PUBLIC LAW BOARD NO. 2960

AWARD NO. 46

CASE NO. 76

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employes

and

Chicago & North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Marvin Townsend for allegedly not wearing a hard hat and safety glasses on December 2, 1981, was without just and sufficient cause and in violation of the Agreement. (Organization's File 9D-2764; Carrier's File D-11-17-392)

(2) The dismissal of Marvin Townsend for alleged unauthorized absence on December 7, 1981, was without just and sufficient cause and excessive. (Organization's File 9D-2770; Carrier's File D-11-17-395)

(3) Claimant Marvin Townsend shall now be reinstated with seniority and all other rights unimpaired and compensated for all wage loss suffered.

OPINION OF THE BOARD:

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

This Docket involves two separate disciplinary incidents and hearings both of which resulted in dismissals.

The first hearing related to a letter dated December 3, 1981, in which the Carrier directed the Claimant to attend an investigation on the following charge:

> "Your responsibility, if any, in connection with your failure to wear hard hats and safety glasses while you were working at approximately 11:30 AM on December 2, 1981 at M19A."

The hearing was ultimately held December 30, 1981. The Claimant was given a dismissal letter in connection with this hearing January 5, 1981.

The second hearing related to a letter dated December 14 in which the Carrier directed the Claimant to attend an investigation on the following charge:

> "Your responsibility, if any, in connection with your violation of Rule 14 when you again absented yourself from your assignment on December 7, 1981 without proper authority."

Rule 14 reads as follows:

> "Employes must report for duty at the designated time and place."

The Claimant was given a letter of dismissal in connection with this hearing on January 5, 1982. It should also be noted that the Claimant was subsequently reinstated without pay for time lost and without prejudice to his claim for time lost on October 18, 1982. Thus, the issue before the Board relates only to the question of lost wages from January 5 to October 18, 1982.

In regard to the first hearing, the Organization makes two arguments--first, the argument that the discipline was procedurally defective inasmuch as the Claimant failed to receive written notice of the hearing as required by Rule 19(a) and second, the Claimant was on his lunch hour when he was observed without his hard hat and glasses. In regards to the second hearing, the Organization claims the absence was justified. They direct attention to the Claimant's testimony that he was unable to contact his supervisor until 8:45 a.m. regarding his absence because he was tied up in connection with having taken his nephew to a hospital emergency room.

The Carrier, in support of the discipline on the first incident, points to the testimony of the Claimant where he clearly acknowledged the rule requiring a hard hat and safety glasses and clearly admitted not wearing them. In support of the second offense, the Carrier notes again the Claimant's admission that he failed to show up for work or call prior to the start of his shift. In respect to the Claimant's defense, they note no proof was offered that he was at the hospital and, in fact, he was even confused as to which hospital he went to. Moreover, they suggest that, assuming he did go to the hospital, it is not reasonable to believe he had no opportunity to call prior to 8:45 a.m.

In regard to the procedural issue on the first charge, the Carrier directs attention to Third Division Award 15575 which stands for the principle that the Carrier cannot be held to be the insurer of the receipt of a notice sent by registered mail.

In regard to the procedural issue involved with the first incident, the Board finds there is no fatal error. Regarding the merits it is the Board's conclusion that the Claimant was in technical violation of the rule requiring a safety hat and glasses.

Regarding the second incident the Board was not convinced by the Claimant's defense which, under the circumstances, was his burden to support. It is the Board's opinion that the Carrier put forth a prima facie case establishing that the Claimant violated Rule 14. When the Carrier establishes a prima facie case, the burden shifts to the employe to support his/her affirmative defense. The Claimant offered no more than mere assertion that he was at the hospital with a relative. Moreover, the Board agrees with the Carrier that, even if he were at the hospital, it is hard to believe that he could not have taken the few minutes required to call his Foreman before his shift.

Having found the Claimant guilty in regard to the two incidents, the Board is faced with the question whether the discipline--what amounted to approximately a ten-month suspension--was appropriate. In regard to the first incident, it is the Board's conclusion that, while in technical violation of the rule, there were mitigating circumstances which would not support a ten-month suspension. In regards to the second incident, it is noted from the Claimant's past record that he should have been quite familiar with Rule 14. Even discounting the improper suspensions found in Dockets 34, 35, and 37, the Claimant's record is much less than exemplary. Apart from these incidents, there are four disciplinary incidents involving Rule 14 including a 60-day suspension. In fact, the Claimant had returned from the 60-day suspension only a few weeks before the instant offense. However, in the absence of valid disciplinary suspensions in Dockets 34, 35, and 37, the past record doesn't represent a complete attempt on the Carrier's part to impose progressive discipline prior to the discharge. A 120-day suspension is the maximum discipline that can be considered less than arbitrary or capricious under the circumstances. The Carrier is directed to compensate the Claimant for time lost in accordance with the Agreement.

AWARD: The Claim is sustained to the extent indicated in the Opinion.

G. Vernon

Gil Vernon, Chairman

H. G. Harper

H. G. Harper, Employe Member

J. D. Crawford

J. D. Crawford, Carrier Member

Dated: Jan 3, 1984