

PUBLIC LAW BOARD NO. 4244

Award No. 219

Case No. 224

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

-and-

BURLINGTON NORTHERN SANTA FE RAILWAY

Statement of Claim:

Claim of Central Region Trackman N. N. Yazzie, (Employment Date January 1984), for reinstatement with all seniorities, vacation and benefit rights restored and compensated for all wage loss beginning October 7, 1996 and continuing.

INTRODUCTION

This Board is duly constituted by agreement of the parties dated January 21, 1987, as amended, and as further provided in Section 3, Second of the Railway Labor Act ("Act"), 45 U.S.C. Section 153, Second. This matter came on for consideration before the Board pursuant to the expedited procedure for submission of disputes between the parties. The Board, after hearing and upon review of the entire record, finds that the parties involved in this dispute are a Carrier and employee representative ("Organization") within the meaning of the Act, as amended.

FINDINGS

On July 30, 1996, the claimant, Norbert N. Yazzie, was issued a letter advising him that his seniority and employment had been terminated due to his absence without authority for more than five consecutive work days. Claimant requested a formal investigation as permitted under Appendix 11 of the agreement. A formal investigation was conducted on September 17, 1996, and his termination was later affirmed by the division superintendent on October 8, 1996.

The evidence established that the claimant was absent from duty without authority for more than five (5) consecutive work days: July 22, 23, 24, 25, 26, and 29, 1996. The roadmaster, Steve Marino, testified that the claimant was under his supervision during this time frame, and the claimant neither reported to work on any of the days charged, nor did he request permission to be absent from duty on any of those dates. (Tr. 4). Claimant's consecutive days of absence without permission were confirmed by Steven Schrum, a foreman on the Seligman West Subdivision.

The Organization's first contention is that the notice of investigation was defective in that no alleged rule violation was cited. The Board rejects this argument as the letter of July 30, 1996, clearly apprises the claimant of the grounds for his termination, including the specific days when he was purportedly absent from work without proper authority. The charge and dates involved also were repeated in the letter of August 20, 1996, which scheduled the formal investigation. There is no evidence to support a finding the claimant was

without adequate notice of the nature of the offense charged and of his conduct alleged to constitute the offense.

The Board finds the claimant's discharge is supported by the evidence of record, including the claimant's own testimony that he was absent from work on the dates charged and he was without permission to be absent from duty on those dates. (Tr. 13). The hearing officer's failure to credit claimant's testimony that he telephoned his supervisor and roadmaster several times on July 21 or 22, 1996, including telephoning their personal residences to inform them of problems he allegedly was having with his personal vehicle, was reasonable. The claimant's testimony was inconsistent, and while he asserted he spoke with his supervisor's wife on July 22, he also testified that he spoke with no one that same date. (Tr. 14; Q & A 115). Supervisor Schrum also disputed the contention that any message was left by the claimant with his wife. Testimony by the claimant that he knew he left a message on the roadmaster's voice mail because he called and heard part of his previous message was rebutted by testimony that a password and phone code was required to access the roadmaster's voice mail and listen to messages.

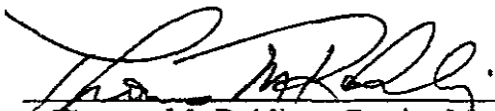
Finally, the claimant testified that he reported to work on July 29. However, the evidence reveals that even if the claimant had appeared at Peach Springs where the gang reported at 7:30 a.m. on the morning of July 29, 1996, by his own admission claimant reported late and failed to realize the gang left Peach Springs for Seligman. The claimant's testimony indicates he was aware that the gang was directed to report to Peach Springs on July

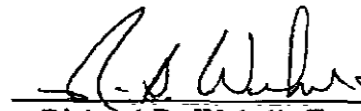
29, whether or not it later left for Seligman. Further, it was evident that had claimant reported to Peach Springs at the time he claimed, the gang would have been present as it had not yet left for Seligman. (Tr. 18). As the Carrier points out, any difficulty the claimant may have had in reporting for duty at the correct location was due in no small measure to his unauthorized absence the previous five work days. In sum, the Board finds the claimant also was absent from his assignment on July 29, 1996.

The Carrier has met its burden of proof that the claimant was absent from duty without authority for more than five (5) consecutive work days. Claimant's past record shows he was no stranger to the obligation to report for duty: on August 28, 1995, he received a thirty-day deferred suspension for being AWOL on the Seligman West Subdivision, and shortly thereafter he served a thirty-day suspension for AWOL. For each of the above reasons, the claim is denied.

AWARD

The claim is denied.


Thomas M. Rohling, Carrier Member


Richard B. Wehrli, Employee Member


Jonathan I. Klein, Neutral Member

This Award issued the 7th day of August, 1998.