

PUBLIC LAW BOARD NO. 3460

Award No. 68
Case No. 68

PARTIES Brotherhood of Maintenance of Way Employees
TO and
DISPUTE Burlington Northern Railroad Company

STATEMENT "1. The Carrier violated the Agreement when removing
OF CLAIM: S. F. Taylor from service February 19, 22, 23,
24, 25, 26 and March 1, 2, 3, 4 and 5, 1982 pend-
ing investigation.

2. That Claimant S. F. Taylor be allowed eighty-eight hours straight time pay at his regular rate of pay plus fifteen days' meals and linen allowance at \$5.45 per day."

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.

The record reveals that Claimant was removed from service on February 19, 1982 pending an investigation which was held on February 26, 1982. The transcript of that investigation was never made as the tape on which the proceeding was recorded was defective. After numerous attempts made to retrieve the testimony, it was determined that no transcription could be made

and based on this fact, no discipline was assessed. The record also indicates, however, that a prior series of investigations had been held on February 8, 1982 and Claimant had been found in violation of a number of Carrier's rules and was notified on March 5, 1982 that as a result of those violations which were established by the February 8 investigation he was dismissed from service. This dispute, therefore, deals only with the period from February 19, at which time he was removed from service until March 5, 1982 when he was dismissed.

The facts in this matter are not in dispute. Carrier alleges that this was a very questionable employee with a very bad record and that no pay should be awarded under these particular circumstances and in view of his ultimate dismissal. Carrier also notes that there is no compensation due for expenses under Rule 40, Section B dealing with unjust discipline. That section provides as follows:

"If it is found that an employee has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from the record. He shall be reinstated with his seniority rights unimpaired and be compensated for wage loss, if any, suffered by him resulting from such discipline or suspension."

Carrier knows that there is obviously no provision for a per diem

allowance or other expenses intended to compensate an employee under the rule cited above. More importantly, Carrier maintains that the record which Claimant had amassed with respect to his attendance did not warrant full compensation for the period in question. Carrier maintains that Claimant made his own work record and should be made whole only to the extent that it could be presumed that he had worked during the days in question.

Petitioner argues that Carrier has conceded that its procedural errors resulted in the particular impasse herein and that it was an error. Carrier made no effort to correct its "mistake" by compensating Claimant for the time lost as a result of Carrier's mistakes. The Organization argues that Carrier must comply with the schedule rules and in this instance must compensate Claimant for the time lost as well as the per diem.

First it must be noted as the Board has examined the facts in this matter, that there is no basis whatever for a claim of expenses or per diem as is specified in the claim. It also must be noted in passing that the fact of Claimant's dismissal has no bearing on the dispute herein since that matter is the subject of other claims and has no direct relationship to the withholding from service which is at issue in this matter.

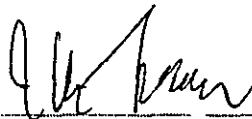
The Board is convinced that Claimant was unjustly deprived of compensation for wage loss suffered as the result of Carrier's mistakes. The only problem is, would the bald approval of the claim result in unjust enrichment. In this particular case the Board believes that it would. Without attempting to establish any new principles or precedents, and based on the facts of this case alone, it is evident that Claimant's work record has a bearing on the amount of loss which he indeed realistically sustained. In fact, as has been established in other matters, the Claimant made and established his own work record. (See Award No. 2, Public Law Board 1135 and Award No. 1443, Public Law Board 2049.) The Board believes that in terms of an equitable solution to the problem and to avoid any improper payment to Claimant, there must be some mitigation of the loss which he sustained as it relates to his prior work record. Therefore the amount claimed by the Organization in this instance shall be modified to the extent that the average work record of Claimant, that is, the percentage of scheduled days which he worked during the immediately preceeding 12 months will be applied to the amount claimed in this instance, which shall become the amount of compensation for his wage loss.

AWARD

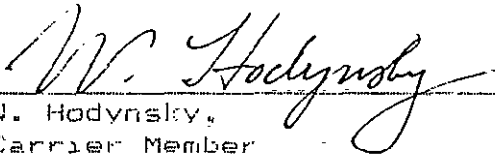
Claim sustained in part. Claimant shall not be compensated for any expenses incurred during the period in question. He shall be compensated for time lost during the days claimed, modified in accordance with the findings above.

ORDER

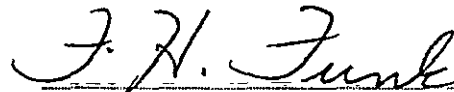
Carrier will comply with the Award herein within thirty (30) days from the date hereof.



I. M. Lieberman, Neutral-Chairman



W. Hodynsky,
Carrier Member



F. H. Funk,
Employee Member

St. Paul, Minnesota

Done
May 24, 1988