

Public Law Board No. 4161

Parties to Dispute

Brotherhood of Maintenance of)	
Way Employees)	Case No. 12
)	
vs)	Award No. 11
)	
Burlington Northern Railroad)	

STATEMENT OF CLAIM

1. The discipline imposed upon Section Laborer E. T. Olson for alleged violation of Rules 700 and 702B was arbitrary, capricious, without just and sufficient cause and wholly disproportionate to the charge leveled against him.
2. The Claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.

FINDINGS

On November 12, 1981 the Claimant was notified to attend an investigation on November 20, 1981 to determine facts and place responsibility, if any, in connection with his alleged insubordination and failure to comply with instructions on November 12, 1981 at approximately 8:15 AM. After postponement the investigation was held on December 28, 1981. On January 11, 1982 the Claimant was advised that he had been found guilty as charged and he was dismissed from service for violation of Rules 700 and 702(B) of the Maintenance of Way Department. These Rules read as follows:

- Rule 700: Employees will not be retained in the service who are careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who do not conduct themselves in such a manner that the railroad will not be subjected to criticism and loss of good will.

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Rule 702(B): Employees must comply with instructions from proper authority.

On January 21, 1982 and dates thereafter the discipline was appealed by the Organization and the Organization and the Carrier conferenced the case on a number of occasions after the first appeal was filed with the Carrier. According to the submission to this Board by the Carrier the Claimant was offered reinstatement to his position on leniency basis on October 12, 1982 and on several dates thereafter prior to 1986. These offers were refused by the Claimant. By letter dated April 29, 1986 the Carrier advised the Organization that at the conclusion of a conference on this matter held on April 28, 1986 "...it was agreed that (the Claimant) will be reinstated to service with seniority unimpaired" in accordance with current Agreement provisions "...without prejudice to his claim for lost wages prior to reinstatement which will be submitted to a Public Law Board for adjudication". The offer for reinstatement also contained other stipulations which this Board need not consider. Relief requested from this Board, therefore, is back pay from November 12, 1981 when the Claimant was first held out of service, to when he returned to service as a Section Laborer on June 19, 1986^{1/}. In other words, he is requesting back pay for what amounts to about a four (4) and one half year suspension.

The record shows that on November 12, 1981 the Claimant's Foreman instructed him to leave his knapsack which he intended to carry on the job either in the truck or at Section headquarters. Testimony at the investigation by the Foreman shows that the Claimant had been instructed several days before this to discontinue the practice of carrying his knapsack on the job site. The Foreman's instructions to the Claimant were the result of instructions given to him by the Roadmaster. It was supervision's position that having a knapsack by a Section Laborer presented certain safety problems. When he was

^{1/} The record is inconsistent with respect to the date when the Claimant returned to work: at one point it says June 9, 1986 and at another June 19, 1986. Such inconsistency shall have no effect on the substance of the claim at bar.

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instructed to leave the knapsack behind while covering his assignment the Claimant refused. The main reason he appeared to do so is because he had certain personal items therein. This refusal led to his removal from service on November 12, 1981 and ultimately his discharge which was later reduced to a suspension.

There is no doubt that supervision had the managerial prerogative to decide what was and what was not safe for Sectionmen to have with them while covering their assignments. It was the position of the Claimant, however, that he had the right to carry the knapsack to the work site because it contained his "...checkbook and (certain) valuable possessions...". In holding this position the Claimant was clearly in error. A long line of arbitral precedent, both in the railroad industry and outside of it, holds that a Claimant, if he disagrees with the instructions of supervision, should obey an order nevertheless and then seek redress through the grievance machinery of his collective Agreement (Third Division 1508, 8712, 16826 inter alia). Further, as a point of fact, it is unclear to the Board why the Claimant insisted on carrying his personal possessions to the work site in the first place since the record establishes that both the pick-up truck and the Section headquarters were secure. On merits, the record establishes that the Claimant was insubordinate and was in violation of the Rules at bar.

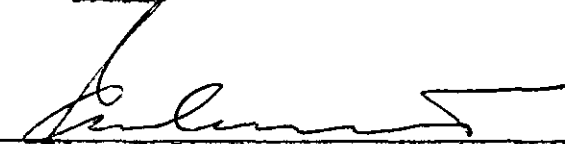
There remains only the issue of whether the discipline assessed by the Carrier was arbitrary or unjust. Since the Claimant was first offered reinstatement in October of 1982, or approximately eleven (11) months after he was taken out of service, the Board must first arrive at a determination of whether this would have been an appropriate discipline since it was the first possible one which the Claimant rejected. When assessing the quantum of discipline Boards of Adjustment such as the instant one have precedentially used the past disciplinary records of Claimants as an important guide for determinations in this matter (Second Division 6632, 8527; Third Division 21043, 22320, 23508). In his some nine (9) years of service prior

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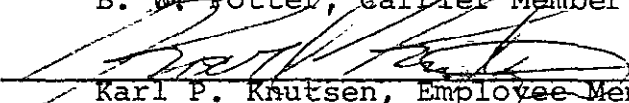
to the discipline received which is herein under consideration the Claimant had been disciplined in 1978 by means of a censure for insubordination (failure to wear a hard hat while on duty), and again in 1979 for a similartype of infraction (failure to comply with instructions). In view of this it was not an unreasonable application by the Carrier of the principle of progressive discipline when it first assessed the Claimant an eleven (11) month suspension for his insubordination on November 12, 1981. Clearly the Claimant had problems on occasions, following orders. The extension of the suspension to beyond eleven (11) months was not the result of decisions by management but was the result of the decision by the Claimant, until 1986, to reject offers of reinstatement. In effect, the extension of the suspension from eleven (11) months to over four (4) years was the result of the actions of the Claimant himself and not the Carrier. Such actions were taken by the Claimant, at his own risk, on grounds that all claims for back pay could be sustained on merits. Such, unfortunately for the Claimant, must be rejected by this Board for reasons of substantial evidence.

AWARD

Claim denied.


Edward L. Suntrup, Neutral Member


B. W. Potter, Carrier Member


Karl P. Knutsen, Employee Member

Date: March 9, 1987

DISSENT: The offers of reinstatement by Management after 11 months were offers of reinstatement on a leniency basis with no opportunity to progress the case to a neutral referee nor any opportunity to remove the dismissal from Claimant Olson's record. The record shows that Claimant Olson was willing throughout this period to return to service if he could progress his claim to remove the dismissal from his personal record as well as the issue of back pay to a neutral referee. Until June 9, 1985 Carrier was unwilling to reinstate Claimant Olson to service with the right to progress his claim to the Board, thus the extension of his suspension was the result of joint action by the Claimant and the Carrier, not solely by either party.