

B-1919-1

PUBLIC LAW BOARD NO. 6102

Award No. 10

Case No. 10

**PARTIES TO DISPUTE:** Brotherhood of Maintenance of Way Employees  
and  
Burlington Northern Santa Fe Railway  
(Former St Louis - San Francisco Railway Company)

**STATEMENT OF CLAIM:**

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when dismissing Mr. J. R. Corum from service for allegedly being absent without authority which violated Rules S-28.13 and S-28.14 of the BNSF Safety Rules and General Responsibilities for All Employees; and Rules 1.13 and 1.15 of the Burlington Northern Santa Fe Maintenance of Way Operating Rules.
2. As a consequence of the Carrier's violation referred to above, Claimant shall be returned to service, be paid for all time lost in accordance with the Agreement, and the discipline shall be removed from his record." [Carrier's File MWC980325AE. Organization's File B-1919-1]

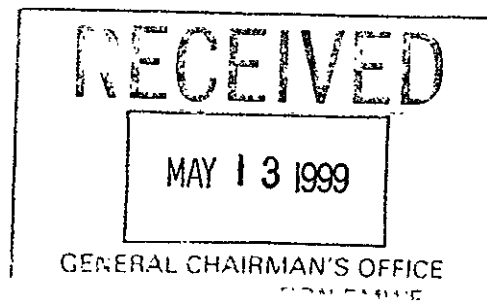
**FINDINGS AND OPINION:**

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction over the dispute herein.

The Claimant, Mr. J. R. Corum, was employed by the Carrier as a B&B Helper on Mobile Gang 41 and last worked on August 4, 1997. He did not report for work on August 5, but he telephoned his immediate supervisor, Mr. Steven L. Talbot, the Carrier's Structures Supervisor, the morning of August 5, advising that he was being held in jail and expected to be released about 8:00 p.m. The Claimant called Mr. Talbot again on August 6 and August 8, advising he was still in jail. He requested a leave of absence on August 8, and his request was denied.

There is some conflicting testimony about dates and requests, but the record indicates that the Claimant called Mr. Talbot at other times. In one of these calls, he asked that he be put on vacation, but that request was declined also, because his vacation was not scheduled to begin until September 1, 1997, and according to Mr. Talbot, no deviation from vacation scheduling is permitted.

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Additionally, on August 11, the Organization's General Chairman wrote Mr. Talbot and requested a 60-day leave of absence and a week's vacation for the Claimant. On August 25, the General Chairman presented an identical request to Carrier's Manager Maintenance Support. The record does not disclose any response to these requests.

The Claimant was released from jail on the evening of September 4, 1997. He left a voice mail message for Mr. Talbot on September 5, stating he was ready to resume work, but requesting a 90-day leave of absence. He did not leave a number where he could be reached, however. Again, on September 8, he called Mr. Talbot, who advised the Claimant that he was dismissed from the Carrier's service. On the same date, a letter was mailed to the Claimant's last known address, advising that his employment was terminated for his continued failure to report for duty. The letter went undelivered because the Claimant had moved, but he acknowledged that he was aware of his dismissal. The record further shows that the Claimant advised the Organization's General Chairman of his dismissal that same day, September 8, and the General Chairman immediately requested an investigation and advice of the precise charge.

Following mutually agreed-upon postponements and a recess, the investigation was completed on November 24, 1997; thereafter, the Carrier's Manager Structures reaffirmed that the Claimant would remain a dismissed employee. Further appeals were pursued by the Organization, finally bringing this case before this Board.

The Board notes that the record does not reflect the charge nor the reason for the Claimant's being jailed for 30 calendar days. There is a letter in the record from the Claimant's psychiatrist, dated September 12, 1997, stating the Claimant "is currently still under my care and carries a diagnosis of Bipolar Mood Disorder, mixed type." A copy of this letter was furnished the Carrier's Manager Maintenance Support on September 15, with a request for a 90-day leave of absence for the Claimant. This request went unanswered.

The Organization argues that the Claimant's absence from work was beyond his control, that he should have been granted a leave of absence, and allowed time off for his vacation.

The Carrier responds that it never grants a leave of absence when an employee is in jail. It further argues that the Claimant's unexcused absence is in violation of several Safety and Maintenance of Way Operating Rules pertaining to timely reporting for duty, leaving one's assignment, proper authority for absence, and compliance with supervisory instructions.

During the course of the investigation on November 24, 1997, the Claimant's representative objected to the introduction of these Rules, because they were not referred to in the notice of charges. The Board believes this objection is without merit. Employees are

deemed to have knowledge of the Rules which govern their employment. If unrelated Rules are raised for the first time during the course of the investigation, there might be merit to the objection, but not in this case.

