

PUBLIC LAW BOARD NO. 3460

Award No. 21

Case No. 21

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employes
and
Burlington Northern Railway Company

STATEMENT

- "(1) The dismissal of Allen Smith, Jr., laborer, dated August 6, 1980, was without just and sufficient cause and wholly disproportionate to the alleged offense.
- (2) Laborer Allen Smith, Jr., be reinstated with all seniority and other rights unimpaired, be compensated for all time lost and his record be cleared."

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 herein was charged by letter dated July 10, 1980, with being absent from duty without proper authority since July 7, 1980. Following an investigation held on July 18, he was found guilty of the charges and dismissed from service. The record indicates that claimant never received a notice of investigation and neither he nor his representative were present at the investigation.

The facts indicate that Claimant Smith worked last on May 30, 1980. According to petitioner he notified his foreman that he had sustained a back injury that day and his back bothered him throughout the weekend. He saw a doctor on the following Monday and was hospitalized. He called Carrier from the hospital and reported where he was. He also talked with a Carrier clerk from the hospital on June 11 or 12, 1980, indicating that he was still receiving treatment in the hospital. According to petitioner, he also notified his foreman of a change of address. Petitioner insists that being absent because of duty-incurred injury does not require a leave of absence and there was no violation of any Carrier rules by claimant. Furthermore, the Organization argues that there was no excuse

for having an investigation without notification to claimant since claimant's foreman obviously knew where he could be located. The Organization also notes that it is odd that the notice of discipline was delivered to the proper address of claimant whereas the notice of investigation was not. The Organization concludes that since claimant was not given an opportunity to defend himself, since he was not notified of the investigation, the claim should be allowed on that basis alone. Additionally, the claimant had notified his foreman of his new address and also Carrier was aware that he was in the hospital due to a duty-incurred injury.

Carrier argues, first, that a notice of the investigation was mailed to claimant at the address he had provided the Carrier. This letter, mailed Certified Mail, postmarked July 10, 1980, was returned as not-deliverable. Carrier maintains that it made a reasonable effort to inform the claimant of the investigation and, therefore, was entitled to proceed while he was not present under that circumstance. Additionally, Carrier insists that the evidence was clear that claimant did not report for work following May 30 and there was only a phone call on June 11 or 12 indicating that he was receiving treatment in the hospital. Thus, Carrier concludes that claimant was absent without authority and did not request a leave of absence. For that reason, it is apparent that the discipline involved herein was appropriate and should not be disturbed. Carrier is aware that claimant filed a personal injury claim for an alleged injury on May 30, 1980, subsequent to the discipline being rendered.

The facts in this dispute are far from unclouded. There is no testimony from claimant's foreman who allegedly knew where he could be located and knew of his injury at the investigation. Furthermore, the evidence is quite clear that Carrier was aware that claimant was hospitalized and is presumed to have known the reason for that hospitalization (from his foreman). Additionally, it is quite apparent that claimant notified Carrier that he was hospitalized and receiving treatment. On this subject there is no dispute. The Board is left no choice. Carrier was incorrect in the way it handled the investigation of this matter. There is no doubt but that a better effort could have been made to notify claimant of the investigation and it should not have been held on an ex parte basis. Furthermore, the investigation should have contained some

information from claimant's supervisor with respect to the injury involved (or at least alleged to have taken place). However, the claimant, himself, bears some culpability in not keeping Carrier informed of his whereabouts and status during the period following the alleged accident. For this reason, it is determined that claimant shall be reinstated to his former position with all rights unimpaired but without compensation for time lost. Furthermore, his reinstatement shall be conditioned upon his supplying medical evidence of his ability to return to work.

AWARD

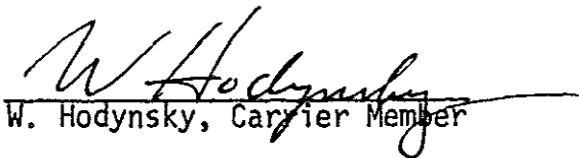
Claim sustained in part; claimant shall be returned to service with all rights unimpaired but without compensation for time lost as provided above.

ORDER

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



I. M. Lieberman, Neutral-Chairman



W. Hodynsky, Carrier Member



F. H. Funk, Employer Member

St. Paul, Minnesota

May 22, 1985