

PUBLIC LAW BOARD NO. 2960

AWARD NO. 28

CASE NO. 32

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago & North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The twenty (20) day suspension imposed upon Trackman M. L. Simonis was without just and sufficient cause and on the basis of unproven and disproven charges. (Organization's File 7C-1424; Carrier's File D-11-19-75)

(2) Trackman M. L. Simonis shall have his record cleared and be compensated for all wage loss suffered.

OPINION OF THE BOARD:

This Board, upon the whole record and all of the evidence, finds and holds that the employees and the Carrier involved in this dispute are respectively employees and Carrier within the meaning of the Railway Labor Act as amended and that the Board has jurisdiction over the dispute involved herein.

On October 23, 1980, the Carrier directed the Claimant to appear for a formal hearing on the following charge:

"Your responsibility for failure to perform your work as directed by Track Foreman and failure to comply with the instructions of Track Foreman while employed as a Trackman on the AFE Gang at Winona, Minnesota, on Friday, October 17 of 1980."

A hearing was held November 5, 1980. Subsequent to the investigation, the Claimant was assessed 20-day actual suspension and also was required to serve another 10-day suspension which had previously been deferred in connection with another disciplinary offense.

The Carrier relies mainly on the testimony of Foreman W. J. Welter and Machine Operator D. Gunderson. Mr. Welter submitted a statement at the hearing regarding the incident. The statement indicated that at approximately 11 a.m. Section Foreman Don Singer had instructed the Claimant and three other men to shovel out jack holes along the track. At approximately 11:10 a.m. Mr. Singer was instructed to keep an eye on the Claimant as the Claimant had been standing around more than he had been working. Mr. Welter's statement then indicated that at 11:15 he and Mr. Gunderson observed the Claimant standing around and not working, so "I walked down to them and told them that the next person I observed standing around would be sent home." At 11:25 a.m. Mr. Welter indicated that he and Gunderson observed the Claimant drop his shovel and walk into the yard office and also observed him returning at 11:30 a.m. He also indicated that he and Gunderson again observed the Claimant standing around at 11:35 a.m. and that he again walked down to the area where the Claimant was working and reiterated his warning. Mr. Welter also indicated that at 11:45 he and Gunderson again observed the Claimant standing around and when he did shovel, he did so with one hand. At that point, Mr. Welter again walked down to the area and instructed the Claimant to go home. Mr. Gunderson's testimony corroborates that of Mr. Welter's.

This case involves a conflict in testimony. The Organization relies primarily on the testimony of Assistant Foreman Gullickson, Trackman Holcomb, Trackman Masel, and the Claimant. The Carrier relies on the

testimony of Track Foreman Welter and Machine Operator Gunderson. The Carrier chose to resolve the conflict in evidence in favor of Mr. Welter's and Gunderson's testimony. It has often been stated that it is not the Board's function to weigh the evidence, to resolve conflicts in testimony or to assess credibility. The Board is obligated to defer to the hearing officer's judgment on these matters so long as the decision is supported by substantial evidence. However, it is the Board's opinion that on the whole, the Carrier's conclusion in this case is not supported by substantial evidence. There is not enough evidence to convince the Board, under the substantial evidence test, that the Claimant was guilty of failing to perform work as directed or that he failed to comply with the instructions of the Track Foreman. The work that he was directed to accomplish was the digging of jack holes and the instructions were not to stand around. The charge, thus, amounts to an accusation that the Claimant was loafing.

Based on the testimony of Gullickson, Holcomb, and Masel, as compared to the testimony of Welter and Gunderson, it cannot be concluded that there is substantial evidence on the record that the Claimant was in fact loafing. Moreover, even if it could be concluded that the Claimant was loafing, it cannot be concluded that he was any more culpable than the other members of the crew. In this respect, assuming that he was loafing, discipline would appear to be arbitrary and capricious because there is no apparent justification for the differential treatment of the Claimant compared to the others.

In arriving at its conclusion, the Board takes particular note of Assistant Foreman Gullickson testimony that the first warning of Foreman Welter was directed at all four employees. It was Gullickson's opinion that Mr. Simonis was working as hard as himself, Mr. Masel, and Mr. Holcomb.

Mr. Gullickson also testified that it was his opinion that Mr. Simonis was performing his duties during the period of the time in question. Mr. Holcomb testified that each of the members of the crew including Mr. Simonis were performing their duties. He also testified that it was his impression that the initial warning was directed at all four employees and not at Mr. Simonis individually. It was also his impression that all four employees were working equally and that Mr. Simonis was holding up "his end of the work." Mr. Masel's testimony was quite similar to that of Mr. Holcomb's and Gullickson's.

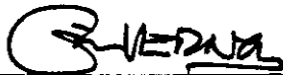
Much greater weight must be given to the testimony of Gullickson, Masel, and Holcomb in as much as they were in a position to observe the Claimant and his work on a continual basis. It is also noted that there is no reason to disbelieve their testimony as there was not an apparent motive for them to lie. On the other hand, the observations of Gunderson and Welter were intermittent and took place from a significant distance away. Gunderson testified that they were 400 to 500 feet from the Claimant and the other employees, although Welter estimated the distance at approximately the distance of 75 yards. Gunderson also testified that he was operating a machine, facing the opposite direction of the Claimant. Thus, it is clear that he would not be in a position to make anything but occasional observations. Moreover, he testified that he did not see or could not observe how many holes the Claimant dug in comparison to other employees. The testimony of Mr. Welter indicated that he and Gunderson were working together, so it must be concluded that Welter's observations were no more comprehensive than Gunderson's. It is believed that to conclude that someone was loafing to a degree to justify a 20-day suspension, one would have to make more than occasional observations over a 35-minute period of time. As for the Claimant's

five minute absence from the job from 11:25 to 11:30 a.m., Assistant Foreman Gullickson testified that he gave the Claimant permission to use the bathroom in the yard office.

In view that the charges are not supported by substantial evidence, the Claim will be sustained.

AWARD

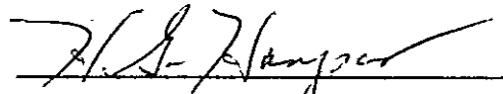
Claim sustained. Carrier is ordered to comply within 30 days of the date of this Award.



Gil Vernon, Chairman



J. D. Crawford, Carrier Member



H. G. Harper, Employee Member

Date: Feb. 15, 1983