

PUBLIC LAW BOARD NUMBER 3932

Award Number: 11
Case Number: 11

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

STATEMENT OF CLAIM

"On Monday, December 12, 1983, I spoke to Track Supervisor P. Adamovich on the phone at 7:30 A.M. and advised him that I would be approximately one-half hour late due to car troubles. I was advised by him that I would not work if I was going to be late. Because of this action on his part, I did not work that day.

Subsequent to this on Wednesday, January 4, 1984, Joe McConnell, trackman G182 was allowed to arrive 1 hour late and still complete the day after talking to Mr. Adamovich.

On Thursday, February 9, 1984, Mr. A. Preston, foreman, arrived 1 hour late and he also was allowed to work after speaking to Mr. Adamovich.

In light of this violation of Item 4, The Committee Work Agreement dated October 1, 1978, I am requesting 7 1/2 hours at the pro rata rate, and that the Carrier cease this discrimination against union representatives."

FINDINGS

By letter dated February 13, 1984, Claimant filed a claim for compensation with Carrier on the grounds that Carrier improperly refused to allow him to work on December 12, 1983.

The issue to be decided in this dispute is whether Claimant was wrongfully denied an opportunity to work.

The Organization contends that Carrier violated the Agreement through its arbitrary and discriminatory treatment of Claimant. The Organization alleges that Claimant called Carrier and notified his supervisor that he would be one-half hour late due to car trouble. The Organization further alleges that two other employees arrived late for work on the date in question and were allowed to remain on duty while Claimant was not permitted to report for work. The Organization contends that this disparate treatment clearly constitutes discrimination on Carrier's part in violation of Item 4 of the October 1, 1978 Agreement, which states "The Corporation shall not discriminate against any of its employees who are selected as Local Committee Representatives of the Organization..."

Finally, the Organization disputes Carrier's contention that the other two employees were not similarly situated to Claimant. The Organization contends that Carrier failed to establish why Claimant could not have been utilized while the other two late employees were allowed to work. The Organization maintains that since Carrier presented the dissimilar situations as an affirmative defense, it has the burden of proving such was the case. Finally, the Organization argues that logically Carrier's excuse lacks credibility since the other two employees arrived one hour late while Claimant would have been only one-half hour

late.

The position of the Carrier is that Claimant is not entitled under the Agreement to the compensation requested.

Initially, Carrier argues that it is undisputed that Claimant reported late for work. Carrier maintains that Claimant's supervisor made a proper determination that his gang would be departing before Claimant would be able to arrive at work, and that he therefore told Claimant not to report for work. Carrier argues that Claimant's tardiness, not any discriminatory treatment on its part, was the cause for his failure to be utilized. Carrier further argues that it is under no obligation to accommodate a late employee's transportation needs. Carrier maintains that it is a well established principle that an employee reporting late for work may properly be denied an opportunity to perform work on that date, and cites several awards to support its position.

Finally, Carrier denies that Claimant was treated in a discriminatory manner in violation of Item 4. Carrier argues that Item 4 has no applicability since its decision regarding Claimant's situation had nothing to do with his status as a Union representative. Carrier further argues that it established that the other two employees had different transportation available to them, thus explaining their ability to perform service on the date in question.

After review of the record, the Board finds that the Organization's Claim must be denied.

In a claim based in whole or in part on alleged discriminatory treatment, the burden of proof rests with the party alleging such discrimination. In the present case, we find that the Organization has failed to establish through substantive evidence that Carrier acted in a discriminatory manner towards Claimant.

Under the circumstances of this Case, the Organization must establish that Carrier could have utilized Claimant despite his lateness, and yet purposely decided not to do so. Furthermore, to sustain a claim under Item 4, the Organization must establish that Carrier ~~demonstrated~~ ^{discriminated} against Claimant because of his Union representative status. The Organization has failed to establish either of these allegations.

It is undisputed that Claimant would have been one-half hour late. It is well established that Carrier need not allow an employee to report late if his services will not be required due to such lateness. The Organization has failed to establish that Carrier acted in bad faith when it determined that Claimant could not be used. The mere fact that other employees reporting late were utilized is not dispositive. Carrier has offered a reasonable explanation for the alleged disparate treatment, and

the Organization has failed to refute that explanation. The key inquiry concerning this Board is whether Claimant was wrongfully denied an opportunity to work. We find that the Organization has failed in all respects to establish that Claimant was intentionally and discriminatorily denied the opportunity to work.

AWARD

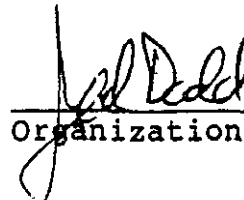
Claim denied.



Neutral Member



Carrier Member



Organization Member

DATE: 8-26-86