

PUBLIC LAW BOARD NUMBER 3530

Award Number: 37
Case Number: 37

PARTIES TO DISPUTE:

NORFOLK AND WESTERN RAILWAY COMPANY
AND

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

STATEMENT OF CLAIM:

Claim of J.J. Matney for reinstatement for pay for all time lost with vacation and seniority rights unimpaired.

FINDINGS

This dispute involves the conduct of the Claimant, a Laborer between March 18, 1983 and April 15, 1983. On June 17, 1983, the Claimant was dismissed for having worked for the United Coal Company while he was receiving sick pay from the Carrier. On June 24, the Organization requested a hearing on the Claimant's behalf, which was held on July 19, 1983.

The Claimant was not present at the hearing. Mr. DeKamp, the Hearing Officer delayed the start of the hearing 30 minutes, waiting for the Claimant. The Organization Representative, Mr. McCoy, did not object to the hearing being held in the Claimant's absence. During the hearing, Mr. Self, Roadmaster,

introduced into evidence a certified mail return receipt signed by the Claimant, which indicated that he had received the letter notifying him of the time and location of the hearing.

The evidence of the hearing revealed that the Claimant injured his back while working on March 18. He received sick pay from the Carrier from that day through April 15. A Time Reporting Sheet from the United Coal Companies was also introduced into evidence. It revealed that the Claimant had worked for eight hours on each of the following days:

March 29 through April 1.

April 4 through April 8.

April 11 through April 15.

Furthermore, during another hearing (held on May 27, 1983 to investigate an alleged violation of Safety Rule 1172 by the Claimant), the Claimant admitted that he was working for the coal company. He stated that all the job involved was some paper work and occasionally riding in a truck.

On July 28, 1983, the Carrier informed the Claimant that the decision to dismiss him had been upheld. On September 21, 1983, the Organization filed a claim on his behalf. After a series of appeals, Mr. Steele, Assistant Vice President - Labor Relations, denied the claim on July 12, 1984.

The issue in this dispute is whether the Claimant's dismissal was for just cause.

It is the position of the Organization that the Claimant did not receive notification of the hearing. The Organization also argues that the Carrier, by failing to hold a hearing within ten days after the request (as required by Rule 33b), waived its right to discipline the Claimant.

The position of the ^{CARRIER} Organization is that the Claimant received a fair hearing, which he had been notified would occur. The Carrier also maintains that since the Claimant was performing work for the coal company while he was being paid by the Carrier for being allegedly too injured to work, dismissal was justified.

Rule 33b provides that "the investigation shall be held within ten calendar days after receipt of request for same, if practicable" (emphasis added). This rule does not require that the hearing must be held within ten days in every single situation. Perhaps, if the Carrier took an unreasonable amount of time before conducting an investigation, the Board might be willing to hold that the Carrier had waived its right to discipline. But, it is the opinion of this Board that the Carrier did not take an unreasonable amount of time to conduct the hearing.

The Claimant signed a certified mail return receipt on July 13, 1983. This receipt was introduced at the hearing to prove that the Claimant received the letter notifying him of the time and location of the hearing. The Claimant offered no excuse for his failure to appear, nor did he attempt to have the hearing postponed. Furthermore, his representative did not object to the hearing occurring in his absence.

The evidence is clear that the Claimant was performing work for the Carrier. Sick pay is provided for employees who need time to recover from an injury or illness, so that they will be able to meet their living expenses. The money is not provided so that employees may use the time to work full-time elsewhere and earn additional money.

The Carrier needs to be able to discipline those employees who are not actually ill or injured, but claim that they are, in order to receive sick pay and use the "recovery" time to work elsewhere. Such employees have committed a fraud upon the Carrier, and dismissal is a penalty that is justified in such a situation.

The Board recognizes that the Claimant was genuinely injured, but is unwilling to interfere with the Carrier's disciplinary policy in this particular situation. It is the opinion of this Board that the dismissal was for just cause.

AWARD

Claim denied.

Nicholas Pumar
Neutral Member

J. A. Abbattuto, Jr.
Carrier Member

Bryce L. Hall
Organization Member

DATE:

1/13/86