

PUBLIC LAW BOARD NO. 3460

Award No. 9
Case No. 9

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employees
and
Burlington Northern Railroad Company

STATEMENT
OF CLAIM

"Claim of the System Committee of the Brotherhood that:

- (1) the dismissal of Water Service Foreman Myron Brown, March 5, 1980, was without just and sufficient cause and wholly disproportionate to the alleged offense.
- (2) Claimant Myron Brown be reinstated to his position of Water Service Foreman with all seniority rights unimpaired and paid for all time lost."

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 indicates that claimant was charged with being absent without proper authority on January 28 and January 29, 1980, and following an investigation was found guilty of the charges and dismissed. The evidence indicates that on January 22, 1980, the claimant called his supervisor and requested permission to be off that day. On the following day he called once again and indicated that he was ill and requested permission to be off for the remainder of the week. The request was granted. Claimant did not contact Carrier on Monday, January 28, and on Tuesday, January 29, at approximately 10:30 A.M., claimant called and talked to an employee in the tool room, indicating that he would be off for the rest of the week. The absence was not authorized by any supervisor following that telephone call.

Carrier argues that claimant was clearly absent without proper authority on the two days in question and that he was well aware of Carrier's rules with respect

to such absences. Furthermore, since he had been guilty of four prior infractions for the same type of problem, the dismissal penalty was appropriate.

The Petitioner indicates that it was clear that claimant was ill from January 22 through February 4, 1980, and that he returned to work on February 5. Further, according to the Organization, it was obvious since he had called in ill on January 23 that Carrier had no right to expect him to report for work while he was ill. Thus, the Organization argues, Carrier has not met its burden of proof and claimant was not guilty since he was clearly ill and unable to come to work on the days in question.

The Board finds that the critical information in this dispute is that on January 23 when the claimant called in he indicated that he would be off work due to illness for the rest of the week. That evidence is not contradicted by carrier. It is also undisputed that he failed to report for work on either the 28th or 29th and did not secure permission to be off on those days, even though the same illness was involved. It must be concluded, therefore, that claimant was indeed guilty of the charges in view of his own testimony concerning the events in question. However, the Board must note that since the absence was indeed caused by the same illness, the penalty assessed must be considered to be arbitrary and wholly disproportionate to the type of infraction involved, even after taking into consideration the prior discipline on the same type of problem. It is obvious that had claimant simply indicated that he would be absent due to the problem he had until further notice or until the expiration of the doctor's excuse, which would have been February 4, there would have been no problem. However, he apparently did not make such statement but merely indicated that he would be out for the rest of the week. It is also significant to note that the supervisor who talked to him with respect to the projected absence did not testify at the hearing. Thus, from the Board's point of view, even though technically claimant did request time off for the 28th and 29th in timely fashion, he was indeed ill and should not have been dismissed from service. It is appropriate to note, however, that as a foreman, in particular, claimant must abide by the rules and he was obviously well aware of what was required of him. For the reasons indicated, therefore, he will be reinstated to service with all rights unimpaired but not paid for time lost as a penalty for his own lack of appropriate action under the circumstances of this case.

AWARD

Claim sustained in part; claimant will be reinstated to service with all rights unimpaired but without compensation for time lost.

ORDER

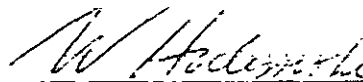
Carrier will comply with the award herein within thirty (30) days from the date hereof.



E. M. Lieberman, Neutral-Chairman



F. H. Funk, Employee Member



W. Hodynsky, Carrier Member

St. Paul, Minnesota

September 30, 1984