

PUBLIC LAW BOARD NO. 5850

**Award No. 178
Case No. 178**

PARTIES TO DISPUTE:

(Brotherhood of Maintenance of Way Employees

(The Burlington Northern Santa Fe Railroad

STATEMENT OF CLAIM:

- 1. The Carrier violated the Agreement when on October 10, 2000, Mr. Calvert Grey was dismissed from service for allegedly being absent without proper authority for more than five consecutive days as outlined in the letter of Agreement dated July 13, 1976.**
- 2. As a consequence of the Carrier's violation referred to above Mr. Grey shall be returned to service, the discipline shall be removed from Mr. Grey's personal record and he shall be compensated for all wages lost, if any, in accordance with the Agreement.**

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

Under Appendix 11, an employee absent in excess of five consecutive work days without authorization will have his seniority and employment rights terminated, except the recipient of such a letter can within 20 days of the date of the termination letter request an investigation as provided in the Disciplinary Rule.

Claimant timely requested a hearing and it was held November 6, 2000, following which the Carrier reaffirmed its dismissal.

Even an investigation involving Appendix 11 obligates the Carrier to furnish a complete transcript. There is no provision against using a recorder with someone later transcribing the proceedings, but the Carrier must be sure the record is complete. In this case, almost all of Claimant's testimony is listed as Inaudible. He has been deprived of his contract right to have a true and complete transcript.

In this instance, Claimant was displaced October 10, 2000. It is not known if he attempted to displace or elected to remain furloughed because of no transportation, nor is it known if Claimant ever did secure transportation. Even with a technical violation such as here concerned, Claimant will not be afforded lost earnings as this Board will not speculate upon these matters, nor does it intend to provide a windfall for an individual who was negligent in his obligation to protect the work for which he had been hired.

Claimant's seniority is reinstated in full, but Claimant must understand it is being done because of a technical violation and for no other reason. There is no pay for time lost.

AWARD

Claim sustained in accordance with the Findings.

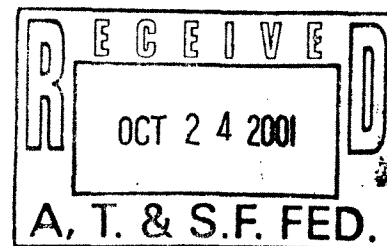
ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the award effective on or before 30 days following the date the award is adopted.

Robert L. Hicks
Robert L. Hicks, Chairman & Neutral Member

See dissent
Rick B. Wehrli, Labor Member
Dated: October 22, 2001

Thomas M. Rohling
Thomas M. Rohling, Carrier Member



ORGANIZATION MEMBER'S DISSENT

TO

AWARD NO. 178 OF PUBLIC LAW BOARD NO. 5850 (Referee R. L. Hicks)

It has been said more than once that one school of thought among railroad industry arbitration practitioners is that dissents are not worth the paper they are printed on because they rarely consist of anything but a regurgitation of the arguments which were considered by the Board and rejected. Without endorsing this school of thought in general, it is equally recognized that a dissent is required when the award is not based on the on-property handling. Such is the case here.

The following excerpt is taken from Award No. 178:

"Even an investigation involving Appendix 11 obligates the Carrier to furnish a complete transcript. There is no provision against using a recorder with someone later transcribing the proceedings, but the Carrier must be sure the record is complete. In this case, almost all of the Claimant's testimony is listed as inaudible. He has been deprived of his contract right to have a true and complete transcript."

No more accurate description of this case could be given than that quoted above. An integral part of due process in matters of this nature is to provide a true and complete transcript of what was presented as evidence during a charged employee's investigation. This Board recognizes, or should recognize, that a true and complete transcript is required for two (2) very important purposes. One, it provides a basis for determining an individual's guilt or innocence; and two, it provides a basis for the individual or the individual's representatives to appeal a negative and inappropriate decision rendered regarding the charges preferred.

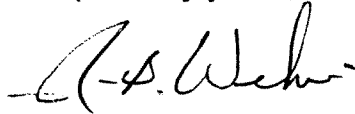
To say it is "imperative" or "essential" to have a true and complete transcript is a huge understatement. Without a true and complete transcript, there can not be a valid or logical basis for rendering a decision; and an employee, for whom the Carrier issued a decision of guilt, has no legitimate way of perfecting an appeal in his/her behalf. A simpler way of saying it is, without a true and complete transcript, the employee is denied the most basic fundamentals of due process.

Within this Award, the majority states: "...this Board will not speculate upon these matters..." This statement is not only appropriate, it is logical as well. However, in the same sentence, it is stated that the Board does not "...intend to provide a windfall for an individual who was negligent in his obligation to protect the work for which he had been hired." (*underscoring added*) Without the benefit of an opportunity to review the testimony

of the Claimant and in recognition of this Board's declaration that it will not speculate upon these matters, how can this Board conclude the Claimant "*was negligent?*" This Board member believes there is no basis for making such a determination and contrary to its stated high standard of never speculating on such matters, the majority of this Board has done just that - determined guilt on speculation. As a result thereof, I must dissent in connection with the Board's decision not to sustain the Organization's claim in full.

To conclude, based on these facts and circumstances, it is this Board Member's opinion the majority of this Board has inappropriately supported the Carrier's denial of the Claimant's right to the most basic fundamentals of due process. As a result thereof, this Board will have to be satisfied, on this occasion, with only two (2) Board Member signatures on this Award because my signature, if affixed thereto, may be construed as an acceptance by the Organization that the decision rendered is appropriate, which is simply and emphatically not the case.

Respectfully yours,



R. B. Wehrli
Organization Member

