

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD

NO. 2576

IN THE MATTER IN DISPUTE)

BETWEEN)

SYSTEM FEDERATION NO. 7.)

RAILWAY EMPLOYEES DEPARTMENT,)

AFL-CIO; ELECTRICIANS AND)

THE BURLINGTON NORTHERN INC.)

CASE NO. 3-4 CLAIM RE: DISCIPLINE
OF J.H. NYBERG

STATEMENT OF CLAIM:

CASE No. 3

"Claim filed account Electrician J.H. Nyberg of Superior, Wisconsin, unjustly suspended from Carrier service effective July 31, 1978 for a ten day period. Claim filed for the ten (10) day suspension at applicable Electricians pro rata rate, together with restoration of any lost vacation time, holidays, sick pay or hospitalization benefits and say other railroad retirement benefits and any other rights, privileges or benefits he may be entitled to under schedules, rules, agreements or law and the mark be removed from his personal file."

CASE No. 4.

"Claim filed account Electrician J.H. Nyberg of Superior, Wisconsin, unjustly dismissed from Carrier service on September 11, 1978. Claim filed for eight (8) hours compensation at pro rata rate for date beginning September 11, 1978 and each day thereafter that Claimant is withheld from service, together with restoration of any lost vacation time, holidays, sick pay or hospitalization benefits, railroad retirement benefits and any other rights, privileges or benefits he may be entitled to under schedules, rules, agreements or laws and the mark be removed from his personal file."

FINDINGS:

This public Law Board No. 2576 finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and that this board has jurisdiction over the subject.

The Claimant had been employed by the Lake Superior Terminal and Transfer Railway Company, for, in excess of, 15 years, as a Fireman. That carrier operates at the Oredock facility at Allouez, Wisconsin, and operates for approximately one hundred days during the summer months.

In 1974 the Claimant became employed by the Burlington Northern as an electrician. During the time between his employment by Burlington Northern and his termination, he worked as a electrician for the Burlington Northern through out the year.

The L.S.T. and T. has been merged with, and is a subsidiary of, the Burlington Northern.

On June 15, 1978, the Claimant was scheduled to work as an electrician. That day he requested permission of the carriers' agents to be absent from duty. That permission was denied to him. However, the Claimant did not report to work for Burlington Northern, but rather worked as a Fireman for the L.S.T. and T. *For the June 15, 19 78, absence, the Claimant was suspended for ten days, and for the July 26 and 27 absence, the Claimant was discharged.

This carrier contends that the suspension, and subsequent discharge, were neither Arbitrary nor capricious, because they were based upon his admitted absence from duty, without proper authority. They contend that this violates the carriers unilaterally promulgated work rule against engaging engaging in other occupations without permission. Secondly, the employer contends that both of the hearings held were according to the Collective Bargaining Agreement provisions and consequently did not deny the Claimant of due process.

The organization contends that the suspension and discharging was Arbitratary, unjust and an abuse of managerial discretion, because the carrier knew of the Claimants employment by its subsidiary, and had allowed such continued employment for a period of five years without objection. Rather they contend that the penalty of discharge was to severe in light of the circumstances.

Further, the organization contends that the two hearings were defective, because they did not grant sufficient time for the preparation of a defense, and because the charge failed to specify the basis for the disciplinary conduct.

In any discipline case the determination of whether the carrier acted in an Arbitratary, or capricious fashion, or conversely had just cause for such discipline, must be viewed again the conduct of the employer and employee.

In applying this criteria to the instant case, we find that the record contains no denial by the carrier that the L.S.T. and T. was a subsidiary company of the carrier. Further, there is no denial that the Claimant was allowed to continue to work at his position of Fireman with the L.S.T. and T., while concurrently employed by the carrier as an electrician. Finally, there is no explanation given by the employer as to any reasonable basis for denying the Claimant's request for an excused absence on June 15.

Therefore, based upon the foregoing absence of explanation by the carrier as to any reasonable basis for its refusal to grant an absence on June 15, it must be concluded that the employers conduct was arbitrary and capricious, and thus without just cause.

On the other hand, the conduct of the Claimant as to the June 15, events were inherently reasonable. His request for leave of absence on that date was a reasonable attempt to give notice to the employer of his need to be absent on that day. Apparently he made no attempt to conceal from his immediate supervisors that his absence was for the purpose of being employed as a Fireman on the L.S.T. and T. job.

Thus on the carrier's refusal, the Claimant was faced with either failing to appear for work on June 15, as an electrician, or failing to appear at the L.S.T. and T. job as a

Fireman. This placed him on the horns of a dilemma. His opting to work for L.S.T. and T. and retain his fifteen or twenty years of seniority with that company was not unreasonable under the circumstances.

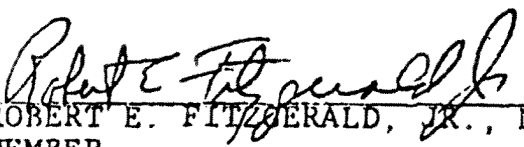
When the July 26, and 27, absences are viewed against the conduct of the employer and the employee in June, the employee's absence without permission is similarly found to be understandable. Therefore, it is a conclusion of the undersigned neutral Arbitrator that the conduct of the employer in suspending, and subsequently discharging the Claimant, was without just cause and consequently was arbitrary and capricious.

The remedy to be afforded the Claimant is reinstatement to his position with the Burlington Northern without any loss of seniority, or of other contract rights and with compensation in the amount of any back pay which was lost as a result of the suspension and the discharge.

AWARD: Claims sustained.

ORDER:

The carrier is directed to comply with this award within thirty days from the date hereof.


ROBERT E. FITZGERALD, JR., NEUTRAL
MEMBER

Ben F. Targeman
ORGANIZATION MEMBER

R.E. Carty - dissenting
CARRIER MEMBER

October 20, 1980