

PUBLIC LAW BOARD NUMBER 3566

Award Number: 1

Case Number: 1

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 Foreman V.L. Kinder for "alleged insubordination to Roadmaster McCafferty on June 7, 1982" was without just and reasonable cause.

(2) The Claimant shall be reinstated with seniority and all other rights unimpaired, the charge levelled against him shall be removed from his record and he shall be compensated for all wage loss suffered.

FINDINGS:

On June 7, 1982, Roadmaster Dale McCafferty directed Claimant, Track Foreman of McBride Gang 103, to raise and line track at Mile Post 68 plus 15 poles, near St. Genevieve. McCafferty was contacted by the dispatcher on June 9, 1982 and informed that Claimant had not been performing the work on that date. McCafferty contacted Claimant on June 12, 1982, and removed him from service for insubordination.

A hearing, which Claimant did not attend, was held in order to investigate the charge. On the basis of the evidence adduced during the investigation, Carrier determined that Claimant had been insubordinate as charged and that he should be dismissed. The Organization filed a claim protesting Carrier's actions and requesting that Claimant be returned to service with pay for time lost and with seniority and all other rights unimpaired. The claim was denied at all levels of appeal on the property, and the Organization then submitted the matter to this Board for resolution.

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

Where an employee has been dismissed from service, that dismissal may be upheld only if the record contains clear and convincing evidence that of the employee's culpability. It is the opinion of this Board that such evidence is lacking in the instant case.

Proof of insubordination requires a showing that the accused employee refused to perform the assigned work. Such a refusal may be evidenced by an outright verbal refusal or by an indication from the employee's subsequent

actions that he or she never intended to perform the assigned work. In the present case, Claimant agreed to perform the work when instructed to do so by McCafferty, and eventually carried out the assignment two days later. There is nothing in the record to show that Claimant verbally refused the assignment or that he did not intend to comply with his orders. The only evidence of record bearing on Claimant's state of mind on the day in question is a letter from Claimant stating that the radio call from McCafferty "slipped my [Claimant's] mind." While this may indicate Claimant's negligence in performing his duties, it does not constitute clear and convincing evidence of refusal sufficient to sustain a charge of insubordination. Since Claimant was charged with insubordination only, the claim must therefore be sustained.

AWARD:

Claim sustained. Carrier shall return Claimant to service in his former position immediately with full seniority. Carrier shall compensate Claimant for all time lost, minus any outside income Claimant may have earned during this period of dismissal.

Nicholas Hymas
Neutral Member

M. Sklar Dissenter
Carrier Member

M.A. Christie
Organization Member

Date:

February 1, 1985