

PUBLIC LAW BOARD NO. 1844

AWARD NO. 5

CASE NO. 17

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation
Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The dismissal of Foreman L. H. Gobeli was without just and sufficient cause and on the basis of unproven charges (System File D-11-24-19).
2. The claim presented by General Chairman S. C. Zimmerman on July 30, 1975 to Division Manager D. B. Carlisle is allowable as presented because said claim was not disallowed by Mr. Carlisle in accordance with Rule 21.
3. Because of (1) and/or (2) above, Foreman L. H. Gobeli be re-instated with all rights unimpaired and with pay for time lost.

OPINION OF BOARD:

This case involves the dismissal from service of Foreman L. H. Gobeli following an investigation at which he was found culpable by Carrier of "falsifying report of time worked on Work Report." The issues before us, as joined on the property and argued in the parties' submissions, concern both the merits of the dismissal and a violation of the time limit on claims rule by Carrier. With respect to the merits of the case the parties are in disagreement as to whether Carrier adduced sufficient evidence on the record to support a charge that Claimant falsified his work report. In connection with the violation of Rule 21 (Time Limit on Claims Rule) Carrier admits that it made untimely denial of the appeal on the property and the only point of contention before us for resolution is the appropriate remedy for such procedural violation.

In June, 1975, Claimant was employed as section foreman with headquarters near Dike, Iowa. On June 19, 1975, his immediate supervisor, Roadmaster T. J. Crubaugh, and another supervisor arrived at the section headquarters at approximately 2:30 p.m. They observed Claimant and another employee washing their hands and "assumed" that they were quitting work early. During the period of time in question Claimant had regularly assigned hours of 7:30 a.m. to 12:00 noon and 1:00 p.m. to 4:00 p.m. The record indicates that Crubaugh and the other supervisor did not remain at the site after observing Claimant and could not say of their own knowledge whether Claimant left work early on June 19, 1975. Claimant's work report for the day in question showed that he worked until 4:00 p.m. and at the hearing he testified without contradiction that after washing his hands at approximately 2:30 p.m. he performed paper work until quitting time at 4:00 p.m. Based upon his observations of June 19, 1975, Crubaugh and another roadmaster returned to the section headquarters on June 20, 1975, at approximately 2:45 p.m. to find Claimant's truck locked and no employees in and around the headquarters. Claimant's work report for that day showed that he reported working on inspection of track and switches until 4:00 p.m. on June 20, 1975. Subsequently, by notice dated July 7, 1975, Claimant was instructed to appear for a hearing on July 15, 1975, into charges reading as follows: "Your responsibility in connection with falsifying report of time worked on Work Report."

Following the investigation Claimant was found responsible as charged and he was dismissed from all service of Carrier effective July 24, 1975. By letter dated July 30, 1975, the Organization's General Chairman filed this claim with the Carrier's Division Manager appealing the discipline assessed Mr. Gobeli and asking that he be reinstated with seniority and vacation rights unimpaired and compensated at his straight time rate for all time lost. The record indicates that Carrier's Division Manager never responded in any form to this claim letter. Thereafter, on October 15, 1975, the Organization appealed to Carrier's Director of Labor Relations in a letter reading as follows:

"On July 30, 1975, I wrote to Division Manager D. B. Carlisle asking that Mr. L. H. Gobeli be reinstated with seniority and vacation rights unimpaired and he be compensated at his straight time rate for all time lost. As to date, I have not received a reply from Division Manager Carlisle. The aforementioned claim should be allowed not only on its merits but by the default provisions of the claim and grievance rule (Rule 21) which specifically stipulates that should any such claim or grievance be disallowed the Company shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented.

"Therefore, Mr. Gobeli should be reinstated with his seniority and vacation rights unimpaired and he be compensated at his straight time rate for all time lost.

"Please advise."

By letter dated December 10, 1975, Carrier's Director of Labor Relations (Non-Operating) denied the claim as to the merits of the dismissal, admitted failure by the Carrier to timely deny the appeal of July 30, 1975, and suggested conference to determine the appropriate remedy for the violation of Rule 21. Extensive discussions on the property in an effort to settle this claim proved unavailing and the matter accordingly has been appealed to our Board for final and binding disposition.

