

PLB 1837
AWARD 7
NWW NWA 75-8

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees
vs.
Norfolk and Western Railway Company

STATEMENT OF CLAIM:

1. Carrier violated the effective Agreement dated April 1, 1951, on September 19, 1975, by unfairly and unjustly dismissing Charles T. Tolliver, Jr. from service.

2. Claimant Charles T. Tolliver shall be reinstated to Carrier's service, compensated for all wages lost, and have all seniority and other rights returned unimpaired.

FINDINGS: This Board upon the whole record and all the evidence finds that:

The Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended.

OPINION:

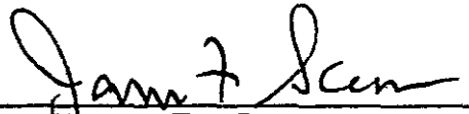
During the period of February through August, 1975, the attendance record for the Claimant indicates he was absent some 26 1/2 days at different times and according to the Carrier, without production of an acceptable excuse. The Organization asserts medical excuse was proffered for some such absences and that those remaining do not constitute a basis for discharge. The Organization also objects to the Carrier producing the Claimant's prior absenteeism record during the investigation and hearing, and, thus, asserts a procedural error on the part of the Carrier.

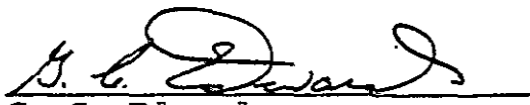
The burden must rest on the Organization to prove its affirmative defense that excuses were proffered, since the Carrier can hardly demonstrate the contrary by production of proof that no such excuses were forthcoming. In point of fact, a review of the Claimant's testimony is, at best, equivocal on this point and more emphatically indicates that the Claimant had a bad habit of "oversleeping." On balance, we must conclude that the Claimant was inattentive to his employment obligation and was sufficiently warned during the period cited that he was on treacherous ground, insofar as being an acceptable employee. We concur that the Carrier committed a "technical error" in its execution of the hearing by permitting introduction of the Claimant's prior disciplinary record in conjunction with the charge for which he was being investigated. We do not consider this fatal to the Carrier's case, however, and we affirm the Carrier's right to take any such prior record under review and consideration when determining the extent of discipline it intends to impose. It is the Carrier's right to be apprised of an employee's work availability in a timely manner that will permit it to make alternative plans for a full work force. The record here is manifest that such notice by the Claimant was not forthcoming. We are mindful that the Claimant had five years service at the time of his removal, and while long service might arguably be a basis for a Carrier to mitigate another wise

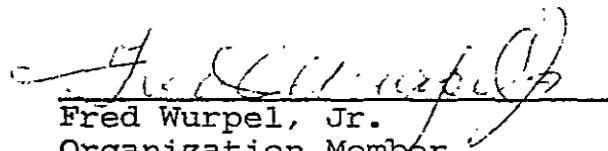
unacceptable record, we shall not disturb the Carrier's action in this case. We conclude that the Agreement was not violated.

AWARD:

Claim is denied.


James F. Searce
Neutral Member


G. C. Edwards
Carrier Member


Fred Worpel, Jr.
Organization Member

Dated this 1st day of February, 1980 at Cleveland, OH