

PUBLIC LAW BOARD NO. 1838

Award No. 76

Case No. 76

Carrier File MW-RO-81-1

Parties Brotherhood of Maintenance of Way Employees

to and

Dispute Norfolk and Western Railway Company

Statement Claim on behalf of H. E. English in which you protest the
of discipline assessed as a result of investigation held on
Claim February 6, 1981, and request that he be reinstated with pay
for time lost, that his seniority, vacation and all other
rights be 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 March 1, 1976, that it has
jurisdiction of the parties and the subject matter, and that the parties
were given due notice of the hearing held.

On January 20, 1981, Claimant English was ordered to report to B&B
Supervisor Murgas who handed him a letter dismissing him from all
service of the Carrier, resulting from his poor attendance record and
unsatisfactory work performance. At the request of Claimant's
representative, an investigation was scheduled and held on February 6,
1981. As a result thereof, Claimant English was notified under date of
February 25, 1981 that his dismissal was reaffirmed.

The gravamen of Organization's appeal on behalf of Claimant is that
Carrier failed to develop sufficient evidence to support its conclusion
and that Carrier prejudiced Claimant's right to present a meaningful

defense when Carrier failed to comply with an alleged understanding agreement to call and pay for witnesses requested by Claimant.

The Board finds that Claimant was ably and aggressively represented throughout the investigation. The testimony disclosed that on May 20, 1980, as a result of a incident that occurred in the Hump Yard at the Roanoke Terminal Claimant was sent a letter which, in pertinent part, read:

"...I advised you that your attitude and job performance were not satisfactory.

Be advised that if your job performance does not improve, you may be subject to discipline..."

Claimant apparently continued to demonstrate poor work performance, manifesting itself in chronic absenteeism. Under date of October 22, 1980, Claimant was notified in pertinent part, that he was to,

"...Consider this as a letter of warning to you for being absent without permission...So that you may know the seriousness of being absent without permission, we are quoting Rule 26 of the current M&W Agreement made between your organization and the Norfolk and Western Railroad Company.

'Rule 26 - DETAINED FROM WORK

'An employee desiring to be absent from work must obtain permission from his foreman or the proper officer. An employee detained from work on account of sickness or for any unavoidable cause shall notify his foreman or the proper officer as early as possible.'"

Claimant again failed to heed the warning issued and was absent several times without permission culminating in an assessment of discipline on November 26, 1980.

Claimant again failed to comply with the warnings or respond to the discipline, and, on December 4, 1980, Carrier assessed him thirty (30) days actual suspension, thus also activating the five (5) day deferred

suspension, for failing to comply with the mandates of Rule 26, being absent without permission.

Claimant was due back on January 12th; he contacted Supervisor Murgas approximately two minutes before reporting time, advising he would be late due to automobile trouble. In addition thereto, claimant's immediate supervisor, Assistant Foreman Twine, complained to Terminal Supervisor Murgas of Claimant's work performance and his failure to perform in a satisfactory manner. Several times during the period from the 12th of January until January 20th Claimant was spoken to by his supervisors, arrived at work several hours late or was totally absent.

None of this was denied by Claimant.

Claimant sought to explain his inability to comply with Carrier's requirements by testifying to, and calling witnesses to corroborate, the fact that Claimant had recently experienced the death of a cousin, the loss of an uncle, and grandfather, and that his wife had surgery just prior to giving birth to their baby, as well as having been sick himself with the flu several times during the period in question.

Claimant sought to explain his failure to call in by advising Carrier that he had attempted to call in, but prior to 7:00 AM, the lines were busy, and that he couldn't get through to Mr. Murgas. However, he did advise that he did speak to somebody else whose name he did not know. Claimant asserted that he always tried to call in and relied several times upon his wife to get the message to Carrier that he was either going to be late or that he was not coming to work.

Organization entered a timely objection to what Organization asserted was an understanding with Claimant's Supervisor that Carrier

would pay for witnesses requested by Claimant. Organization asserted that the witnesses were subsequently informed by some undisclosed source that they would not get paid, thus they did not appear.

The Board finds that the naked assertion without any showing of actual prejudice fails to create circumstances that would warrant an overturning of the discipline rendered. The two witnesses that did appear for Claimant offered cumulative testimony to confirm that which Claimant had himself testified to concerning his family problems. There is no showing that the absent witnesses would have offered any different testimony, nor was there any proffer that their testimony would have been anything more than cumulative.

The Board finds that Claimant readily acknowledged the repeated verbal warnings by Carrier concerning his work performance and his absenteeism. The record discloses that Claimant signed for certified letters at each instant of formal warning and discipline.

We cannot conclude from the state of this record that Carrier's actions were arbitrary or capricious, nor can we conclude that the discipline was unwarranted or excessive particularly when Claimant was returning from a thirty-five (35) day suspension due to his chronic absenteeism and poor work performance and immediately began a repetitive pattern.

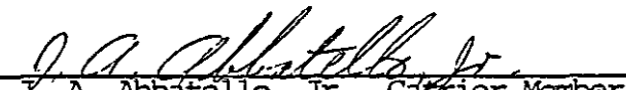
While we are not unsympathetic to the personal problems Claimant may have had, notwithstanding, he was repeatedly advised of and made aware of his requirement to notify Carrier. He cannot place the responsibility for such notification either on his wife or any third party. It was his duty to inform his supervisor if he was not going to be able to show for work. More importantly, Claimant's repeated

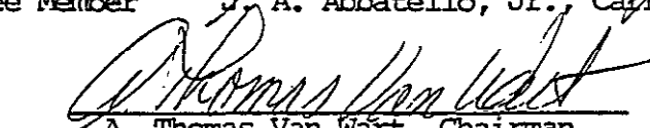
failures to protect service placed Carrier in the difficult position of having to cover shorthanded crews in order to accomplish its work goals. No business can operate with an unpredictable work force.

There is no basis that would warrant the Board intruding into the results that occurred on the property and we must ineluctably conclude that this case must be denied.

AWARD: Claim denied.


Bryce Hall, Employee Member


J. A. Abbateello, Jr., Carrier Member


A. Thomas Van Wart, Chairman
and Neutral Member

Issued at Salem, New Jersey, March 2, 1984.