In their respective exchanges on the property, both the Organization and the Carrier attach significance to the application of Carrier's Safety Rule S-28.14 and Rule 87(a) of the Agreement between the Parties, which read, respectively, as follows:

"Employees must not be absent from duty without proper authority. Except for a scheduled vacation period, authorized leave of absence in excess of ten (10) days must be authorized by formal leave of absence, unless current agreement differs. [Rule S-28.14; underscoring added].

"Written leave of absence, properly approved by Division Engineer or superior officer, is required in every instance of an employee entitled to be working who is absent for 30 calendar days or more." [Agreement Rule 87(a); underscoring added].

This provision of Agreement Rule 87(a) effectively modifies that portion of Carrier's Safety Rule S-28.14 which requires a formal leave of absence authorization when an employee is absent for more than 10 days, except for a scheduled vacation period. The Carrier asserted, in correspondence with the Organization:

"Rule 87(a) of the Agreement between the Carrier and the Frisco Federation BMWF dated August 1, 1975, as brought forth during the investigation, requires 'in every instance' a written leave of absence from the Carrier is required for periods of 30 calendar days or more. Mr. Corum's absence was excess of this time and by his own admission no written leave of absence was obtained."

Indeed, there is some arbitral authority for the proposition that lengthy unexcused absence is tantamount to a voluntary quit. While not ultimately determinative, the Board believes that Claimant was not absent in excess of 30 calendar days, even though without permission. His first day of absence was August 5, 1997, but he was scheduled to begin his vacation on September 1, 1997. He was absent without leave for 27 days, August 5-31, inclusive. Structures Supervisor Talbot was adamant that the vacation schedule be adhered to. The Carrier cannot be heard to require strict adherence to the vacation schedule and then count a planned vacation absence from work as part of an uninterrupted absence without leave. Nevertheless, Rule S-28.14 proscribes any absence from work without proper authority.

The Carrier has cited a number of arbitral awards on its property which have uniformly determined that incarceration in jail is not an acceptable excuse for absence nor justifiable reason to grant a leave of absence. The Organization has not rebutted these awards nor cited contrary decisions. This Board concurs with the general trend of these arbitral decisions. We cannot say the Carrier's decision to terminate the Claimant was unreasonable or an abuse of managerial discretion.

"Prior awards have consistently held that incarceration does not excuse an employee's failure to protect his job assignment. See, e.g., Third Division Award 25894; Public Law Board No. 2206, Award 3. It is also clearly established that a Carrier does not act improperly when it refuses to grant an employee a leave of absence for his period of incarceration. See, e.g., Second Division Award 11185." [Third Division Award 31627].

The Board finds there was compliance with the applicable provisions of Rule 91, the Discipline Rule, of the Agreement between the Parties, and substantial evidence was adduced at the investigation to support the charges.

The Board believes the Claimant should have a last chance opportunity to prove himself a reliable employee. The singular decisive element in the Board's opinion is the Claimant's previous personal record. He was employed in 1976 and, during his 21 years of employment, there are recorded only two disciplinary entries. In 1980 he was assessed a one-day suspension for leaving the job without permission. In 1987 he was assessed discipline with no time lost; the cause is not recorded. The National Railroad Adjustment Board has ruled on numerous occasions that it is proper to survey an employee's past disciplinary record when arriving at conclusions with respect to the quantum of discipline. (Third Division Awards 21043, 22320, and 23508; Public Law Board No. 4161, Award No. 43). In the best interests of all concerned parties, however, there must be conditions attached to this last chance opportunity.

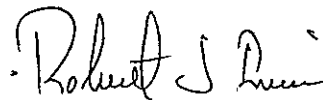
While the cause for his incarceration was not openly revealed in the record, the Claimant testified that he had not used alcohol since the date he was jailed, and that he had been participating in an Alcoholics Anonymous program and psychiatric therapy since his release from jail. The Board infers that these are factors implicated in his incarceration and which must be given judicious consideration in his return to the Carrier's service.

The Carrier is directed to offer reinstatement to the Claimant, with seniority unimpaired, but without pay for time lost, subject to the following conditions: (1) The Claimant must be able to pass the customary, ordinary, return-to-work physical examination, and the Carrier's Medical Officer must be satisfied the Claimant's bipolar disorder is in remission and controllable by proper administration of appropriate psychotherapeutic agents. (2) The

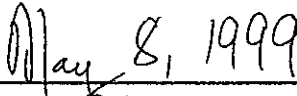
Carrier's Employee Assistance Counselor must be satisfied that the Claimant is abstaining from alcohol and other substances prohibited by the Carrier's rules.

AWARD

Claim sustained in accordance with the Opinion. The Claimant shall be offered reinstatement to service within sixty (60) days from the date of this Award, provided he successfully meets the prescribed conditions.



Robert J. Irvin, Referee

  
Date