

PUBLIC LAW BOARD NO. 3530

Case No. 20  
Award No. 20

PARTIES TO DISPUTE:

Norfolk and Western Railway Company

And

Brotherhood of Maintenance of Way Employes

STATEMENT OF CLAIM:

Mr. H.C. Ford be paid for the sixty (60) day actual suspension and that his record be cleared of the charge that he failed to perform his duties as instructed.

FINDINGS:

Claimant, at the time of the incident in question, was employed by the Carrier as a laborer on the T-3 Tie Force at Eggleston, Virginia.

On July 6, 1982, the Claimant was dismissed from service for allegedly failing to perform his duties on June 30, 1982. A formal investigation was held by the Carrier on August 6, 1982. As a result of the investigation, Claimant was assessed a 60 day suspension.

The issue to be decided in this dispute is whether the Claimant was justifiably disciplined by the Carrier.

The position of the Carrier is that it justifiably disciplined the Claimant for his failure to perform duties on

June 30, 1982. The Carrier maintains that Claimant's actions amounted to insubordination, and the penalty imposed was reasonable under the circumstances.

In support of its position, the Carrier cites the testimony given at the hearing. The Carrier first notes the testimony of Foreman C.E. Weatherly, who testified that he told the Claimant to go to the front end to remove pikes. Weatherly further testified that he was asked by Mr. Self whether the Claimant had been ordered to the back cars, as the Claimant alleged, and replied "no". The Carrier contends that this testimony establishes that Claimant disobeyed his Foreman's orders and therefore warranted the suspension.

The Carrier also refers to the testimony of Self, who testified that he found the Claimant coming out of the Camp Cars at about 7:55 a.m., some 55 minutes after the Claimant was to have reported to the front for assignment. Self also testified that the Claimant told him that the Foreman instructed him to wait at the back for the air compressor to arrive. Self further testified that the Foreman directly contradicted Claimant's version of the instructions.

The Carrier concludes that in light of all the evidence presented, the Claimant was justifiably disciplined for his failure to perform duties. The Carrier contends that it found substantial evidence to support its finding of guilt, and its decision in no way was arbitrary or an abuse of discretion.

The position of the Organization is that the Claimant was suspended without cause by the Carrier, and should therefore be compensated for time lost as a result of the suspension. The Organization first notes that Claimant had been performing service on the air compressor for two to three weeks prior to the incident, and had been told that the job was permanent. The Organization maintains that the Claimant assumed, perhaps mistakenly, that he would be assigned there on the date in question.

The Organization cites the testimony of Foreman Weatherly to support its position that Claimant's error was the result of confusion. Weatherly, when asked whether Claimant acknowledged his order, testified, "I can't swear that he did because it was all the rest of the men were standing in the middle of the track at the same time. It was a lot of confusion out there." Weatherly further testified that "... Mr. Ford ... might not have heard me now when I hollered at him." The Organization contends that this testimony establishes that Claimant might not have heard the orders given and therefore was not at fault for failing to follow them.

The Organization further relies on the testimony of Laborers T.D. Hollie and R.C. Stump, and Cook C.R. Ford to substantiate its position. Hollie testified that Claimant was setting out spikes since 7:00 a.m. Hollie further testified that Claimant left for a short time, allegedly to use a bathroom. Stump testified that the Claimant was working on the

track, setting out spikes. Ford, the Cook, testified that he saw the Claimant "spreading spikes up and down the track ...." The Organization contends that the testimony given by the above employees clearly establishes that Claimant was not trying to avoid duty, and was performing the duty he thought he was assigned to. The Organization further contends that Claimant's temporary absence is fully explainable by the fact that he left to use the bathroom.

The Organization concludes that the charges brought against the Claimant were based on an erroneous assumption by Self that Claimant had not been working. The Organization maintains that the Carrier failed to show by substantial evidence that the Claimant was guilty of the charge proffered.

A review of the entire record compels the conclusion that the Claim must be sustained.

The Carrier has failed to show by substantial, credible evidence that the Claimant was guilty of the offense charged.

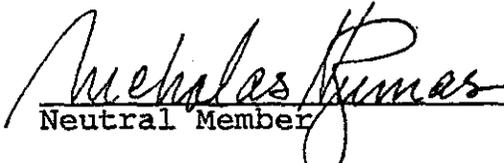
Self's testimony indicated that he felt Claimant lied to him about his absence from his assigned duty. However, Self did not arrive until about 7:55 a.m., and therefore could not have personally witnessed Claimant's actions prior to that time. Further, the testimony of Laborers Hollie and Stump, as well as Cook Ford, establish that Claimant was in fact working from approximately 7:00 a.m. until he left to use the bathroom. This testimony has been uncontroverted by the Carrier, and supports the conclusion that Claimant was merely confused as to his correct assignment.

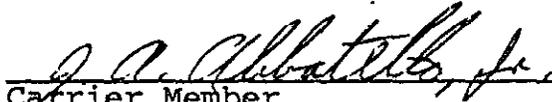
Further, we find the testimony of Foreman Weatherly supports the conclusion that Claimant did not purposefully neglect his assignment duties. Weatherly testified that Claimant had "done anything that I tell him to" and that Claimant had been a good worker. Weatherly further testified that the area was congested with workers when he gave Claimant his orders, and that the Claimant might not have heard them.

The Carrier has only established that the Claimant was not at his assigned job. The Carrier has failed to establish any purposeful violation by the Claimant, and the testimony presented establishes that the Claimant was working at the time of the alleged violation. The Carrier has not shown by substantial evidence that the Claimant was insubordinate by failing to perform his duties. We conclude that the Carrier's findings are without reasonable basis, and that the Claim must therefore be sustained.

AWARD:

Claim Sustained.

  
\_\_\_\_\_  
Neutral Member

  
\_\_\_\_\_  
Carrier Member

  
\_\_\_\_\_  
Organization Member

Date: 8/7/85