

PUBLIC LAW BOARD NO. 2960

AWARD NO. 45

CASE NO. 65

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 Machine Operator D. G. Corning for allegedly failing to protect his assignment on July 13, 1981, was without just and sufficient cause and excessive. (Organization's File No. 3D-2163; Carrier's File No. D-11-1-462)
- (2) The Carrier violated Rule 19 and the February 21, 1980, Letter of Understanding by not rendering a decision and furnishing same with copy of the investigation transcript to the General Chairman within the prescribed ten (10) day time limit.
- (3) Machine Operator D. G. Corning shall be allowed 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.

On July 18, 1981, the Carrier directed the Claimant to attend an investigation on the following charge:

"Your responsibility, if any, for not properly protecting your assignment on Monday, July 13, 1981."

The hearing was held after a postponement on July 24, 1981. The Claimant was dismissed by a notice dated July 31, 1981.

The Organization first argues Rule 19 was violated when the Carrier failed to provide a copy of discipline and the hearing transcript within ten days of the hearing. This assertion was first made when the discipline was appealed by the Vice General Chairman on September 10, 1981. The letter stated in pertinent part as follows:

"The Carrier violated Rule 19 of the effective Agreement by not rendering and furnishing a decision and transcript to General Chairman Jords within the prescribed ten day time limit. Discipline Notice and transcript were not postmarked until August 7, 1981, a full 14 days after the hearing was held."

The Carrier responds to this argument by pointing out that at the highest level in the claim handling, they assert that the notice was issued in a timely manner on July 31, 1981, the date of the notice. Moreover, they contend the Organization has submitted no evidence--including a copy of the envelope allegedly postmarked August 7, 1981--to contradict this assertion.

The Board must first consider this procedural issue. After analysis of the arguments, it is the Board's conclusion that no procedural error has been established. While the Board has no quarrel with the Awards cited to us by the Organization which urge strict compliance with time limits, the burden to show a time limit violation is on the party asserting same and more evidence than mere assertion is necessary to establish a procedural error. The Organization failed to substantiate their assertion that the envelope was postmarked August 7, 1981, after the Carrier challenged this

assertion. It is the opinion of the Board that in the absence of the envelope, the Organization's position cannot be sustained.

In respect to the merits, there is little doubt that the Claimant failed to report for work on the date in question. It is also clear that the Carrier never received a call from the Claimant giving notice of his absence.

The Claimant testified he attempted to call but called the wrong number which, according to the operator, was out of service. The Board does not find this defense sufficient to exonerate or mitigate the charges against the Claimant. The Project Clerk testified without refutation that the correct number had been given to all employees. Further the Claimant admitted he did not attempt to contact directory assistance when he was told the number was out of service. It would have been reasonable to have done this.

The Organization also argues that dismissal for failing to protect his assignment for one day is arbitrary, capricious, and excessive. However, when this single incident is viewed in conjunction with the Claimant's past record, it cannot be concluded that dismissal is excessive. The record contains two letters of reprimand, two deferred suspensions, and two actual suspensions (30 days and 60 days) for absence-related offenses, in addition to another disciplinary suspension. The past record was developed in approximately a one-year period. The Claimant, a short service employee, had been the beneficiary of progressive discipline for these minor offenses yet failed to respond accordingly and remained recalcitrant. In view thereof, dismissal for this offense is not unreasonable.

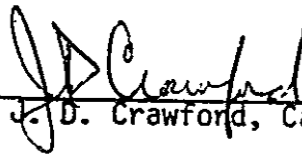
AWARD: The Claim is denied.



Gil Vernon, Chairman



H. G. Harper, Employee Member



J. D. Crawford, Carrier Member

Dated:

Jan 3, 1984