

PUBLIC LAW BOARD NUMBER 3530

Award Number: 58

Case Number: 58

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM

Track Laborer, Bobby Ayers, 333 Dunn Street, Chesapeake, VA 23320, was dismissed from service on August 22, 1984 for alleged excessive absenteeism. Claim was handled on the property in accordance with Railway Labor Act and agreement provisions. Employees request reinstatement with back pay for all lost time with vacation and seniority rights. unimpaired.

FINDINGS

Claimant was employed as a Laborer at Norfolk, Virginia. By letter dated July 31, 1984, Claimant was notified to attend an investigation concerning charges of excessive absenteeism. An investigation was held on August 13, 1984. By letter dated August 22, 1984, Claimant was dismissed from service.

The issue to be decided in this dispute is whether Claimant was dismissed for just cause under the Agreement.

The position of the Organization is that Carrier failed to establish any wrongdoing on Claimant's part, and that the discipline imposed was therefore without justification.

Initially, the Organization argues that Claimant followed the procedure outlined in Rule 26 regarding his absence on July 31, 1984. Specifically, the Organization cites the testimony of Carrier witness J. T. McLean who admitted that Claimant's relatives contacted him and informed him of Claimant's inability to protect employment on July 31. The Organization asserts that Claimant's compliance with Rule 26 renders any charge on the basis of his absence on July 31, 1984, invalid. The Organization further maintains that Carrier impermissibly based Claimant's discipline on previous absences, arguing that those absences were not previously questioned by Carrier. The Organization contends that Carrier's failure to discipline Claimant at the time of the absences makes any attempt to do so now violative of Claimant's notice rights. The Organization additionally argues that Carrier cannot document any of the previous absences as in violation of its rules, and that there is therefore no substantive justification for the charges brought.

The position of the Carrier is that Claimant was properly dismissed for his continued and chronic failure to protect his employment.

Initially, Carrier maintains that there is no factual dispute concerning Claimant's absenteeism problem. Carrier cites the fact that Claimant was absent a total of 36 days during 1984, up to and including his absence on July 31, 1984. Carrier

asserts that this record alone justifies Claimant's dismissal on the basis of his inability to protect employment. Carrier additionally argues that Claimant's testimony indicated an inability on his part to explain or justify several of the absences.

Carrier maintains that the evidence brought out at the investigation clearly established that Claimant was culpable of the charges. Carrier contends that the Organization's argument concerning the impropriety of using past absences to support the charge lacks any logical support. Carrier argues that by its very nature a charge of excessive absenteeism must include past conduct and that therefore it was entirely justified in basing Claimant's discipline on those past infractions. Carrier further argues that Rule 26 is largely irrelevant to the present dispute, since the main reason for Claimant's dismissal was the excessive number of absences, and not Claimant's violation of Rule 26.

Finally, Carrier maintains that the discipline imposed was reasonable. Carrier contends that Claimant's poor prior record, including a previous dismissal for excessive absenteeism, indicates a long standing inability on Claimant's part to adequately protect his employment.

After review of the record, the Board finds that the claim must be denied.

It is not the purpose of this Board to rehear an investigation that Carrier held but only to determine if the discipline imposed was arbitrary, capricious or an abuse of discretion.


Initially, we find the Organization's position regarding the use of Claimant's past absences unpersuasive. We agree with the general principle that Carrier may not base charges on past conduct that went unchallenged by Carrier at the time. However, a charge of excessive absenteeism, by its very nature, requires the consideration of past absences. Furthermore, Claimant's long history of discipline for absenteeism clearly puts him on notice that continued absenteeism, for whatever reason, could lead to his dismissal from service. The fact that Claimant was not disciplined for the previous absences, therefore, does not invalidate the discipline imposed based partially on those absences.

It is a well established principle that a Carrier is not required to retain an employee who demonstrates a chronic inability to protect his employment. Claimant's disciplinary record, as noted above, clearly points to such an inability. Further, Claimant's absenteeism record during 1984 reflects an inability to correct his behavior despite several warnings and suspensions during the previous three years. The fact that the 1984 absences may have been legitimate is totally irrelevant to the present dispute, since it is Claimant's continued failure to

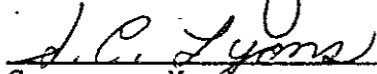
protect employment that stands as the basis for the discipline imposed. In light of Claimant's inability to protect his employment, we cannot find that Carrier abused its discretion by dismissing him. Accordingly, the Claim must be denied.

AWARD

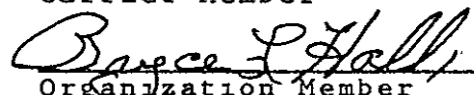
Claim denied.



Neutral Member



Carrier Member



Organization Member

DATE: 1-29-88