

PUBLIC LAW BOARD NO. 3530

Award Number: 86

Case Number: 86

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM

Claimant J. E. Pack was dismissed from service on October 17, 1986 and removed his name from the seniority roster. Employees request he be allowed the investigation which was requested and that his name be added back to the seniority roster since he is off sick.

FINDINGS

Claimant entered the Carrier's service on July 12, 1982. By letter dated October 17, 1986, Claimant was dismissed for failure to exercise his seniority according to Rule 14 (b).

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

Claimant was employed on Eastern Region Fence Gang No. 2. On October

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7, 1986, he properly was displaced and became eligible for displacement rights under Rule 14 (b) of the Schedule Agreement.

Claimant visited Dr. Timothy L. Jameson on October 15 and 27 and November 10, 1986. In his telephone conversation with K. E. Barbour, Supervisor Maintenance of Way Personnel, on October 15, 1986, Claimant did not mention any illness. Rather, he advised Barbour that he did not have transportation to the T-1 or T-2 Tie Force on which junior employees worked and into which he could displace. The Organization requested an investigation on October 23, 1986.

Rule 14 (b) provides:

(b) When force reductions are made, positions are abolished, or displacements occur, employees affected, other than section laborers, shall, within ten days, exercise their seniority to positions to which their seniority entitles them. Employees other than section laborers shall exhaust all seniority rights before being considered furloughed, and failing to do so, will forfeit all seniority established under the provisions of this agreement, except as provided for in Section (b) of Rule 11, and Rule 17.

Rule 30 provides, in relevant part:

An employee who has been in service more than sixty (60) calendar days shall not be disciplined or dismissed without a fair and impartial investigation, at which investigation he may be assisted by duly authorized representatives. He may, however, be held out of service, except for minor offenses, pending such investigation.

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

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On the merits, the Organization maintains that Claimant was off work sick during the middle of October and, by implication, that the exercise of his seniority would have been meaningless or impossible. Further, the Organization contends that the Carrier has not proved that Claimant violated Rule 14 (b), since he called Barbour on October 15, 1986.

On the questions of procedure, the Organization contends that the Carrier violated the Agreement by not initiating an investigation as the Organization requested. The Organization further contends that Rule 14 (b) is not self-executing, and that an investigation therefore was necessary to determine whether a violation occurred.

The position of the Carrier is that Claimant was accorded all proper procedures, and that the merits of the case justify his dismissal.

The Carrier maintains that Rule 14 (b) is clear on its face, and that it is well established to be self-executing. Therefore, Claimant had an obligation to exercise seniority within ten days of displacement. By implication, the Carrier argues an investigation is not required. The Carrier rejects the Organization's position that Claimant was off sick because Claimant did not mention it to Barbour on October 15. The Carrier rejects the Organization's proof of illness based on Dr. Jameson's note because it only says Claimant was in his office, not that he was ill or that illness prevented exercise of seniority. Likewise, the Carrier maintains that the Organization has the burden of proving a violation of the Agree-

ment, and it has failed to meet that burden.

After review of the entire record, the Board finds that the dismissal of Claimant was for just cause under the Agreement, but that the more appropriate disposition of this matter is to reinstate Claimant, with seniority unimpaired, but without back pay.

The Carrier has established through substantial credible evidence in the record that Claimant did not exercise his seniority within ten days of his displacement as required by the Agreement. The Organization has failed to meet its burden of showing that illness intervened to prevent Claimant from doing so; it has proved, at most, that he went to a doctor. If he were ill, he should have communicated this in some fashion to the Carrier, just as he communicated regarding his dismissal to the Organization in order to seek an investigation.

As to questions of procedure, Rule 14 (b) is indeed self-executing, and no investigation is required to release from service employees who do not exercise their seniority as required. Still, the evidence shows that Claimant can make a productive contribution to the Carrier in the future and therefore, the more appropriate disposition is reinstatement, with seniority unimpaired, but without back pay.

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AWARD

Claim disposed of per Findings herein.

Nicholas Kumar
Neutral Member

J. Miller Jr.
Carrier Member

Bryce L. Hall
Organization Member

Date: JUNE 12, 1989