

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5244

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| BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES |) | |
| |) | Case No. 14 |
| and |) | |
| |) | Award No. 2 |
| NORTHEAST ILLINOIS REGIONAL COMMUTER |) | |
| RAILROAD CORPORATION (A PUBLIC CORPORATION) |) | |
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Martin H. Malin, Chairman & Neutral Member
M.J. Schappaugh, Organization Member
J.S. Morse, Carrier Member

Hearing Date: August 26, 1992

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LABOR RELATIONS

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The dismissal of Track Laborer R. A. Lopez for alleged violation of Rule Q on April 20, 1990 was arbitrary, capricious and on the basis of unproven charges (Carrier's File 08-13-103).
2. The Claimant shall be reinstated in the Carrier's service with seniority and all other rights unimpaired; he shall have his record cleared of the charges leveled against him and he shall be paid for all wage loss suffered.

FINDINGS:

Public Law Board No. 5244, upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On April 22, 1990, Claimant was notified of a formal hearing to develop the facts relating to an incident which

occurred on April 20. The notice charged Claimant with violating Rule Q, based on his "alleged failure to properly protect your position . . . on April 20, 1990"

The hearing was held on May 22, 1990. At the hearing the Local Chairman, representing Claimant, requested a postponement, which was denied. On June 8, 1991, Claimant was advised that he was found to have violated Rule Q, and was dismissed.

On April 20, 1990, Claimant did not report for work. Claimant's wife telephoned Carrier and reported that Claimant would not be in because he was in jail and she lacked the money to post bond. Claimant also had a court appearance on April 20, 1990, in connection with the charges against him. Claimant's supervisor spoke with Claimant's wife, acknowledged the information that she conveyed and advised her that if Claimant was to be out additional days, he should call in. The supervisor did not expressly authorize the day off or deny it. Subsequent to April 20, Claimant had at least one other court appearance for which he requested and was granted the day off in advance.

Claimant contends that he was denied a fair hearing because his request for a postponement was denied. Claimant argues that the General Chairman was prepared to represent him and that the Local Chairman did not learn until 10:30 p.m. the night before the hearing of the General Chairman's inability to be present. In Claimant's view, a postponement would not have prejudiced Carrier and would have allowed Claimant to be represented by the representative who had prepared for the case.

Claimant further contends that the charge was not proven at the investigation. Claimant argues that he did not fail to protect his assignment. Rather, he was unable to report to work on April 20, his wife called in prior to his start time and, by acknowledging Claimant's absence and advising his wife to report in if he would be out additional days, his supervisor implicitly authorized his absence.

Carrier objects that Claimant's argument that is premised on the denial of the postponement was never raised on the property. Carrier further contends that the evidence proved the violation, as Claimant admitted that he failed to report for work on April 20, 1990. Carrier contends that Claimant's supervisor did not authorize the absence and that Claimant's incarceration cannot excuse his failure to report for work.

The Board finds that Claimant was not denied a fair hearing. The hearing officer had discretion to grant or deny Claimant's request for a postponement. Our review of the record convinces us that the hearing officer did not act

arbitrarily and that Claimant was not prejudiced by being forced to proceed on May 22, 1990.

Claimant did object to the denial of the postponement at the investigation. At the conclusion of the hearing, the Local Chairman, on Claimant's behalf, stated that he could not say whether the hearing was fair because he had been given less than 24 hours to prepare. The Local Chairman's remarks were a reference to the grounds which he asserted at the beginning of the hearing as a basis for the postponement. However, during subsequent handling by the General Chairman on the property, the denial of the postponement was not mentioned further.

The postponement denial was not arbitrary. The investigation had already been postponed twice, first at the Organization's request and then at Carrier's request. The record discloses no attempt prior to the hearing to communicate the postponement request and there is no explanation as to why the General Chairman was suddenly unavailable.

Most importantly, the record shows that the Local Chairman very ably represented the Claimant at the investigation. The Local Chairman brought out all of the facts and defenses which formed the basis for Claimant's claim on the property and before this Board. Although the General Chairman represented Claimant in subsequent handling on the property, he did not suggest any facts or defenses that he would have raised that the Local Chairman, because of inadequate preparation, did not. Nor in his submission does Claimant suggest any matters that the last minute substitution of the Local Chairman for the General Chairman precluded him from raising. There is simply no evidence that the denial of a third postponement denied Claimant a fair hearing.

Whether Carrier proved the charge turns on the interpretation of Claimant's supervisor's conversation with Claimant's wife. The supervisor acknowledged the wife's statement that Claimant was incarcerated, that she was unable to post bond and that he would not be able to work. The supervisor further advised her that should Claimant be out additional days, she should be sure to call.

Claimant argues that the supervisor implicitly authorized his absence by failing to affirmatively deny authorization in the conversation with Claimant's wife. We agree that under some circumstances, a supervisor's silence when advised of an absence may reasonably lead to the conclusion that the absence was authorized. We find, however, that the circumstances of the instant case preclude such a conclusion.

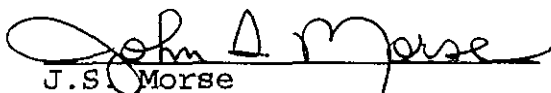
In some circumstances, an employee reporting his absence may, if advised that his absence is not authorized, be able to react and report for work. In such cases, the employee might rely on the supervisor's acknowledgment of the information by not changing his contemplated behavior. If there is a chance that the employee could report for work, the supervisor's failure to advise the employee that the absence will not be authorized might reasonably be interpreted as approving the absence. In the instant case, however, the Claimant's wife advised the supervisor that the Claimant was in jail and could not post bond. That information conveyed to the supervisor a situation that could not be changed. Thus, the supervisor merely acknowledged the inevitable, i.e. that the Claimant would not work that day, and advised that future absences should also be reported. Under these circumstances, we cannot infer from this acknowledgement that the supervisor approved the absence.

AWARD

Claim denied.



Martin H. Malin, Chairman



J.S. Morse
Carrier Member



M.J. Schappaugh,
Organization Member

Dated at Chicago, Illinois, November 3, 1992.