

PUBLIC LAW BOARD NO. 3460

Award No. 2
Case No. 2

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employes
and
Burlington Northern Railroad Company

STATEMENT
OF CLAIM

"Claim of the System Committee of the Brotherhood that:

- (1) the dismissal of Section Laborer F. D. Manley is without just and sufficient cause and wholly disproportionate to the alleged offense.
- (2) Section Laborer F. D. Manley shall be returned to his former position with all rights unimpaired and be compensated at his applicable rate for all time lost."

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant was employed by Carrier on November 8, 1968. At the time of the incident involved in this matter, he was employed as a section laborer. The record indicates that on July 10, 1980, at approximately 9:20 A.M., while assigned to the task of pulling spikes, Manley threw a track spike which was intended to go into a keg and hit another employee in the mouth causing some injury. The spike allegedly caught in claimant's glove and the accidental injury was not a serious one. A couple of hours later on the same day the Foreman instructed the gang, including Manley, that a train was about to pass the gang and Manley did not move to a place of sufficient safety when the train passed, resulting in his hardhat being blown off and destroyed by the passing train. The record indicates that he was approximately 10-12 feet from the passing train at the time of the incident. Another employee was somewhere in his vicinity at the time. Subsequently, the claimant was charged with failure to work safely in the discharge of his duties and "by being careless with the safety of himself and others by his throwing a track spike and hitting another employee in the mouth....and his failure to move

to a place of sufficient safety when Train No. 163 passed, resulting in his hard-hat being blown off and destroyed under train, at about 11:29 A.M., July 10, 1980...." He was also charged with insubordination in the course of that same series of incidents but was not found guilty of that matter. He was found guilty of the earlier other two items in the charge and was, following an investigation, discharged. Subsequently, in September of 1980, the Organization and claimant were advised that Carrier was agreeable to reinstating him with seniority unimpaired, as a matter of managerial leniency, with the understanding that he would not process a claim for payment of wages lost as a result of the dismissal. This offer of leniency, with the condition attached, was refused.

Petitioner insists that the incident of the spike hitting another employee was an accident which was not due to carelessness or lack of safety precautions by claimant. In fact, Petitioner insists that the foreman was aware that he was tossing the spikes into the keg and made no effort to stop him until the accident occurred. With respect to the alleged failure of Manley to get clear of the train which passed, the Organization maintains that Manley did, indeed, comply with the instructions and was a sufficient distance from the train.

Carrier states that the violations by claimant were clearly demonstrated at the investigation and they were very serious and warranted dismissal. Carrier notes that claimant's actions seriously endangered his own safety and that of his fellow employees. These violations, in conjunction with claimant's past unsatisfactory work record (indicating two censures and two suspensions in the preceding 2½ years), warranted dismissal.

In the course of the handling of the matter prior to being assigned to this Board, Carrier made the point that its liability, if any, terminated with its offer of reinstatement on a leniency basis in October of 1980. The Board notes, however, that this offer of reinstatement was conditioned upon there being no claim for monies lost and, hence, does not act as a termination point for any potential liability. Had the offer of leniency not been conditioned on the abdication of the right to file for wages lost, Carrier's position would be correct.

There is no question but that Carrier established through the investigation

adequate evidence to indicate lack of safe operations on the part of claimant. He was careless in the use of the keg, throwing the spikes, and further he did not go to a place of safety after being warned by his foreman that a train was coming. Both acts were clearly incorrect and deserved punishment. The conclusion reached, however, is that the type of infractions involved were those which would not warrant dismissal. That penalty was excessive and discriminatory in view of the nature of the particular offenses committed. Even in consideration of the claimant's past record, there was absolutely no justification for dismissal for his lack of safety in the two incidents. The Board is keenly aware of the necessity for safe operations and Carrier's proper concern for such safe operations. However, in this instance, the discipline far exceeded the "crime" committed. In the Board's view, a suspension would have been an adequate penalty for the particular infractions. For that reason, the Board will order claimant's reinstatement with all rights unimpaired following a suspension for 90 days. Claimant will be made whole for all wage loss suffered in excess of the suspension imposed.

AWARD


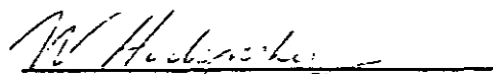
Claim sustained in part. Claimant will be reinstated to his former position with all rights unimpaired and made whole for all wage loss sustained in excess of 90 days; the 90-day period will be considered a disciplinary lay-off for the infractions he committed.

ORDER

Carrier will comply with the award herein within thirty (30) days from the date hereof.



I. M. Lieberman, Neutral-Chairman


F. H. Funk, Employee Member
W. Hodynsky, Carrier Member

St. Paul, Minnesota
September 30, 1984