

PUBLIC LAW BOARD NO. 4338

PARTIES) UNION PACIFIC RAILROAD COMPANY  
TO )  
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

STATEMENT OF CLAIM:

1. The 30-day suspension assessed Laborer J. W. Orefice for allegedly absenting himself without proper authority on April 5 and 6, 1990, as indicated in Mr. Moser's letter of June 11, 1990, was arbitrary, capricious and unwarranted.
2. Provided the sustaining of charges in this regard was appropriate, which it was not, the amount of discipline assessed is obviously excessive.
3. The Carrier failed to handle this matter in a procedurally correct fashion as evidence contained in the hearing transcript clearly shows.
4. In light of (1), (2), and (3) above, the claimant's record shall be cleared of the discipline referred to in Part (1), as well as any mention of the alleged incident, and he shall be compensated for any and all time lost.

FINDINGS: This Public Law Board No. 4338 finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction.

In this dispute the claimant was notified to attend an investigation on May 4, 1990 in Portland, Oregon. The claimant was charged with absenting himself without proper authority on April 5 and 6, 1990 while working on Gang 9013. Pursuant to the investigation the claimant was found guilty and was assessed a 30 day suspension.

The Union objected to the fact that a necessary witness was not present for the investigation. The Union alleged that Mr. Maes had information which was pertinent to the case at hand. The Hearing Officer stated it was the claimant's responsibility to contact this witness and to pay him to be there for such an investigation.

S. R. Adams, Track Supervisor, testified he was the Supervisor of Gang 9013 on April 5 and 6. He testified that on April 4 the claimant approached him and stated he had been sprayed by the passing of Amtrak 27 from them dumping their toilets and said he would like to go home and change his clothes. Mr. Adams

testified that he told the claimant it was his responsibility to take the claimant to the outfit car, the meeting place from which the gang goes to work. He testified he gave the claimant the option of going back to work, or he would take him to the outfit car.

Mr. Adams then testified that the claimant departed at approximately 9:30 or 10:00 a.m. and did not return to work the rest of that day or on April 5 and 6. He stated the claimant gave him no indication when he left he would not return on April 5 and 6.

The Union representtve, J. A. Wheeler, questioned Mr. Adams and asked if the procedure was not to give a written reprimand to an employee for an unexcused absence, and the anwwer was that this would have been the case if the employee had contacted him, but there was no contact made in this case.

E. R. Smith, Track Supervisor on Gang 9013, testified he knew on April 9 that the claimant was not at work on April 5 and 6. Mr. Smith was asked by the claimant: "What were the other things that I weren't cooperating with you that caused you to determine to write me up these letter? You said other things." Mr. Smith responded that the claimant was being uncooperative on the 9th, the day he talked to him. When asked in what manner, Mr. Smith stated he asked the claimant to go to a company doctor.

The claimant testified he was off work on April 5 and 6, and he did not feel he needed to ask anyone's permission to see a doctor. He stated he wanted to see his own doctor.

The claimant testified he had missed a day approximately three weeks earlier, and he had attempted to call Larry Harla to tell him to tell his foreman, and Mr. Harla told him to call somebody else. He stated he thought they gave him the runaround, and he was not gonna go for it. The claimant testified a fellow worker agreed to relay the message that he would not be at work on April 5 and 6.

The claimant testified he was not going to ask for permission to go to a doctor because his back hurt. He said he was not going to ask anybody for permission to go to a doctor.

Scott Maes, the witness whom the Union had objected to as not being present, appeared and he did testify. Mr. Maes testified that on April 4 the claimant rode to work with him as he had done for the past four, five or six weeks, and on the way to work that date he informed him he was going to be seeing his doctor the next day and to let Everett or Alvin or one of the other guys there know. He testified the next day he conveyed that information to Scott Adams, Alvin Toledo or the foreman.

Mr. Maes admitted that the policy on Gang 9013 for missing work was to have an excused absence or they can write you a letter of reprimand or something or do what the Supervisor thinkw best.

The claimant testified that when he left work at approximately 11:00 a.m. on April 4, he took his friend's car and took it home so he could get cleaned up. Mr. Maes had testified that the claimant rode to work with him on April 4, and there was evidence that the claimant knew before he departed on April 4 that he was not going to be at work on April 5 and 6. Therefore, the claimant had an opportunity to request permission to be off on April 5 and 6 from Track Supervisor Adams.

There are numerous factors involved in this case which have a direct bearing on the decision. First of all, Mr. Smith should not have taken into consideration the claimant's failure to co-operate with his request for him to go to the hospital. That was an entirely different matter which should have been resolved by other means. That should not have been a consideration in charging the claimant for failure to report for duty on April 5 and 6.

At the same time, the Carrier is justified in reaching a decision that the claimant had no intention of learning the rules or in complying with those rules. By his own testimony, the claimant evidently believed he can do what he likes and disregard the rules of the Carrier. The Carrier is justified in issuing serious discipline to the claimant.

The claimant allegedly had an injury to his back and was going to see a doctor on April 5 and 6. This certainly justifies the Carrier withholding the claimant from service pending an investigation. The claimant refused to see a doctor as requested. The claimant did not have to accept treatment by that doctor.

For the reason that Mr. E. R. Smith stated he took the claimant's failure to cooperative into consideration in writing the charge letter, the Board finds the discipline must be reduced. It is possible the Hearing Officer would still have assessed 30 days suspension. However, it was improper for Mr. Smith to consider the uncooperative attitude of the claimant in writing the charge letter.

On that basis the Carrier is directed to reduce the discipline assessed to a 20 day suspension, and if the claimant was available and physically able to return to work, to pay the claimant for the remaining 10 days.

AWARD: Claim sustained as per above.

ORDER: The Carrier is directed to comply with this award within thirty days from the date of this award.

Preston J. Moore  
Preston J. Moore, Chairman

C. F. Jones  
Union Member

R. D. Rod  
Carrier Member