

PUBLIC LAW BOARD NO. 2960

AWARD NO. 42

CASE NO. 98

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 dismissal of D. L. Gates was without just and sufficient cause and excessive. (Organization File 9D-2958; Carrier File D-11-17-406).
- (2) Claimant D. L. Gates shall be provided the remedy prescribed in Rule 19(d).

OPINION OF THE BOARD:

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

By notice dated March 15, 1982, the Carrier requested the Claimant to attend an investigation to be held March 19, 1982, at 11:00 a.m. on the following charge:

"Your responsibility, if any, in connection with damage done to a privately-owned automobile and being quarrelsome, belligerent, and threatening toward the owner of that automobile at approximately 11:30 AM on March 15, 1982 under the C&NW trainshed at Washington Street."

A review of the transcript indicates that the Claimant received this notice. While the receipt is not in the record provided to the Arbitrator, the receipt was introduced at the investigation, and the Union took no exception to it. The record reflects that the Union did request a postponement in view of the fact the Claimant was not in attendance. There is a notation in the transcript that Mr. Gates was contacted at 11:10 a.m. on the day of the hearing and he indicated he couldn't make it.

The transcript also reflects that because of the presence of a non-employee witness (Mr. Cirignani, owner of the private automobile involved by the Hearing Officer proceeded without Mr. Gates. Presumably a postponement would have been inconvenient for Mr. Cirignani. The Hearing Officer took testimony and the hearing was concluded by him with the following statement: "I will close the investigation now at 11:58 a.m."

Under date of March 22, 1982, the Carrier issued a dismissal notice to the Claimant. Under date of March 29, 1982, the Carrier directed a letter to the Claimant which read in pertinent part as follows:

"The decision os [sic] dismissal has been withdrawn. The investigation held on March 19, 1982, has been recessed.

Your are hereby instructed to report for a continuance of this investigation on March 31, 1982 at 11:00 a.m. in the Office of the Assistant Division Manager - Engineering, 500 West Madison, Room 411 CPT, Chicago, Illinois."

The hearing on March 31, 1982, was opened with the following statement:

"Let the records show it is 11:20 AM, March 31, 1982. This is a continuance of the formal investigation of the charges against Mr. D. L. Gates. I am R. D. Benston, Manager of Signals, Suburban Division and Investigating Officer. This investigation was held on March 19, 1982 as scheduled without the presence of Mr. Gates because one of the witnesses, Mr. Cirignani is not an employe of the Chicago Northwestern Transportation Company and

he is not readily available. He was present as scheduled. Mr. Gates did not show up or ask for a postponement at that time. The continuance was scheduled for today, March 31, 1982 at 11:00 AM. Present at this continuance is Mr. R. W. Berg, Assistant Division Manager-Engineering, Mr. M. G. Arter, Manager Maintenance Operations, and Mr. Kent Bushman. Mr. Gates is not present. Does anyone know why he is not here? Mr. Berg do you know why Mr. Gates did not show up today?"

Mr. Berg explained at the hearing that a notice of the "continuance" was mailed on March 29. He also called Mr. Gates on the 29th, and the call was returned by Gates on March 30. According to Berg, Gates said he could make it. The phone conversation was witnessed by a Mr. Arter. Berg also indicated Gates called at approximately 8:30 a.m. the morning of March 31 and indicated he couldn't attend. Mr. Arter concurred with Berg's statement. The Union representative requested another postponement which was denied. A second dismissal notice was issued April 2, 1982.

The Organization argues a fair hearing as guaranteed by Rule 19 was not afforded the Claimant. They do not believe a fair hearing was afforded because a request for a postponement was denied and a dismissal notice was issued before the second hearing. They assert that the Claimant could not receive a fair and impartial investigation as the Carrier was already prejudiced as evidenced by the letter of dismissal. The simple withdrawal of the dismissal letter was not enough to guarantee a fair hearing according to the Organization.

The Carrier contends that no procedural error occurred because the Claimant was given an opportunity to appear at both hearings and failed to do so. Under the merits, they contend that the evidence is overwhelming that the Claimant was negligent in damaging the car and that after the owner of the vehicle stopped and talked to the Foreman, the Claimant

came over and began arguing and swearing at the owner of the car. They also claim the Claimant began spitting at the owner and threatened to kill him.

The Board would first like to address the issue regarding whether, under the circumstances, the Claimant received a fair hearing. It is noted that implicit in the Organization's position are suggestions as to several different causes of the procedural error.

First, there is the question of whether the Carrier erred in failing to grant a postponement at the first hearing. The Carrier is obliged after due notice of a hearing to grant postponement for good and sufficient cause. The record is void of any indication of a good and sufficient basis for the request except the Claimant apparently chose not to attend. In fact, if the Carrier had not called the Claimant ten minutes after the start of the hearing, nothing at all would have been heard from him. Thus, without some sufficient basis for the postponement request, the Carrier's decision was not in error.

Second, there is the suggestion that withdrawal of the dismissal notice and holding a continued hearing prejudiced the ultimate dismissal decision. The circumstances in this case are unusual to say the least. However, the second decision could only be suspect in its fairness in relationship to the first decision if Mr. Gates had shown up at the second hearing and offered a defense to the charge. In view that he didn't, the second decision was based on the very same evidence available at the time of the first hearing; therefore, there was no defense to be prejudged.

Third, there was no error in failing to grant a postponement to the second hearing.

Regarding the merits, the testimony of Mr. Cirignani, the Foreman, and a carpenter who witnessed the incident stands unrefuted. This testimony clearly established conduct that the Carrier should not be expected to tolerate especially from an employee with as poor past record as the Claimant.

AWARD: The Claim is denied.



Gil Vernon, Chairman



H. G. Harper, Employee Member



J. D. Crawford, Carrier Member

Dated: Dec. 23, 1983