

PUBLIC LAW BOARD NO. 3530

Award Number: 80
Case Number: 80

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM

Claimant L. F. Almond, Rt. 1, Box 241-B, Altavista, VA 24517, was dismissed from service on May 6, 1986 for alleged being absent from his assignment. Claim was filed by the Employees in accordance with Railway Labor Act and agreement provisions. Employees request he be reinstated with pay for all lost time with vacation and seniority rights unimpaired.

FINDINGS

Claimant entered the Carrier's service on February 3, 1975.

In May 1985, Claimant marked off sick on account of injuries received in an altercation. His position was abolished a short time later, and he remained marked off.

By letter dated March 11, 1986, the Carrier's Terminal Supervisor R. P. Steele wrote Claimant and instructed him to contact the Carrier within ten

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days for an assignment or show cause why he could not, on penalty of being deemed to have resigned the Carrier's service. That same day, the Carrier's Police and Special Services investigated court records and found Claimant had been arrested on September 13, 1985 for the felony of maliciously discharging a firearm in an occupied dwelling imperiling one or more persons. Claimant pleaded guilty to a lesser charge of brandishing a firearm on January 7, 1986. He was sentenced to 12 months in jail, with six months suspended, which he began serving February 1, 1986. On March 20, 1986, Supervisor of Maintenance of Way Personnel K. E. Barbour accepted a collect call from Claimant in which he stated he was under a doctor's care and could not return to service on account of his illness. Barbour instructed Claimant to provide written verification of his illness within ten days. Claimant had received psychiatric treatment prior to his incarceration and continued to receive treatment while incarcerated.

By letter dated March 26, 1986, Claimant was notified to attend a formal investigation to determine his responsibility in connection with being absent from his assignment since May 30, 1985 and failure to protect his assignment pursuant to the Carrier's letter of March 11, 1986.

On April 2, 1986, the Organization provided a statement from Dr. Jessie Marsh Enslin that Claimant was being treated for severe depression and could be expected to return to work by June 1986.

By letter dated April 7, 1986, the formal investigation as to Claimant's prolonged absence was cancelled, but he was notified to attend a

formal investigation on charges that he was absent from his assignment on false pretenses and had committed a dishonest act in violation of Rule 1713. Rule 1713 provides that:

1713. Negligence in handling Company business, sleeping on duty, wilful neglect of duty, viciousness, desertion, dishonesty, insubordination, immorality, disloyalty, making false statement, or concealing facts concerning matters under investigation are sufficient cause for dismissal.

An employee lying down or in a slouched position with eyes closed or with eyes covered or concealed will be considered sleeping.

By letter dated May 6, 1986, Claimant was dismissed based on evidence adduced at the investigation on April 18 at which he was not present.

The question to be resolved in this dispute is whether Claimant was dismissed for just cause under the Agreement; and if not, what should the remedy be.

The position of the Organization is that Claimant was dismissed without just cause both as to the merits and as to matters of procedure.

On the merits, the Organization contends Claimant was not capable of performing his duties due to his unstable mental condition which was the result of the fight that produced his injuries in May 1985.

On the question of procedure, the Organization contends that the Carrier did not conduct a formal investigation within 30 days of the Carrier's first knowledge of the offense, as is required by the parties'

Agreement. The Organization maintains that March 11, 1986, the day Claimant's incarceration was discovered in the court records, should begin the 30-day clock. The 30 days ran out before the April 18 investigation.

Finally, the Organization maintains that the discipline of dismissal is too harsh in light of Claimant's alleged offense.

The position of the Carrier is that Claimant was dismissed for just cause under the Agreement.

On the merits, the Carrier maintains that Claimant's culpability is clear: He was in jail when he told Barbour he was out on account of illness. This was a lie and was an attempt to mark off under false pretenses. Pointing to the provisions of Rule 1713, the Carrier contends this is a flagrant violation, punishable by dismissal; and that dismissal is appropriate under the circumstances. Additionally, the Carrier maintains that Claimant's excessive absenteeism and failure to protect his assignment are also grounds for dismissal.

As to procedure, the Carrier maintains that the investigation was held in a timely fashion pursuant to the Agreement. The Carrier cites March 20 as the date of the offense charge and April 18 as the date of the investigation; these dates are less than 30 days apart.

After review of the entire record, this Board finds that the dismissal of Claimant was for just cause under the Agreement.

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The Carrier has established through substantial, credible evidence in the record that Claimant was incarcerated on March 20, 1986 at a time when he told Barbour he was marked off due to illness. That Claimant may also have been too ill to perform his duties had he not been incarcerated is of no relevance, and the Organization's argument on that point is without merit. Claimant made a false statement as to the cause of his absence from work, and this dishonest act was properly the grounds for his dismissal and constituted a violation of Rule 1713. Truthful communications from employee to employer and employer to employee are essential in maintaining the smooth function of the industrial workplace; for either party to be untruthful is a grave offense. In the case of Claimant's untruthfulness, dismissal was an appropriate remedy.

As to the procedural questions, the Carrier has not violated the Agreement and has conducted a timely investigation. The offense for which Claimant was dismissed was the false statement/dishonesty charge arising from his conversation with Barbour on March 20, 1986. April 18, 1986 is within the 30 days mandated by the Agreement. It is not sound to count the 30 days from March 11, 1986, because nothing occurred on that date for which Claimant was charged, investigated or dismissed.

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AWARD

Claim denied.

Nicholas Pumas
Neutral Member

L. Miller
Carrier Member

Boyce L. Hall
Organization Member

Date: JUNE 12, 1989