

PUBLIC LAW BOARD NO. 1760

Award No. 18

Docket No. MW-DEC-76-33

Parties Brotherhood of Maintenance of Way Employees

to and

Dispute Norfolk and Western Railway Company *Western Region*

Statement of Claim 1. Carrier violated the effective Agreement dated December 1, 1963, by unfairly and improperly refusing to pay Claimant G. P. Lape for time lost for dismissal from service between November 17, 1976 and December 7, 1976.  
2. Claimant G. P. Lape shall be compensated for the time loss period November 17, 1976 through December 7, 1976. Also, that Claimant's seniority, rights and all other rights be returned unimpaired.

Findings The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated February 2, 1976, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

Claimant was dismissed from service November 17, 1976.

The General Chairman under date of November 18, 1976, wrote:

"On behalf of Gary P. Lape, we are requesting a hearing as provided in Rule 20 of the effective agreement, who was dismissed from service on or about 1:15 p.m. on the day of November 17, 1976. Please advise Gary P. Lape and myself of the future time and place of the hearing.

Gary P. Lape's address is R. R. #2, Brownstown, Ill. 62418."

The Division Engineer responded thereto, on November 24, 1976, notifying Claimant,

"You are to report to the Division Engineer's Office, 780 East Cerro Cordo Street, Decatur, Illinois at 1:30 PM on Tuesday, December 7, 1976 relative to your alleged dismissal from service on or about 1:15 PM on November 17, 1976.

If you desire witnesses and/or representatives present, please arrange for their presence."

Following the hearing Claimant was addressed the following:

"As a result of the formal investigation conducted at Decatur, Illinois on December 7, 1976, it is deemed that you be returned to the services of the Norfolk & Western Railway Company, but that you not be compensated for time lost between November 17, 1976 through December 7, 1976."

Claimant had been employed some seven months before the November 17 incident. The incident in question reflects that Claimant had returned from the bathroom about 1:15 PM, on November 17, 1976, at which time he encountered the Assistant to the Division Engineer, J. A. McBride, who according to Claimant "was jumping my foreman because I wasn't to work". Apparently because Claimant was speaking in a loud voice Mr. McBride asked him to step outside. During the course of their conversation Claimant gestured with his hand which Mr. McBride interpreted to be pointing his finger at him and he told Claimant that he was relieved at 1:15 PM. Claimant asserted that he understood he had been dismissed. However, according to the Assistant

Division Engineer he told Claimant to go to see the Division Engineer because of his insubordination, but that he was never fired, or dismissed. According to Claimant, McBride told him, subsequent to the gesturing, that "this is insubordination you are relieved of duty".

In any event, Claimant went to the Division Engineer's office but Division Engineer was not there. Claimant then reported the matter to the General Chairman who requested the investigation.

The question thus raised by these facts are, was Claimant merely relieved from duty and instructed to report to the Division Engineer's Office in connection with his alleged insubordinate conduct? Or was Claimant dismissed from service because of his alleged insubordinate conduct.

The transcript supports the conclusion that it is distinction without difference. The Assistant to the Division Engineer testified that he believed Claimant to be insubordinate because he pointed his finger and hollered at him. He cut his time off at 1:15 and told him to report to the Division Engineer. What was the purpose thereof?

Certainly, Claimant is not without fault for his conduct on November 17, 1976. First, because of the manner and tone in which he spoke to his Supervisor certainly such

was not that which is normally expected. Secondly, that while Claimant apparently did report to the Division Engineer he did nothing further. Finding the Division Engineer absent he made no effort to talk with the Division Engineer or to find out what his status was.

On the other hand, the reaction of the Assistant to the Division Engineer sending Claimant to the Division Engineer certainly was not clear. Mr. McBride said that while he had the authority to dismiss Claimant that he was not dismissing the man but was merely removing him from service. He admitted that Claimant was a good worker.

Claimant denies that he was insubordinate. He does admit that maybe he talked loud that he gestured with his hands and that such gesture might be interpreted to be pointing his finger.

Whatever the true facts of the situation may be, it is clear that there is fault on both sides. Consequently, we believe that the time involved should be split as between the parties. First, because the time for holding the investigation was within the control of the Carrier. Here, the investigation was requested on November 18th, thus if there were a delay that would be more the responsibility of the Carrier. They deemed it appropriate to put back almost immediately

a man who they had alleged had been insubordinate. On the other hand the Claimant's conduct was such that he cannot be let free without some responsibility. We believe that it would be more appropriate to pay Claimant 12 of the 20 days that he was withheld from service.

Award Claim disposed of as per findings.

Order Carrier is directed to make this Award effective within thirty (30) days of date of issuance shown below.

M. A. Christie  
M. A. Christie, Employee Member

E. N. Jacobs  
E. N. Jacobs, Carrier Member

Arthur T. Van Wart  
Arthur T. Van Wart, Chairman  
and Neutral Member

Issued at Salem, New Jersey, April 4, 1980.