

PUBLIC LAW BOARD NO. 2960

AWARD NO. 44

CASE NO. 34, 35,
36 & 37

PARTIES TO THE 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 ten (10) day deferred suspension assessed Machine Operator Marvin Townsend for alleged unauthorized absence on August 13, 1980, was without just and sufficient cause and on the basis of unproven and disproven charges. (Organization's File 90-1155; Carrier's File D-11-17-365)
- (2) The five (5) day suspension assessed Machine Operator Marvin Townsend for alleged responsibility in sustaining an injury was without just and sufficient cause and on the basis of unproven charges. (Organization's File 90-1393; Carrier's File D-11-17-369)
- (3) The fifteen (15) day suspension assessed Machine Operator Marvin Townsend for not reporting to his assignment on December 16, 1980, was without just and sufficient cause and in violation of the Agreement. (Organization's File 90-1619; Carrier's File D-11-17-367)
- (4) The thirty (30) day suspension assessed Machine Operator Marvin Townsend for not reporting to his assignment on December 19, 1980, was without just and sufficient cause and in violation of the Agreement. (Organization's File 90-1620; Carrier's File D-11-17-368)
- (5) The Claimant shall be allowed the remedy prescribed in Rule 19(d) of the Agreement.

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.

This case involves four separate disciplinary actions. The Board will review them separately.

Docket No. 34

On August 14, 1980, the Carrier directed the Claimant to attend an investigation on the following charge:

"Your responsibility, if any, concerning your absence from duty without proper authority on August 13, 1980, and on any subsequent dates."

On September 4, 1980, the Claimant was assessed a ten (10) day deferred suspension in connection with the above quoted charge.

A review of the evidence in regard to this charge fails to reflect a substantial basis in evidence to support the Carrier's decision. The Carrier relied on the testimony of Mr. J. Jewell. He testified that if Mr. Townsend was going to be absent, he would have to notify Jewell or Mr. Campbell, the Roadmaster. Jewell admitted he wasn't in his regular office on the day in question. He did claim that he talked to Campbell who allegedly told Jewell he was in the office between 6:30 and 7:30 a.m. and received no call from Townsend.

The Board cannot uphold even mild discipline of ten (10) days deferred on the basis of the evidence presented. It is noted that

Campbell did not testify, so it cannot be known with any certainty, whether he was in the office or did not receive a call from Townsend. The Claimant testified he called in and notified the Roadmaster's secretary of his absence. There is nothing in the record from Campbell or his secretary to refute this or to suggest that this was improper procedure. It cannot be concluded he was absent without proper authority.

Docket No. 35

On October 9, 1980, the Carrier directed the Claimant to attend an investigation on the following charge:

"Your responsibility, if any, in connection with the injury you sustained at approximately 9:15 a.m., on October 7, 1980."

In connection with the above charge, the Carrier, on October 31, 1980, assessed the Claimant with a five-day suspension and he was required to serve a 15-day deferred suspension assessed "per discipline notice No. 58, dated August 28, 1980." This was to be served in addition to the five-day suspension. However, Discipline Notice No. 58, which was issued in connection with Docket 34, only imposed a 10-day deferred suspension.

In respect to this case, it is the conclusion of the Board that substantial evidence does not exist to support the charge. The record reveals that the Claimant injured his back when pulling out a switch tie which was to be replaced. He testified the tongs he was using had a good grip and when he pulled on the rotten tie, it broke, causing him to fall backwards. A foreman who witnessed the accident testified for the Carrier. However, in his testimony he did not take

exception to the manner in which the Claimant was removing the tie. Contrary to suggestions by the Hearing Officer and to the Carrier's belief, the accident was not caused by the Claimant. It is readily apparent that it was the unexpected breakage of the tie which caused the accident. It is noted there is no refutation of the Claimant's testimony that the tie broke. Moreover, there is no reason to believe the Claimant was obligated to get assistance to remove the tie or, that by doing so, the accident or breakage of the tie would have been prevented. In view of the foregoing, the discipline cannot be upheld.

Docket No. 36

On December 19, 1980, the Carrier directed the Claimant to attend an investigation on the following charge:

"Your responsibility in connection with your violation of Rule 14 when you failed to report for your assignment on December 16, 1980."

Rule 14 states:

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

The investigation was held after a postponement and subsequent thereto the Claimant was assessed a 15-day suspension. The Organization raises a procedural issue in respect to Docket 36. They contend that Rule 19 was violated, because the Claimant wasn't

properly notified of the investigation and because the discipline notice was not mailed until the eleventh day after the hearing instead of the tenth day as required by the Rule.

In regard to the contention that the Claimant was not properly notified of the investigation, the Board finds there is no foundation for same. The Claimant received notice of the investigation on December 24. The hearing was held on January 7, and thus, allowed the Claimant the required advance time as stated by the Rule. Moreover, he acknowledged, at the hearing, that he had sufficient time to prepare for the investigation.

In regard to the contention that the decision wasn't rendered within ten days, the record is lacking any substantive proof. The Organization asserted that the envelope in which the decision arrived was postmarked January 18. However, they have not offered the envelope. It has been stated by this Board before that it is the Organization's burden to establish a basis for their procedural objectives. Under these circumstances, without the envelope or some other probative evidence, the Board cannot overturn discipline on mere procedural speculation.

Regarding the merits of this case, it is the opinion of the Board that there is substantial evidence to support the Carrier's decision to discipline the Claimant. The Claimant contended he made three attempts to call Roadmaster Shanks to notify him of his absence. However, in view of the circumstances and Shanks' testimony, it was not improper to discredit the Claimant's testimony. Shanks indicated he was in his office at the times the Claimant said

he called and that there were five extensions on which incoming calls could arrive, and they would be answered either by him or his clerk. He indicated he received no calls. Thus, it is difficult to believe that the Claimant was unable to reach the Carrier. Moreover, it is significant to note that Mr. Townsend knew of the necessity of being absent two days prior to the date in question and failed to make any attempt to notify Shanks.

Docket No. 37

The discipline in this case related to a charge that the Claimant was in violation of Rule 14 when he failed to report for his assignment December 19, 1980. Roadmaster Shanks testified the Claimant called in on the date in question in advance of his shift and requested permission to be absent because he was "tired." Mr. Shanks denied the Claimant permission to be absent. It is uncontroverted that Mr. Townsend was absent.

The Claimant testified--without rebuttal from Shanks--that he told Shanks he needed to be absent because of a back injury. There is nothing in the record that disputes the existence of the injury. Under the circumstances, it is the Board's opinion that there was reasonable basis for the Claimant's absence and, therefore, the denial of permission to be absent was improper, and the discipline cannot be upheld.

It is noted the same procedural issues raised in Docket 36 were raised in this Docket. The Board holds, as we did above, that there is no basis in these contentions.

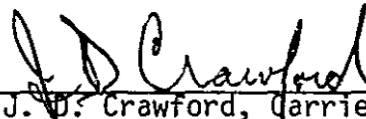
AWARD: The Claimant is to be compensated for time lost as a result of the improper suspensions in Dockets 34, 35, and 37 pursuant to the Opinion, in accordance with the Agreement, within 30 days of the date of this Award.



Gil Vernon, Chairman



H. G. Harper, Employee Member



J. D. Crawford, Carrier Member

Dated:

Jan 3, 1984