

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4370

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 47

Case No. 47

STATEMENT OF CLAIM

1. That the Carrier violated the provisions of the current Agreement, when it dismissed Mr. Darrel W. Keys. Said action was arbitrary, capricious and on the basis of unproven and disproved charges.

2. The Carrier will now be required to reinstate Claimant to his former position with seniority and all rights restored unimpaired with compensation for all wage loss suffered.

F I N D I N G S

Resolution of this dispute can best be undertaken by a chronological review of relevant events.

August 9, 1990 -- Owing to on-duty injury, Claimant commences authorized sick leave.

October 15 -- Claimant undergoes surgery in relation to injury.

December 3 -- Roadmaster telephones Claimant and leaves message inquiring about Claimant's condition.

December 7 -- Claimant calls Roadmaster, advising he was "in Houston, Texas, visiting his father who was sick and that his car had broken down".

December 20 (or shortly thereafter) -- Carrier receives letter from Claimant's physician as follows:

This letter is in regard to Darrel Keys who had arthroscopic surgery on October 18, 1990.

I last saw Mr. Keys on October 30, 1990 with instructions to return in two weeks for further evaluation for return to work. I have not seen Mr. Keys since that time so it is difficult for me to comment on his ability to return to work. However, in most patients with a meniscal tear, return to work could be anticipated within 4 to 8 weeks. Mr. Keys is now approximately 8 weeks out from his surgery so without the benefit of seeing him, I would say that he should be able to go back to work unless problems have become evident.

January 3, 1991 -- Roadmaster is advised of information that the Claimant, according to this report, "had been in jail since November 16, 1990 for possession and sale of a controlled substance".

January 7 -- Claimant notified by certified mail to his home address to attend an investigation on January 14, 1991 under the following charge:

. . . for the purpose of ascertaining the facts and determining your responsibility in connection with your alleged failure to protect your assignment while assigned as Laborer to Longmont Section on December 13, 1990 and December 14, 1990 at Longmont, Colorado.

Additional letters are also sent to the Claimant on January 7 for investigations to be held on January 14 for absences on

December 26-28, 1990 and on January 15 for absences on January 2-4, 1991.

January 14 -- Investigative hearing as to December 13-14 absences proceeds in absence of Claimant. No proof is provided that Claimant received notice of hearing. (Hearings in relation to second and third notices are not held.)

January 15 -- A fourth notice of hearing as to absences on January 7-11, 1991 is sent to Claimant. Hearing is scheduled for January 22 (later changed to January 29 at request of Organization).

January 16 -- According to the Organization, unrefuted by the Carrier, "Claimant attempted to return to work. Roadmaster Underwood informed Claimant on this date that he could not return to service after a personal injury until he had been examined by a carrier approved physician. Claimant was examined by a company physician on January 28, 1991. That physician deferred the decision to return Claimant to work to [the Carrier's] chief medical officer."

January 29 -- Carrier sends notice to Claimant in reference to January 14 hearing. Claimant is advised of his dismissal for failure to protect assignment on December 13-14 "due to being incarcerated in the Denver County Jail. Further testimony shows non-compliance with Doctor Ross M. Wilkins instructions to return for further evaluation."

The notice added:

Also, dishonesty when you informed Roadmaster Jim Underwood on December 7, 1990 that your father had been

ill and you drove to Houston; that your car had broken down and you were having trouble getting back to town when, in fact, you were incarcerated in the Denver County Jail and had been since November 16, 1990 for possession and sale of a controlled substance.

The notice referred to personal record entry including violation of Rule 570 as to absence and Rule 564, stating "Employees will not be retained in the service who are dishonest . . . or who conduct themselves in such a manner that the railroad will be subjected to criticism and loss of good will".

January 29 -- According to the Organization, the Claimant and his Organization representative appeared for the scheduled investigation of January 7-11 absences, and they were advised that, because of the dismissal action under the January 14 hearing, the January 29 hearing was cancelled.

* * * * *

The Organization raises objections to the entire hearing and dismissal procedure, based on Rule 40, which reads in pertinent part as follows:

A. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. . . .

C. At least five (5) days advance written notice of the investigation shall be given the employee and the appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for presence of necessary witnesses he may desire. The notice must specify the charges for which investigation is being held.

The Board finds that the objections raised by the Organization have merit on the following bases:

1. The investigation notice refers solely to "alleged failure to protect assignment" on December 13-14. No mention is made of the alleged "non-compliance" with the "instructions" of the Claimant's doctor nor of "dishonesty" in reference to the Claimant's report to the Yardmaster. Yet these alleged incidents are included in the dismissal notice. Clearly, the Carrier failed to "specify the charges for which investigation is being held".

2. An examination of the doctor's December 20, 1990 letter does not reveal the conclusion which the Carrier reached. Whether or not the Claimant remained disabled on December 13-14 requires more current medical diagnosis.

3. Prior to sending the investigation notice to the Claimant's home, the Carrier had knowledge that he was in jail. Thus, the Carrier knew full well that the "notice" would probably not be received. As it happens, the Claimant apparently was released from jail shortly after the initial hearing date. A simple postponement of the hearing would have permitted both notice to the Claimant and the opportunity for him to appear.

4. The second and third investigation notices, while not acted on by the Carrier, were equally faulty. When the Claimant did appear in response to the fourth notice, opportunity to respond was denied. It is noteworthy that the Carrier did not withdraw this notice upon its dismissal action under the initial investigation.

The Board does not suggest that absence from work owing to incarceration is excusable. As to the Claimant's apparent

"dishonesty" in claiming he was in Houston while he was allegedly in jail, this deserved review in a "fair and impartial" investigation.

Because of these serious and obvious procedural errors, the Board finds that the dismissal of the Claimant was not arrived at in proper fashion. The Award will direct that the Claimant be reinstated to his former position with unimpaired seniority. The Board does not ignore, however, the fact that the Claimant was incarcerated at a time he either should have been at work or, alternately, provided proof of his continuing disability. For this reason, payment of back pay or retroactive benefits is not appropriate.

A W A R D

Claim sustained to the extent provided in the Findings. The Carrier is directed to place this Award into effect within 30 days of the date of this Award.



HERBERT L. MARX, Jr., Neutral Referee

NEW YORK, NY

DATED: November 1, 1992