

NATIONAL MEDIATION BOARD, Administrator

PUBLIC LAW BOARD NO. 2512

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

and

SYSTEM FEDERATION NO. 76, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO-CLC
BROTHERHOOD OF RAILWAY CARMEN OF U.S. AND CANADA

Award No. 20
(Docket No. 21)
(C&NWT File No. D-7-3-314)

S T A T E M E N T O F C L A I M

1. Carman Val G. Wilson was unjustly dismissed from service on July 10, 1979.

2. Carman Val G. Wilson was not properly notified of his investigation, or the charges to be brought against him, as is required by Rule 35.

3. That the Chicago and North Western Transportation Company be ordered to make Carman Val G. Wilson whole for all time lost, restore him to Carrier's service with all seniority rights, vacation rights, holidays, sick leave benefits and all other benefits that are a condition of employment unimpaired and be compensated for all lost time plus 6% annual interest on all losses sustained account loss of coverage under Health and Welfare and Life Insurance Agreements during the time held out of service, as per Rule 35.

F I N D I N G S

According to the Carrier, Claimant failed to protect his assignment from May 16 through May 31, 1979; he was sent notice of an investigative hearing concerning such absences on June 6, 1979; and the charges were read to him on the telephone on June 9, 1979, in the presence of the Acting Local Chairman.

The Claimant failed to appear at the investigative hearing. Following the hearing, he was sent notice of his dismissal from service on July 10, 1979.

There was testimony from a Carrier representative at the hearing that the Claimant had stated that he was under a doctor's care, but at no time was documentary evidence of any kind submitted to support this contention.

Given nothing more, the Board has no basis to disturb the Carrier's action in dismissing the Claimant after three weeks' continuous absence, based on nothing more than the Claimant's statement at one point that he was "under a doctor's care". If not verified sooner, the Claimant could certainly have undertaken to provide proof at the time of the hearing.

However, the Organization raises two procedural objections under Rule 35. The first is that the Claimant did not receive the requisite "five (5) days advance written notice" of the

hearing. The Carrier offered information at the hearing that such a notice had been mailed on June 6, 1979. There is clear evidence that the Claimant was notified by telephone on June 9, in the presence of an Organization representative. If the Carrier had not written to the Claimant, as the Carrier states that it did, the telephoned notice would be insufficient. But it is insufficient proof to the contrary for the Organization simply to state that such letter was not sent or received.

The Organization also argues that the claim should be sustained because a hearing in the matter was held on June 13, 1979, and the notice of discipline dismissing the Claimant from service was not sent by the Carrier to the employee until July 10, 1979 -- 27 days later. The Organization claims this is in violation of Rule 35 (d), for which the remedy is provided in Rule 35 (k).

Rules 35 (d) and (k) read as follows:

"(d) A decision will be rendered within fifteen (15) days following the completion of investigation, and written notice of discipline will be given the employee, with copy to the organization's local representative."

"(k) If investigation is not held or decision rendered within the time limits specified herein, as such time limits are extended by agreement or postponement, the charges against the employee shall be considered as having been dismissed."

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Award No. 28, issued simultaneously with this award, deals with this question at length. As found in Award No. 28, it is clear that Rule 35 (k) requires that "charges" against an employee "shall be considered as having been dismissed" if a decision is not rendered within 15 days following the completion of investigation. The charges here relate to failure to protect assignment between May 16 and May 31.

In considering this case, a majority of the Board (with the Organization dissenting) found the Claimant's abandonment of his position sufficient to deny the claim, despite the provisions of Rule 35 (k). This finding was taken by the Organization to United States District Court, Northern District of Illinois, Eastern Division. The Court found that the Board "went beyond the scope of its authority" (82 C 882, Joel M. Flaum, District Judge, February 28, 1983).

This decision was appealed by the Carrier to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals affirmed the District Court's decision (88-1536, Bauer, Eschbach, and Coffey, Circuit Judges, March 5, 1984).

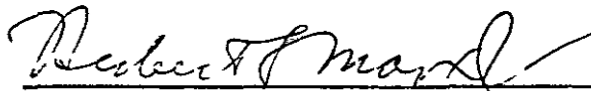
Based on the court action, related above, the Board revises its original majority finding.

A W A R D

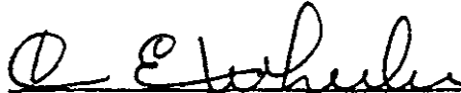
Claim sustained to the extent provided in Rule 35 (h).
The Carrier is directed to put this Award into effect within
thirty (30) days from the date of the Award.

DATED:

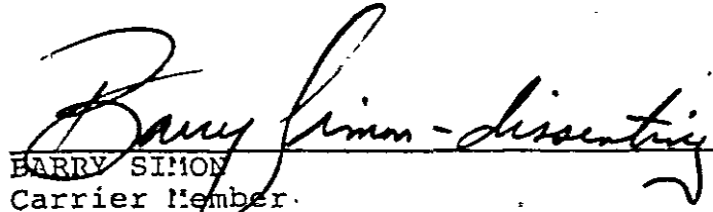
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HERBERT L. MARX, JR.
Neutral Member



C. E. WHEELER
Employee Member



BARRY SIMON
Carrier Member