

PUBLIC LAW BOARD NO. 1844

AWARD NO. 6

CASE NO. 18

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 discipline assessed Section Foreman N. D. Nave (30 days suspension February 23 through March 23, 1976) was improper, arbitrary, capricious and without just and sufficient cause (System File D-11-1-325).
2. Claimant Nave be allowed pay at the section foreman rate for all time lost during the period February 23 through March 23, 1976.

OPINION OF BOARD:

Claimant Norman Nave in January, 1976, was serving as foreman of the night maintenance of way crew at DeKalb, Illinois. His regularly assigned hours of work were from 7:00 p.m. to 3:30 a.m. the following day. On January 25, 1976, Claimant reported to work at 7:00 p.m. but neither of the other two members of his crew reported for work. Claimant spent approximately two hours trying to locate his supervisor, Roadmaster J. A. Tacke, but was unsuccessful in doing so. He then contacted the Dispatcher, who also was trying to locate the Roadmaster. The Dispatcher informed Claimant that there were no existing emergency problems, took Claimant's phone number, and told him if anything developed he would call Claimant at home. Thereupon Claimant departed the property at approximately 9:30 p.m. and went to his home. He testified that he stayed available for call until 3:30 a.m. Thereafter

Claimant submitted a work report claiming eight hours' pay for the night of January 25, 1976. The next two following days were Claimant's regular rest days and he next reported for work on the night of January 28, 1976. At that time a discussion ensued between Claimant and Roadmaster Tacke regarding Claimant's work report for January 25-26. Tacke informed Claimant that he had appeared at the DeKalb depot at approximately 11:00 p.m. on the night of January 25 to find the depot locked and no one about the premises. The Roadmaster had attempted unsuccessfully to contact Claimant and his crew by radio. Claimant explained the circumstances of his crew not reporting and his leaving the property subject to call by the Dispatcher, whereupon the Roadmaster questioned the eight hours of pay claimed. Claimant thereupon suggested that the Roadmaster make any adjustments he deemed appropriate in the hours claimed for January 25 and the Roadmaster said he would do so. Two days later, on January 30, 1976, Claimant received a notice to attend a formal investigation into charges reading as follows: "Your responsibility in connection with your failure to perform the duties of your assignment January 25, 1976, and claiming a full eight hours of pay for performing Maintenance of Way duties on January 25, 1976."

Following the investigation, Carrier found Claimant culpable as charged and assessed thirty days' actual suspension from service as discipline. The Organization appealed the discipline on March 4, 1976, contending that it was too severe and requesting that it be revoked and Claimant compensated for all time lost. The claim was denied at all levels of handling on the property and has been appealed to this Board.

At bottom line in discipline cases Carrier must demonstrate that the accused is guilty of culpable misconduct or malfeasance. In this connection the central question in the case before us is whether the record contains substantial evidence that Claimant was guilty as charged. The essence of Carrier's charge is an

attempt to defraud or dishonestly to obtain money under false pretenses. Careful examination of the record evidence persuades us that Carrier has not carried its burden of persuasion on this central point. Unrefuted evidence developed on the property indicates that Claimant as of January 25, 1976, had been working the job of Night Crew Foreman for only three or four days at the most. Further, the undisputed record shows that he had previously taken instruction regarding performance of his duties from the Train Dispatcher. On the night in question he exerted every reasonable effort to contact the Roadmaster and then turned to the Dispatcher. It is uncontroverted that he left his phone number and remained available for service the balance of his shift. Nor does any record evidence effectively refute Claimant's testimony that on his next work day following January 26, 1976, he reported the incident to the Roadmaster and left it to the latter's judgment whether he should receive a full day's pay for the night in question.

On consideration of the open, candid manner in which Claimant acted, and in light of the fact that he had been only four days on the job with no prior supervisory experience, we cannot conclude that he acted dishonestly or with intent to defraud. Rather all of the record evidence indicates at worst ignorance of procedures on his part. Although such ignorance may be disconcerting and even disruptive in the work situation, it is not culpable misconduct sufficient to support the charges proffered against him by Carrier. We should not be understood to condone proven dishonesty or falsification of the time records and we recognize the validity of the authorities cited by Carrier wherein discipline was not disturbed by Boards of Arbitration in the face of such proven misconduct. See Third Division Awards No. 20182, 20031, 20003, and 19843. But neither the direct nor circumstantial evidence presented in this case may reasonably lead to such a conclusion. In the circumstances, we are guided by other authorities cited by the Organization wherein discipline was deemed

inappropriate because of insufficient evidence of the state of mind necessary to support a finding of fraudulent misconduct. See Third Division Awards No. 16064 and 18594; see also 10582 and Awards cited therein. Based upon the foregoing, we are persuaded that the claim must be sustained.

FINDINGS:

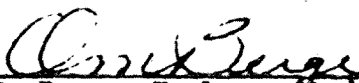
Public Law Board No. 1844, upon the whole record and all of the evidence, finds and holds as follows:

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.

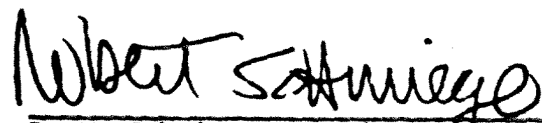
AWARD

The claim is sustained. Carrier is directed to comply with this Award within thirty (30) days of its issuance.


Dana E. Elschen, Chairman


O. M. Berge, Employee Member

Dated: May 5, 1977


R. W. Schmiede, Carrier Member