absence. Unfortunately, in the testimony no specifics were indicated as to when this conversation took place. Since claimant had been having eye problems for some time, there is no evidence whatever to indicate when and under what circumstances he had been informed of the requirement that he file for a formal leave of absence.

On balance, after a careful examination of the entire record of this matter, the handling of this disabled employee's problems was far from correct. His conduct, on the other hand, was also quite suspect, particularly in view of a prior 15-day suspension. It is this Board's view that even though claimant's conduct was questionable in that he did not secure proper authority for his absences (either

for a three-day or a fifteen-day absence) his guilt on this score is unquestionable. However, in view of the known fact of his disability and his many years of service for the Carrier, the penalty of dismissal was obviously harsh, discriminatory and unwarranted.

The question of remedy in this situation is also beclouded. First, the factor must be considered that this employee went on disability retirement under the Railroad Retirement Act in February of 1981. Thus, his protective status in any possible employee status ended at that time. The question then remains of the period following his termination on October 27 up to the time that he went onto disability retirement. As the Board views it, he should be compensated for losses sustained during that period of time with the following major condition: he must establish by competent medical records that he was able to work during the period in question. In the absence of such medical evidence, which must be readily ascertainable by reasonable men, he shall not be compensated for any loss since the presumption would be that his eye problem, precluding his working, persisted during that period of time. If there should be any question with respect to the reasonableness of the evidence presented concerning his status during the months in question, this Board shall retain jurisdiction over this matter to resolve such dispute. Therefore, claimant will be entitled to back pay for losses sustained during the period from October 27 until the date of his railroad retirement subject to the proviso that he present proof that he was physically and medically able to work during that period of time.

AWARD

Claim sustained in part in accordance with the findings above.

ORDER

Carrier will comply with the award herein within ninety (90) from the date hereof.

I. M. Lieberman, Neutral-Chairman

F. H. Funk, Employe Member

W. Hodynsky, Carrier Member

St. Paul, Minnesota
March 13, 1986