

PUBLIC LAW BOARD NO. 4104

Case No. 39

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way
Employees
vs.
Burlington Northern Railroad

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The thirty (30) days suspension imposed upon Section Laborer A.E. Briseno for alleged 'violation of Rules 574 and 564' was arbitrary, on the basis of unproven charges and in violation of the Agreement. (System File 1 Gr GMWA 85-3-19A).

2. The Claimant's record shall be cleared of all the charges leveled against him and he shall be compensated for all wage loss suffered in accordance with Rule 40G."

OPINION OF BOARD: Claimant, A.E. Briseno, is employed as a Section Laborer with headquarters at LaVergne Towers. On June 14, 1984, Claimant and four other employees were found playing cards on Company property. The Special Agents who found the employees playing cards instructed them not to leave the room. However, Claimant left the room.

As a result of the incident, Claimant received a notice instructing him to attend an investigation on June 20, 1984. Claimant waived his right to an investigation and accepted a 10 day suspension for violation of Rule 564. Subsequently, Claimant was instructed to attend an investigation on June 21, 1984 for his alleged insubordinate conduct. On July 11, 1984 Claimant was assessed a thirty day suspension for "failure to comply with instructions issued by the Special Agents and his insubordinate conduct."

The Organization contends that Carrier failed to timely furnish a copy of the transcript. It points out that Carrier did

not provide a copy of the transcript to the General Chairman until after the first level appeal had been presented to the Carrier. Rule 40(E) of the Agreement provides that, "The employee and the duly authorized representative shall be furnished a copy of the transcript of investigation, including all statements, reports and information made a matter of record." Thus, the Organization argues that Carrier violated Rule 40(E) when it was precluded from presenting a fully developed claim at the initial level at appeal due to the lack of the transcript.

On the merits, the Organization contends that there is conflicting testimony in the record and that Carrier has failed to meet its burden of proof in demonstrating that the Claimant is guilty as charged. The Organization states that Claimant is Hispanic and speaks and understand Spanish only. Thus, since the instructions given by the Special Agents to remain in the room were made in English, they were not understood by Claimant. Finally, the Organization argues that Claimant's acceptance of a 10 day suspension for his alleged violation of Rule 564 in connection with this same incident subjects him to double jeopardy with this 30 day suspension. It is undisputed by the Organization that Claimant had been previously disciplined for the incident and should not have been subjected to any further discipline. Therefore, the Organization reasons that the Claimant was improperly suspended. Accordingly, it asks that the claim be sustained on its merits as well as on procedural grounds.

Carrier, on the other hand, insists that it was justified in

suspending Claimant. It maintains that there exists no time limit in the rule within which the transcript must be provided. Additionally, it argues that there was no prejudice to the Claimant in that the appeal procedure was timely adhered to. Thus, it asserts that there is no basis for sustaining the claim on procedural grounds.

As to the merits, Carrier insists that there was substantial evidence that Claimant failed to comply with instructions, thus being insubordinate. It argues that Foreman Almazon and Truck Driver Beserra identified Claimant as the person who left the room after instructed to remain. Although there is some conflicting testimony among other witnesses as to Claimant's presence in the room, the fact that he signed a waiver and acceptance of a 10 day suspension for gambling proves that he was present when the Agents arrived.

Finally, the Carrier argues for an infraction such as insubordination, dismissal is justified. Thus, the 30 day suspension is mild under the circumstances of this case, and Carrier asks that the claim be rejected in its entirety.

After carefully reviewing the record, we must overrule the Organization's procedural objection. Although no time limit provisions exist in Rule 40(E), the duly accredited representative is entitled to a copy of the transcript as expeditiously as possible. Failure to adhere to the provisions of a fair and impartial investigation may result, in the future, in the sustaining of a claim on that procedural ground alone. Such

expressed procedures as addressed in the Agreement can not be looked at lightly.

As to the merits, there is not sufficient evidence on this record to support the charges placed against Claimant. Due to the circumstances in this case regarding Claimant's inability to understand or speak English, it is not clear that he understood the instructions of the Special Agents. Absent clear and convincing proof in the record that Claimant understood that he was not to leave the room, we must find for the Organization. Accordingly, and for the foregoing reasons, the claim is sustained.

FINDINGS: The Public Law Board No. 4104 upon the whole record and all of the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934;

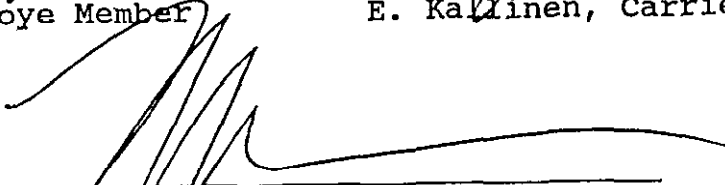
That the Public Law Board No. 4104 has the jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD: Claim sustained to the extent indicated in the Opinion


P. Swanson, Employee Member


E. Kallinen, Carrier Member


Martin E. Scheinman, Neutral Member

1/20/90