PUBLIC LAW BOARD NO. 1844

AWARD NO. 41

CASE NO. 53

PARTIES TO THE DISPUTE

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation Company

STATEMENT OF CLAIM

"Claim of the System Committee of the Brotherhood that:

"(1) The twenty (20) days actual suspension and Notice to Serve Deferred Suspension No. 5A indicating ten (10) days suspension of D. Miller, Roadway Equipment Foreman, was improper, without just and sufficient cause and on the basis of unproven charges (Carrier File No. D-11-3-262).

"(2) Roadway Equipment Foreman D. Miller be paid for all time lost because of violation referred to within Part (1) of this claim."

OPINION OF BOARD:

Claimant is employed as a Roadway Equipment Foreman on Carrier's Iowa Division. During his six years of employment he has a proven history of automobile accidents, personal injuries, and traffic citations, some of which have occurred in Company vehicles. He has served several disciplinary suspensions for his responsibility in connection with the accidents in Company vehicles. Following the most recent accident he was given verbal orders not to drive any Company vehicle without permission from Office Engineer J. E. Trotter. There is no doubt on this record that this restriction was communicated to Claimant and acknowledged by him.

On April 19, 1977, while working on the road between Des Moines, Iowa, and Leavenworth, Kansas, Claimant was requested by Roadway Equipment Mechanic J. E. Brown to take over the driving of a Company vehicle. Claimant did so and

within minutes he was stopped by a police officer and issued a citation for driving 70 miles per hour in a 55-mile-per-hour zone through Worth County, Missouri. Claimant did not inform his employer about the ticket, he did not appear in Court nor did he pay the fine. Claimant just ignored the traffic citation and on August 24, 1977, Carrier was notified by the Sheriff of Worth County, Missouri, that a warrant had been issued for Claimant's arrest. Thereafter, under date of August 30, 1977, Carrier served notice upon Claimant to appear for an investigation into the following charge:

> "Your responsibility in connection with your unauthorized use of Company vehicle and speeding violation at U.S. 169 and Route F in Worth County, Missouri on April 19, 1977, for which you are charged with violation of Rules 7, 8 and 18 of the General Regulations and Safety Rules, effective June 1, 1967."

The original Notice of Investigation was dated August 30, 1977, and set down a hearing date of September 2, 1977. Contained in the same envelope with the Notice of Hearing, however, was a Notice of Postponement, also dated August 30, 1977, and setting an adjourned hearing date of September 13, 1977. It is not disputed that Carrier postponed the original scheduled hearing because certain essential Carrier witnesses had calendar conflicts and could not be available on September 2, 1977. Subsequently the Organization requested several postponements, all of which were granted by Carrier. The hearing commenced on October 26, 1977, but again was adjourned and concluded on November 14, 1977, because Claimant's witness was not present on the earlier date.

At the outset of the hearing the following exchange occurred between then General Chairman Zimmerman and Hearing Officer Wearmouth:

> "Statement by Mr. Zimmerman
>
> "Mr. Wearmouth, as you read the charge against Mr. Miller and notification and the postponements, the notice of the investigation dated August 30 and the postponement was dated August 30 was received in my office, September 1, 1977. At no time was I contacted or Vice Chairman Jorde contacted for the postponement of this investigation and according

to Rule 19 it must be by mutual agreement either by the carrier or myself for the postponement and, therefore, I would not concur to this postponement so this investigation will be under protest.

"Statement by Mr. Wearmouth

"Mr. Zimmerman, your protest will be noted under Rule 19, as it states in there the investigation will be postponed for good and sufficient reasons upon request by either party, which I'm sure with some of the problems we have been having would have been.

"Statement by Mr. Zimmerman

"I know that Vice Chairman Jorde and myself were available.

"Statement by Mr. Wearmouth

"I realize that, but with the problems we have been having and a good number of investigations, I'm sure that it would not be postponed without good sufficient reason so we will record your protest and go on with this hearing."

The hearing proceeded, and on the basis of evidence adduced and his prior disciplinary record, Claimant was assessed a twenty-day suspension without pay. This activated a ten-day deferred suspension which was pending from his prior automobile accidents so that Claimant actually served a thirty-day suspension.

The instant claim mounts no serious challenge to the sufficiency of the evidence nor the appropriateness of the penalty imposed. Indeed, were those the only issues we would deny the claim. But the claim comes to us on the procedural/ jurisdictional complaint that Carrier violated Rule 19(a) which reads in pertinent part as follows:

"The investigation will be postponed for good and sufficient reasons on request of either party."

The crux of this claim, as presented and pursued on the property, is that Carrier did not "request" but rather just unilaterally presumed to postpone the hearing originally scheduled for September 2, 1977. On the property Carrier defended against that complaint by asserting that there were "good and sufficient reasons" for postponement, and also by pointing out that the Organization requested and was

granted several postponements by Carrier before the hearing actually was held. At our hearing Carrier asserted for the first time that then Vice Chairman Jorde was "told" about the necessity of a postponement prior to August 30, 1977. The Organization articulated its objection regarding that postponement on the record at the hearing and pursued this objection diligently on the property. At no time prior to our Board Hearing did Carrier raise this latter defense. It comes too late now to be legitimately raised and considered.

There is no doubt on this record concerning the "good and sufficient reasons" why Carrier wanted a postponement. The only question is whether Carrier complied with the clear contractual requirement that it "request" such postponement from the other party to that agreement. To "tell" is not the same as to "request." We must assume that the parties to the Agreement knew the meaning of the words which they used. Irrespective of the bona fides or the justification for a postponement, Carrier violated Rule 19(a) when instead of requesting a postponement it unilaterally granted itself a postponement and merely informed the Organization of that fait accompli. It should be noted that each party is required to grant the other a postponement under Rule 19(a) when requested to do so for good and sufficient reasons. If Carrier had requested that particular postponement and the Organization had refused, we would have a different case. But Carrier's fatal error herein was in failing altogether to make the request and in acting unilaterally.

Nor in the final analysis is it really relevant that Carrier subsequently granted several requests from the Organization for postponements. Such considerations go to questions of equity and comity; whereas we are called upon here to interpret clear and unambiguous contract language. Perhaps the result does not seem "fair" or a layman might deem that the "guilty party" has been

permitted to escape through a technical "loophole." However, we do not sit to dispense our own particular brand of justice. Rather, we are requested to interpret the contract before us and where it is clear we have no alternative but to enforce it as it is written. See Award 3-11757.

FINDINGS:

Public Law Board No. 1844, upon the whole record and all of the evidence, finds and holds as follows:

1. That the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;

2. that the Board has jurisdiction over the dispute involved herein; and

3. that the Agreement was violated.

AWARD

The claim is sustained to the extent indicated in the Opinion. Carrier is directed to comply with this Award within thirty days of issuance.

Dana E. Eischen, Chairman

H. G. Harper, Employes Member

R. W. Schmiege, Carrier Member

Dated: 5/17/79