

SPECIAL BOARD OF ADJUSTMENT
PUBLIC LAW BOARD NO. 3729

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CONSOLIDATED RAIL CORPORATION		*
"CARRIER"		*
		*
and		*
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BROTHERHOOD OF MAINTENANCE OF		*
WAY EMPLOYEES		*
"ORGANIZATION"		*
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CASE NO. 6
AWARD NO. 3

STATEMENT OF CLAIM

Claim of the Brotherhood (CR-454-D) that:

"(a) The dismissal of Trackman R.C. McCuller on December 2, 1983, was arbitrary and capricious and without just and sufficient cause and was in violation of Rule 27 of the current Scheduled Agreement.

(b) Claimant R.C. McCuller shall be reinstated without loss of seniority, vacation rights and benefits which he enjoyed prior to his dismissal and shall be allowed the remedy of Rule 27, Section 4 of the Scheduled Agreement."

This case arose when the Carrier discharged Richard C. McCuller, hereinafter the Claimant, for three separate and distinct reasons. The first charge, contained in a Notice of Investigation dated October 7, 1983, was as follows:

"Your unauthorized absence from your assigned position on Gang TK-134, Camp Cars, located at Pottstown, PA on September 15, 16 and 19, 1983, also your unauthorized absence from your assigned position on Gang TK-134, Camp Cars, located at Delmar, DE on September 26, 27, 28 and 29, 1983."

The second charge, contained in a Notice of Investigation dated November 4, 1983, was as follows:

"Your unauthorized absence from your assigned position on Gang TK-134, Camp Cars on October 3, 4, 10, 11, 12, 13, 17, 18, 19, 20, 24, 25, 26, 27, 1983 and November 1, 2, 1983."

The third charge, contained in a Notice of Investigation also dated November 4, 1983, was the following:

"Violation of Rule D, General Rules, Rules of the Transportation Department, on October 9, 1983."

Rule D states:

"Employees must devote themselves exclusively to the Company's service while on duty, render every assistance in their power in carrying out the rules and special instructions, and promptly report any violation to the proper official."

To remain in the service, employees must refrain from conduct which adversely affects the performance of their duties, other employees, the public, or from conduct which discredits the Company."

Hearings were scheduled on all three charges for November 18, 1983 at 9:00 A.M. The Claimant called the hearing location on the morning of November 18 prior to 9:00 A.M. and said he would be late. Apparently he gave no reason for his

lateness. The hearing was, therefore, delayed until later the same day.

When the Claimant did not appear, and apparently did not again contact the Carrier or Organization concerning the reason for his continued absence, the Carrier began the hearing at 1:30 P.M. for all three charges. A. Vincent, representing the Organization, requested a postponement of the hearing due to the Claimant's absence. The hearing officer denied the request and conducted the hearings in absentia. The third hearing was concluded at 2:10 P.M., at which time the Claimant had still not appeared.

By separate letters, all dated December 2, 1983, the Carrier notified the Claimant that it had found him guilty in all three charges and assessed the discipline of dismissal.

The above quoted claim covering all three charges was then filed on behalf of the Claimant. It was processed on the property and denied by the Carrier. This Board heard argument concerning this claim on September 12, 1985. The Organization properly notified the Claimant of the Board hearing but he did not attend.

POSITION OF THE PARTIES

The Carrier maintains that there is substantial, credible evidence in the record to support its finding that the Claimant was guilty of all three charges. The first two charges are based on uncontradicted facts concerning the Claimant's

failure to report for work on numerous days. The third charge concerning the Claimant's arrest on charges of attempted rape and indecent assault on a minor and the Claimant's failure to appear for a court hearing in this matter, are adequately supported by newspaper clipping contained in the case record. The Claimant's unlawful and immoral actions violated the cited Carrier rule. It is well-settled that such conduct constitutes grounds for discharge even though they occur off the Carrier's property and while the employee is not working.

Finally, the Carrier denies that the Claimant did not receive due process when all three hearings were held in absentia, as the hearing was postponed to allow the Claimant sufficient time to attend.

The Organization maintains that the record does not contain sufficient evidence to support a finding of guilt in any of the three cases. Probative evidence was not submitted to prove that the Claimant was absent on the days alleged. Concerning the Claimant's alleged arrest, the newspaper logs used as evidence do not establish that the Claimant is the man referred to in the articles. Furthermore, these actions do not provide a proper basis for discipline, as they did not occur on working time.

The Organization further argues that the Claimant was denied due process when the Carrier refused to postpone the hearing as requested by the Organization because the Claimant was not present. This refusal violated Rule 27, Section 1(d)

of the Scheduled Agreement, which states in pertinent part that "a hearing may be postponed for a valid reason for a reasonable period of time at the request of the Company, the employee or the employee's union representative." In addition, the hearing in the second charge was not timely and the third charge was not sufficiently specific.

OPINION OF THE BOARD

The Organization raises a strong argument concerning the Carrier's refusal to postpone the hearing when the Claimant failed to appear. As noted by the Organization, Rule 27, Section 1(d) contemplates hearings will be postponed for "valid reasons." A Claimant's legitimate inability to attend a scheduled hearing would normally constitute a "valid reason" for postponement if rescheduling within a reasonable period would enable the Grievant to attend. In addition, due process requires that a claimant be given every reasonable opportunity to be present at his hearing.

In this case, the Board has determined that there is insufficient evidence to conclude that the Claimant's failure to attend the regularly scheduled hearings was for legitimate reasons. The Claimant apparently received proper notification of the hearing, as he called before it began to say he would be late a short period of time. However, there is no evidence that the Claimant gave a legitimate reason for being late or called again later that day to explain why his absence was

continuing. Moreover, there is also no evidence that the Claimant ever explained his inability to attend the hearing. In these circumstances, the Carrier complied with contractual and due process requirement by postponing the hearing for four hours.

The Board has further determined that there is sufficient, credible evidence in the record to support the Carrier's finding of the Claimant's guilt in the first two charges concerning absenteeism and that the Organization's remaining due process arguments concerning these charges are without merit. In view of the Claimant's extensive record of absenteeism and his past record the penalty of dismissal was not arbitrary.

The Board questions whether sufficient probative evidence is in the record to support the third charge concerning the Claimant's alleged arrest. Uncorroborated newspaper accounts are generally considered unreliable evidence. This is particularly true in this case, where the address of the alleged criminal given in the newspaper was not that of the Claimant and there is no information concerning the outcome of the criminal charges. However, the Board need not definitely decide this issue, as the Carrier has legitimate grounds to dismiss the Claimant for the two other charges standing alone.

AWARD

The claim is denied.

S. Buchheit 11-5-85
S. BUCHHEIT
Neutral Member

R. O'Neill
R. O'NEIL
Carrier Member

J. P. Casese 11-6-85
J. P. CASSESE
Organization Member