PUBLIC LAW BOARD NO. 5850

Award No. 204
Case No. 204

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes

(The Burlington Northern Santa Fe Railroad (Former (ATSF Railway Company)

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement on February 22, 2002, when it dismissed Mr. W. W. Stout Jr., from service for allegedly violating Maintenance of Way Operating Rules 1.1.3 and 1.6, for late reporting and falsification of an injury.

2. As a consequence of the violation referred to above, the Carrier shall return Mr. Stout Jr., to service with seniority and benefits unimpaired, remove any mention of the incident from his personal record, and make him whole for any wages lost, per 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.

On January 30, 2002, the Carrier wrote Claimant as follows:

"Arrange to attend investigation at 14100 John Day Road, Bldg. G, in Haslet, Texas, at 1000 hours Friday, February 8, 2002 for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged late reporting and falsification of injury allegedly sustained by you on November 1, 1998, while operating track equipment."

Following the investigation, Carrier wrote Claimant on February 22, 2002,

terminating his services based upon the substantial evidence criteria which is the rule of thumb in this industry.

The Carrier's first awareness of Claimant's alleged injury that occurred sometime in November or September of 1998, was when the Claims Department received a copy of the document Claimant's attorney filed in court sometime in December, 2001. No injury report was filed in 1998, nor has any injury report been filed to date. The only record Carrier is aware of regarding the alleged injury is in this transcript and in the suit filed under FELA.

Claimant is a 25 year veteran of this Carrier, and he has suffered minor injuries in the past so that he cannot plead ignorance of the requirement to promptly file an injury report. His reason for not filing was the Roadmaster at that time threatened him with dismissal if he did file. This is an affirmative defense. An admittance that he violated the Rule, but offering a reason as to why he did so.

In all discipline matters, the burden of proof is on the shoulders of the Carrier, but when an affirmative defense is offered, the burden of proof shifts to the shoulders of the Claimant. This has not occurred. Claimant did not substantiate his plea.

Failing to timely file an injury report is a serious violation which, when it occurs, is not treated lightly by the Carrier. In fact, it is considered a Level S violation and this is Claimant's second Level S violation in three years.

The dismissal will stand.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

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

See Dissent
Rick B. Wehrli, Labor Member

Thomas M. Rohling, Carrier Member

Dated:

ORGANIZATION MEMBER'S DISSENT
TO
CASE NO. 204 OF PUBLIC LAW BOARD 5850

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 recognized that a dissent is required when the award is not based on the on property handling. Such is the case here.

In this case the Claimant was charged with and dismissed for alleged late reporting and falsification of an injury allegedly sustained by him on November 1, 1998, while operating track equipment. Conspicuously, without addressing the charge of falsification of the injury, which is accepted by this Board Member as an acknowledgement that the charge was not sustainable in any way, the majority, nonetheless, allowed the dismissal to stand as a result of concluding the Claimant was guilty of failing to submit an injury report in a timely manner as charged. While this may or may not be a dismissable offense under normal circumstances, the point here is that this situation did not involve normal circumstances.

The mitigating factor in this case is the Claimant was threatened by his supervisor that if he submitted an injury report in line with the company rules, he would be fired. In this regard , the Neutral of this Board indicated the following:

> "This is an affirmative defense. An admittance that he violated the Rule, but offering a reason as to why he did so. In all discipline matters, the burden of proof is on the shoulders of the Carrier, but when an affirmative defense is offered, the burden shifts to the shoulders of the Claimant. This has not occurred. Claimant did not substantiate his plea."

The problem with this logic is the fact the Claimant's explanation why he did not file an injury report, i.e., why he did not comply with the rule, **was accepted as fact by all concerned**. That is, there is absolutely no testimony contained in the hearing transcript or documentation of any kind where the Claimant's explanation was challenged in any way. As such, there was no shifting of the burden of proof responsibility to the Claimant as the Neutral indicates. This is not merely an error in judgment, but it also represents a technical error associated with burden of proof responsibilities due to an obvious misapplication and misunderstanding of affirmative defense principles.

In view of these facts and circumstances, this Board will, once again, have to be satisfied with only two (2) Board Member signatures on this award because my signature, if affixed thereto, may be construed as an acceptance by the Employes that the decision is procedurally acceptable and appropriate, which is simply not true.

Yours truly,

R. B. Wehrli
Organization Member

12-10-02

Organization Member's Dissent
AWD 204 PLB NO. 5850