PUBLIC LAW BOARD NO. 1844

AWARD NO. 81

CASE NO. 96

PARTIES TO DISPUTE:

Brotherhood of Maintenance of
Way Employes

and

Chicago and North Western
Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The forty-five (45) day suspension imposed upon Truck Driver T. H. Fitzgerald for alleged insubordination was without just and sufficient cause and excessive. (Carrier's File D-11-17-297)

(2) Truck Driver T. H. Fitzgerald shall be compensated for all wage loss suffered from August 23, 1979 to October 7, 1979.

OPINION OF BOARD:

Claimant was employed as a Truck Driver in the Engineering Department, Chicago Division, Proviso Yard. Following due notice he was the subject of an investigation on August 15, 1979 into the following charge:

> "Your responsibility in connection with your violation of Rule Number 7 of the General Regulations and Safety Rules in that you did not obey a direct order given to you at approximately 11:15 a.m. on August 7, 1979, by Mr. Jeff Perenchio, your failure to take Vehicle Number 21-3473 back to the Equipment Repair Shop which resulted in it being left in Yard 2, Proviso, and the theft of portions of the Motorola radio from the above vehicle sometime between the hours of 3:30 p.m., August 7, 1979, and 7:00 a.m., August 8, 1979."

Rule 7 cited in the Notice of Investigation reads as follows:

> "Employes are prohibited from being careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious or conducting themselves in such a manner that the railroad will be subjected to criticism and loss of good will, or not meeting their personal obligations."

After the hearing and investigation, Claimant was found by Carrier to be guilty as charged and assigned a 45-day actual suspension. On September 4, 1979 the Organization initiated the present claim on behalf of Mr. Fitzgerald seeking reversal of the discipline and compensation for wage loss. The claim was handled to impasse on the property with a denial by the Director of Labor Relations (Non-Operating) on February 1, 1980. Thereafter the matter was placed before us for determination.

The factual record in this case is not disputed and is developed primarily by the testimony of Claimant Fitzgerald and his immediate supervisor Assistant Engineer Perenchio at transcript pages 3 and 4, as follows:

Mr. Kuehn to Mr. Fitzgerald:

"Q. On the date in question, Mr. Fitzgerald, that being August 7, 1979, what was your assignment?

A. I was suppose to bring a dump truck down to Yard 2 and leave it there for the day, so that I could use it to clean up scrap in Yard 2. I was told by Jeff to drive the dump truck down there and leave it and I did have a ride back to the shop so that I report on duty for the day. The truck sat down there for most of the day and I was told that I have a ride back to the yard, back to Yard 2 to get the dump truck, and I was never picked up to go back to Yard 2 to get the dump truck so I assumed that the dump truck was either going to be picked up by somebody else for today, so at 3:30 I went home.

"Q. You were never instructed by Mr. Perenchio to take the truck back to the work equipment repair shop?

A. Yes, he told me to bring it back there, that he would give me a ride back to get the dump truck, to bring it back to the shop."

Assistant Project Engineer Perenchio testified:

Tr. P. 3:

Mr. Kuehn to Mr. Perenchio:

"Q. Mr. Perenchio, would you please state your name and occupation with the Transportation Company?

A. Jeff Perenchio, Assistant Project Engineer.

Q. Mr. Perenchio, on the date in question, being August 7, 1979, could you tell us some of the circumstances involved with the dump truck?

A. Yes I can. I had Tom bring the dump truck to Yard 2 so that we could clean up. Come to Yard 2, and, which he did, he brought it down there in the morning and we used it and it was about 11 o'clock until I got back down to Yard 2, and Tom was there with the other Brigadier dump truck and we got together and we discussed getting the dump truck back to the yard or is it the mechanic shop, where they will be tied up. I told Tom that I could arrange to pick him up at the mechanic shop after he driven the first or the second dump truck back there, cause we have two down in Yard 2 now, to give him a ride back to pick up the first dump truck. I told him that under no circumstances did I want a dump truck left down in Yard 2. We left with that agreement and went to lunch. After lunch, I went to track

Tr. P. 4:

rehabilitation gang, and I did not make it back to the shop to pick up Mr. Fitzgerald, as I had mentioned that I would, and I assumed that he had found other means to get down to Yard 2 to pick up the dump truck."

Mr. Bushman to Mr. Perenchio:

"Q. Mr. Perenchio, did you instruct Mr. Fitzgerald that you would give him a ride down to bring the second truck back to the equipment repair shop?

A. Yes. I told Tom that I would drive over to the shop sometime after dinner so that I could give him a ride.

"Q. And you did not go down to pick up Mr. Fitzgerald? Is that correct?

A. That is correct, I was busy with another gang.

Q. Were you aware of the fact that you weren't picking Mr. Fitzgerald up?

A. Yes, I remember and I was aware that he needed a ride back to Yard 2.

Q. Did you go to Yard 2 to see if the dump truck had been taken back to the equipment repair shop?

A. No, I did not go back to Yard 2."

On the facts of this record we are persuaded that Carrier erred in concluding that Claimant had been insubordinate. Insubordination consists of a knowing or willful failure or refusal to carry out a reasonable order of a supervisor acting within the scope of his authority. We cannot find such culpability in Claimant's failure to return the truck because the instructions that he do so were coupled with Perenchio's assurance that he would provide or arrange for Claimant's transportation to the Yard. According to Perenchio's testimony, he became other wise occupied and therefore failed either to instruct Claimant further on a contingency plan to get him to the Yard, or to make other arrangements for retrieval of the truck. In those circumstances we cannot find that Claimant was disobedient or that he acted unreasonably in concluding when Perenchio failed to pick him up or contact him that the supervisor had made other arrangements regarding the truck. Claimant is not charged with lack of initiative or originality but rather with insubordination and Carrier has not demonstrated the latter misconduct on this record.

AWARD

Claim sustained. Carrier is directed to implement this Award within thirty (30) days of its issuance.

H. G. Harper
Employe Member

J. D. Crawford
Company Member

Dana E. Eischen, Chairman

Date: Sept. 10, 1982