Turning our attention initially to the violation of Rule 21, we have studied in detail and considered carefully the well-documented arguments and extensive citations furnished by both parties relative to the appropriate measure of damages for Carrier's failure to timely deny the Organization's appeal of July 30, 1975. The details thereof are well known to the parties, are clearly understood by this Board, and no useful purpose can be served by lengthy reiteration herein. The Organization relies for the most part on the literal language of Rule 21 and cites certain awards supportive of its view that the Rule requires as remedy for late denial complete reinstatement of the Claimant with all rights, benefits and back pay as demanded in the July 30, 1975, appeal. It should be noted that the Organization refuses to recognize the December 10, 1975, denial by the Director of Labor Relations

(Non-Operating) and insists that only denial by the Division Manager, to whom the claim was initially presented, may effectively toll Carrier's liability. Arguendo, the Organization maintains that even if the December 10, 1975, late denial is recognized, the Rule still requires Carrier to grant every element of relief demanded in the July 30, 1975, claim letter. Carrier, on the other hand, contends that the December 10, 1975, denial by the Director of Labor Relations (Non-Operating) is effective to limit its liability under Rule 21 and cites numerous authorities for the proposition that the proper measure of damages for the procedural time limit violation is compensation for the period July 30, 1975, until December 10, 1975, when the claim was denied by Carrier. Both parties cite in support of their respective positions Decisions No. 15 and 16 of the National Disputes Committee established May 31, 1963 (NDC). As noted supra, we have considered carefully all of the authorities cited by both parties. The contentions of the Organization have substantial merit and if this were a case of first impression we might well find them persuasive. But we do not sail here in uncharted waters and in our considered judgment the best indicator for the proper interpretation and application of Rule 21 in cases such as the one we have before us are the decisions of the NDC. In our considered judgment a careful reading of Decision No. 16 (a unanimous decision of the bilateral NDC) supports the position advocated herein by Carrier. We have examined all of the awards cited by the parties construing and applying the principles announced in Decision No. 16 and conclude that those reaching a contrary result either may be distinguished on their facts or the state of the evidentiary record or else are in plain error. Applying these guiding principles to the instant case, we find that the Carrier denial of December 10, 1975, albeit a late denial, was effective to toll Carrier's liability for the procedural violation as of that date. We find further, based upon all the precedents before us that the proper measure of damages for Carrier's violation of Rule 21 is compensation to Claimant at his straight time hourly rate from July 24, 1975, through and including December 10, 1975.

With respect to the merits of the dismissal, the Organization contends that Carrier has not presented sufficient evidence to support its charges. Our review of the record, including the transcript of the hearing on the property, persuades us of the validity of the Organization's position with respect to July 19, 1975. The only record evidence adduced by Carrier on this point is that Claimant was washing his hands at 2:30 p.m. that day. From this fact Carrier assumed that he took an early quit and charged him accordingly with falsifying his records which showed he worked until 4:00 p.m. Claimant testified that he did in fact work until 4:00 p.m. that day and there is no record evidence whatever to gainsay this testimony. Indeed, the sole Carrier witness on this point testified that he did not know whether Claimant returned to work after washing his hands. Accordingly, we must conclude that Carrier has not carried the burden of persuasion by substantial record evidence that Claimant falsified his time report on July 19, 1975.

With respect to July 20, 1975, the record is somewhat equivocal and credibility conflicts are presented. Claimant testified that he took an early quit on July 20, 1975, on instructions of his Roadmaster to make up for overtime he had coming as a result of attending a safety meeting on June 6, 1975. The Roadmaster denies granting any such permission to Claimant. Working from a cold transcript and without the ability to observe the demeanor of witnesses, there is no way we can resolve this conflict in testimony. Assessing the record objectively, we cannot positively conclude that Carrier's judgment of Claimant's culpability on July 20, 1975, is unfounded. It is evident, however, that the extreme penalty of dismissal was premised upon a conclusion that Claimant was guilty of falsification on at least two occasions and the transcript contains unfounded allusions to several other instances. Inasmuch as we find evidence of only one such transgression, in the particular facts and circumstances of this case, we must conclude that the penalty of dismissal is

unreasonably harsh and inappropriate. Accordingly, we shall reduce the penalty to a disciplinary suspension and direct Carrier to reinstate Claimant with seniority rights unimpaired but without compensation except for the period July 24, 1975, through December 10, 1975, as discussed supra.

FINDINGS:

Public Law Board No. 1844, upon the whole record and all of the evidence, finds and holds as follows:

1. That the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;
2. that the Board has jurisdiction over the dispute involved herein; and
3. that the Agreement was violated to the extent indicated in the Opinion.

AWARD

Claimant is to be reinstated with seniority rights unimpaired, but without back pay, except he shall be compensated at his straight time hourly rate for the period July 24, 1975, through December 10, 1975. Carrier is directed to comply with this Award within thirty (30) days of its issuance.


Dana E. Elschen, Chairman


O. M. Berge, Employee Member


R. W. Schmiede, Carrier Member

Dated: May 5, 1977