

PUBLIC LAW BOARD NO. 2206

AWARD NO. 25

CASE NO. 35

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Burlington Northern, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Sectionman D. A. Luzzo was without just and sufficient cause and wholly disproportionate to the alleged offense. (System File P-P-384C)
- (2) Sectionman Luzzo now be allowed compensation for all lost time and his personal record be cleared of the discipline."

OPINION OF THE BOARD:

This case started out as a dismissal and the remedy sought by the Organization was reinstatement with full back pay and benefits. It is stipulated, however, that the parties entered into a partial settlement of this claim without prejudice to further processing before the Board of the portion not settled. Thus, the parties entered into the following Letter Agreement, effective October 15, 1971:

"Mr. F. H. Funk, Vice President September 24, 1979
Bro. of Maintenance of Way Employees File MW-20 4/21/78 B
730 Hennepin Avenue, Suite 715
Minneapolis, Minnesota 55403

Dear Mr. Funk:

Please be referred to previous correspondence concerning the claim on behalf of former Sectionman D. A. Luzzo for reinstatement which we discussed in conference on September 14, 1979, your file P-P-384C.

At the conclusion of such discussion it was agreed that Mr. Luzzo will be reinstated with the understanding that he will accumulate no vacation time or benefits during the time he has been out of service and that his reinstatement will be subject to the Carrier's usual physical and visual requirements and will be effective after those conditions are agreed to and met by Mr. Luzzo. It was additionally understood that the claim for wages lost prior to reinstatement will be submitted to Public Law Board No. 2206 for adjudication.

Mr. Luzzo will be promptly recalled to service and if he satisfactorily passes the examinations referred to above and returns within 20 calendar days after date of notification to do so, he will be permitted to return to his former position of Sectionman at Snake River, Washington, if position is still in existence and not occupied by a senior employee. If Mr. Luzzo is unable to return to that position, he may exercise seniority in accordance with the rules of the Maintenance of Wage agreement over any junior regularly assigned employee.

No claims will be submitted by or in behalf of any employees because of the reinstatement of Mr. Luzzo or because of the exercise of seniority by Mr. Luzzo when returning to service.

Failure to return to service within the 20 calendar day period referred to above, unless prevented by sickness or failure to satisfactorily pass the required examinations, will result in loss of all seniority rights.

Sincerely,

ACCEPTED:

L. K. Hall
Asst. to Vice President
LKH:aml,7

Vice President - BMWE
Signed 10/15/79"

Thereafter, Claimant received a certified letter on November 1, 1979 recalling him to service in accordance with the terms of the Letter Agreement supra. So far as the record shows, Claimant disregarded that recall notice and never has reported as directed. Under date of December 12, 1979, Carrier advised the Organization as follows:

"Please be referred to my letter dated September 24, 1979 and previous correspondence concerning the claim on behalf of former Sectionman E. A. Luzzo for reinstatement, your file P-P-384C.

In the above referred to letter, it was agreed Mr. Luzzo would be recalled to service, and further that his failure to return to service within 20 calendar days will result in loss of all seniority rights.

On October 31, 1979, Mr. Luzzo was sent a letter by Division Superintendent J. G. Edwards by certified mail, return receipt requested. The signed receipt indicates the letter was delivered on November 1, 1979; however, Mr. Luzzo has not reported for service as of this date.

Mr. Luzzo's failure to report as agreed to within the 20-day period has resulted in the loss of all his seniority."

Subsequently, the parties agreed to place the claim before this Board.

In light of the Letter Agreement and Claimant's failure to comply, it is clear that our remedial authority in this case is limited. If arguendo, we find that Carrier erred as alleged in part 1 of the claim, then the maximum remedy we shall award would be appropriate back pay for the period January 10, 1978 (date of termination) through November 29, 1979 (the last date Claimant could have reported for duty under the Letter Agreement).

Turning to the propriety of the termination, we find that the Organization's allegations of procedural impropriety are not well founded. Our review of the transcript shows no support for the charges of misconduct levied by the Organization against the Hearing Officer. Nor, upon review of the overall record, can we conclude that the Notice of Hearing was insufficiently precise under Rule 40C. Specifically, we find no fatal flaw in the failure of Carrier to cite a particular Safety Rule in that Notice. See, Awards 2-7818; 2-7936; 3-12898; 3-20238; 3-20285; and 3-22119.

On the merits, Claimant was found culpable by Carrier and terminated on January 10, 1979 as follows:

"This is to advise you that effective this date you are hereby dismissed from the service of Burlington Northern Inc. for violation of Safety Rules 2, 3, 4, 661, and 662, for failure to make prompt and factual report of alleged injury sustained November 2, 1977, as disclosed by investigation accorded you December 12, 1977.

Please acknowledge receipt by affixing your signature in space provided on copy of this letter and relinquishing all Company property, including free transportation, that has been issued to you."

The Safety Rules cited in the dismissal letter read as follows:

"Rule 2

An employee having any knowledge of information concerning an accident or injury before his tour of duty ends (or as soon thereafter as possible), must complete Form 12504, Report of Personal Injury, in triplicate, supplying the information required. All copies are to be sent to the superintendent.

"Rule 3

Accidents, injuries, defects in track, bridges, signals, or any unusual condition which may affect the safe operation of the railroad, must be reported by the quickest available means of communication to the proper authority, and must be confirmed by wire on or required form.

"Rule 4

Injury of any kind, however minor, must be promptly reported.

"Rule 662

Employees who withhold information or fail to give factual report of an irregularity, accident, or violation of rules will not be retained in the service."

After reviewing all of the testimony and documents, we must conclude that Carrier has sustained its burden of proof that Claimant was culpable of failure to make a prompt and factual report regarding his alleged injuries. Credible testimony and several written documents prepared by Claimant himself fixed the occurrence date of the injury as November 2, 1977 when he was unloading ballast. At the hearing, however, Claimant asserted that this was a mistake and the injury actually occurred on November 9, 1977. This latter contention surfaced after Carrier demonstrated that no ballast was unloaded by Claimant on November 2, 1977. Carrier resolved credibility conflicts against Claimant regarding the time of his first oral report of the injury. We can find no basis in this record for reversing those conclusions. In any event, it is clear from the record that Claimant first made written claim of an on-the-job injury on December 1, 1977. In the particular facts of this record, we cannot find that Carrier erred in assessing discipline, nor can we find that the quantum finally imposed was arbitrary, unreasonable, or capricious. Accordingly, we shall deny the claim.

FINDINGS:

Public Law Board No. 2206, 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 not violated.

AWARD

Claim denied.


Dana E. Eischen, Chairman


L. K. Hall, Carrier Member


F. H. Funk, Employee Member

Date: July 15, 1980