

PUBLIC LAW BOARD NO. 4426

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BROTHERHOOD OF MAINTENANCE OF  
WAY EMPLOYEES

"Organization"

VS.

CENTRAL VERMONT RAILWAY, INC.  
"Carrier"

AWARD NO. 10

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STATEMENT OF CLAIM:

Claim of the Brotherhood that:

(a) Carrier's dismissal of Claimant John C. Cook was an arbitrary and capricious act, wholly beyond the Scope of the Scheduled Agreement.

(b) Claimant Cook shall be reinstated into Carrier's service with all seniority entitlements and shall be compensated for all lost wages, including overtime and benefits which would accrue to him, as provided for in Rule 27-A of the Scheduled Agreement.

OPINION OF THE BOARD

Claimant, J. C. Cook, was dismissed by letter of March 16, 1988, which stated as follows:

On March 15, 1988 at approximately 0815 hours you reported to the Chief Train Dispatcher's Office, Mr. R. Viens to be requalified in the "D" book rules. This was to be done so you could come back to work from furlough as a Light Maintenance Patrol Helper.

You were insubordinate and defiant in attitude. You refused to be requalified. Therefore, effective immediately you are dismissed from the employment of the Central Vermont Railway, Inc. for insubordination and your defiant attitude towards your Supervisors.

Upon being notified of his dismissal, Claimant requested a hearing, which was held on March 31, 1988. By letter of April 7, 1988, Carrier informed Claimant that his dismissal was confirmed. Appeal was made through various levels of the grievance procedure and was declined at all levels.

The hearing before this Board took place on March 13, 1989. Claimant was informed of the hearing before this Board by certified mail, but he did not attend.

The basic facts concerning this matter are as follows. On February 9, 1988, the Carrier bulletined the position of Light Maintenance Helper. The job classification for this position stated in part as follows:

Successful applicant must be qualified in "D" Book of Uniform Code of Operating Rules, Book 834, Track Car Regulations, and FRA Regulations. Must carry a reliable watch and must be in possession of a valid Motor Vehicle Operator's License.

In response to this Bulletin, Carrier received a bid from an employe represented by the Organization, J. M. Lawyer, who was a furloughed Trackman but not qualified in the "D" Book to fill the position. Claimant, who at that time was also a furloughed employe, did not bid on the position. Claimant had previously been qualified in the "D" Book, for which an employe must requalify every two years, but his qualifications for the "D" Book had run out while he was on furlough. Carrier nonetheless determined that Claimant was the senior furloughed qualified employe in the district where the Light Maintenance Helper position existed.

Accordingly, on February 22, 1988, a Carrier representative contacted Claimant by telephone and explained to him that he was the senior non-assigned employee for the position of Light Maintenance Helper in the relevant district. Claimant stated that he was not interested in the position. Cy Gura, Engineer of Track and Structures, told Claimant that there was no provision in the Organization's Contract for relinquishing his seniority and that he had two choices: either resign from the service of the Carrier or accept the position. Claimant stated that he was no longer qualified in the "D" Book and Gura advised that he would have him requalified and that he also would arrange for Claimant to have a return to work physical. Claimant declined to report back to work immediately. Accordingly, on February 22, the Light Maintenance Helper position was awarded to Lawyer. According to the Carrier, this was done on a temporary basis, as Claimant was contractually entitled to 15 days to report back to Carrier, and Carrier had a need to immediately fill the Light Maintenance Helper position.

On February 23, 1988, Gura sent Claimant a certified letter notifying him to return to work on March 8, 1988. Gura's letter also advised Claimant to make arrangements with the Employee Relations Department for a return to work physical. On March 10, 1988, the Carrier's physician notified the Employee Relations Department that Claimant had passed his physical. A date of Monday, March 15, 1988 was established for Claimant's requalification exam in the "D" Book. On March 15, Claimant

arrived at the office of Carrier's Rule Instructor, R. A. Viens. Claimant advised Viens that he was refusing to take the exam and become regualified in the "D" Book. Carrier's Manager of Employee Relations, J. J. Welch, advised Claimant that it was Carrier's policy for him to regualify in the "D" Book. Claimant again refused to take the exam and was sent home. On March 16, Carrier sent Claimant the above-quoted dismissal letter.

The Carrier contends that the allegations against the Claimant are supported by substantial evidence in the record and that the claim should therefore be dismissed. The Organization maintains that the charges against Claimant are defective, that in any event the charges have not been proven by substantial evidence, and that Carrier further failed in its obligation to afford Claimant a fair and impartial hearing.


The Board has determined that the claim must be sustained in part.

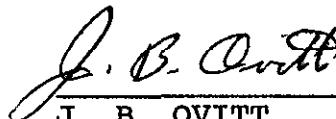
Whatever the merits of the Carrier being able to compel a furloughed employe to return to work and regualify for a position if the position at issue has previously been filled, at least temporarily, it is clear that the facts of this case go well beyond that question. Specifically, Claimant did agree to take his return to work physical, and did report to Carrier on March 15. Having taken his physical and reported to Carrier, Claimant was not privileged to then refuse instructions to take the regualification examination. Moreover, the totality of the record before this Board establishes to its satisfaction that


Claimant did indeed have an insubordinate and defiant attitude in his employment with the Carrier. Accordingly, disciplinary action against Claimant was appropriate. The Organization, however, has strenuously raised legitimate mitigating arguments concerning the circumstances of this case and Carrier's handling of it. In these circumstances, the Board concludes that the appropriate outcome is that the Claimant be reinstated with full seniority but without back pay.

AWARD

Claim sustained in part. Claimant reinstated with full seniority but without back pay.

  
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W. E. LA RUE,  
Organization Member

 4-12-89  
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J. B. OVITT,  
Carrier Member

  
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S. E. BUCHHEIT,  
Neutral Member