

PUBLIC LAW BOARD NO. 2206

AWARD NO. 44

CASE NO. 44

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 Section Laborer Curtis L. Anderson November 21, 1978, was without just and sufficient cause and wholly disproportionate to the alleged offense. (System File T-D-124C).
- (2) Section Laborer Curtis L. Anderson be paid eight (8) hours pay at his respective straight time rate until he is returned to service with all seniority rights and privileges unimpaired.

OPINION OF BOARD:

Claimant was employed from May 1977 until October 1978 as a Section Laborer on an AFE Crew, under the daily supervision of Section Foreman L. M. Nicholas. During working hours on the afternoon of October 6, 1978 Claimant told the Foreman that he was sick and that he had a friend available to drive him home. The record is not clear as to whether the Foreman told the Claimant to leave or gave him permission to leave. The Foreman denies telling Claimant directly to go home on October 6, 1978. But as we read the record he does not refute Claimant's testimony that he said to Claimant in words or substance: "If you can't show up regularly for work you might as well go home". In any event, shortly thereafter Claimant left work on

October 6, 1978 and never did report back again or contact any Carrier representative. Subsequently, under date of October 18, 1978, Claimant was served with a written notice of investigation reading as follows:

Attend investigation in the Conference Room, Division Office Building, Fargo, North Dakota, at 1:30 PM, Tuesday, October 24, 1978, for the purpose of ascertaining the facts and determining your responsibility in connection with your alleged failure to protect your assignment as section laborer on AFE Gang working at West Fargo, North Dakota, October 16, 1978 and subsequent dates.

Arrange for representatives and/or witnesses, if desired, in accordance with governing provisions of prevailing schedule rules.

Acknowledge receipt of this notice by affixing your signature on attached copy of this letter.

W. A. Hatton
Superintendent

WET:slh

cc: Mr. M. C. Schlaugh, Local Chairman BMWE
Mr. W. B. Vadnais
Mr. R. H. Preuss

The hearing was postponed at the request of the Organization and was held on October 31, 1978. Following the hearing, Claimant was notified of his dismissal from service, as follows:

Effective this date, November 21, 1978, you are dismissed from the service of the Burlington Northern Inc., for violation of General Rule A and Rule 7 of Form 15477, RII Selective Safety and H/V Rules when absenting yourself from duty without proper authority as section laborer, AFE Gang, West Fargo, North Dakota, on October 16, 1978, and subsequent dates as per testimonies developed at investigation held at Fargo, North Dakota, on October 31, 1978.

Relinquish any and all Company property, including free transportation, that has been issued to you.

Acknowledge receipt of this letter by affixing your signature on attached copy.

L. R. Sandvik
Trainmaster-Road Foreman

DRL:jm

cc: Mr. H. C. Schlauch, Local Chairman, BMWE
Mr. C. A. Klippenes, Vice General Chairman, BMWE
Mr. W. B. Vædnais
Mr. R. H. Preuss
Personal Record

File: 301-14(24)

The Organization immediately appealed the discipline on grounds that the discharge allegedly violated Rules 15 and 40. The claim was denied at all levels of handling and ultimately was appealed to this Board.

Close analysis of the hearing notice, the transcript of investigation and the dismissal letter shows that Carrier's local management on October 18, 1978 accused Claimant and subsequently convicted and disciplined him for failure to protect his assignments on October 16, 1978 and subsequent dates, i.e., for the two-day period October 16-17, 1978. Carrier's local management drafted these charges and, for reasons known only to themselves, confined the charge to the period on and after October 16, 1978, without any reference to the period from October 6, 1978 forward. Accordingly, the period October 6-15, 1978 never was under challenge by Carrier and cannot properly be considered in determining Claimant's culpability or in assessing the proper quantum of discipline.

Focusing exclusively upon the period properly within the scope of the charge against Claimant, we find in the transcript of investigation the

colloquy between Claimant and the hearing officer:

46. Q. Mr. Anderson, I'm going to ask you again. Did you contact anybody on the railroad advising them that you were not going to return to work after the 16th of October, 1978?

A. I contacted a foreman in Edgeley by the name of Roger Anderson.

47. Q. Is Roger Anderson, the foreman at Edgeley, your immediate supervisor?

A. No, he's not.

48. Q. Did you expect Mr. Anderson at Edgeley to contact the local Maintenance of Way people here to tell them that you would not be available for work?

A. No, I did not inform anybody about not returning because I hadn't made my mind up yet.

49. Q. Rule 7 of the Selective Safety and Maintenance of Way Rules for Seasonal Employees reads as follows:

"Employees must report for duty at the designated time and place. They must be alert, attentive, and devote themselves exclusively to company service while on duty. They must not absent themselves from duty, exchange duties with, or substitute others in their place without proper authority."

Mr. Anderson, do you understand the provisions of Rule 7 that you must report for duty at the designated time and place, and that you are not to be absent from duty without proper authority from your supervisor?

A. Yes, sir, I do understand...(inaudible).

50. Q. Were you absent from duty on October 16 and the days following October 16 without obtaining permission from the proper authority?

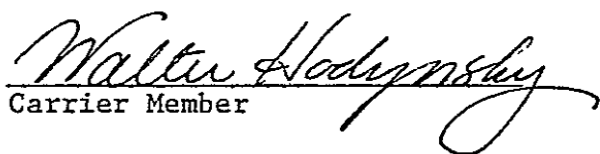
A. Yes, sir, I'm guilty of that.

We note that in the claim Mr. Anderson seeks reinstatement and back pay from November 21, 1978 forward. Apparently this is an implicit assertion that he was medically unfit for service until that date. In the context of the present record, it was incumbent upon Claimant to prove his inability to work due to sickness, especially with respect to the critical dates of October 16 and 17, 1978. However, he provided not one iota of evidence and not even a bare assertion that he was sick and unable to work on those dates. From the available evidence, including Claimant's statements, it appears that he was absent without permission on October 16 and 17, 1981 because he could

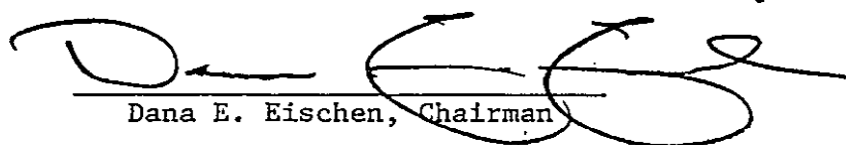
not decide whether he still wanted to work for Carrier. We find that Carrier was not unreasonable in treating this unjustified failure to appear for work or to notify Carrier management of his inability to do so as an abdication of his employment rights. See Awards 3-14601 and 3-20178.

AWARD

Claim denied.


Carrier Member


Employee Member


Dana E. Eischen, Chairman

Date: 10/7/81