

Joseph Lazar, Referee

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AWARD NO. 12

CASE NO. 12

PARTIES)
TO)
DISPUTE)

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
- vs
BURLINGTON NORTHERN RAILROAD COMPANY

STATEMENT
OF CLAIM:

Claim in behalf of Larry G. Woods for payment for all time lost and that the charges be removed from his service record account suspended from the Carrier's service for forty-five days.

FINDINGS:

FINDINGS: The Board, on consideration of the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated April 10, 1987, that it has jurisdiction of the parties and the subject matter, and that, pursuant to the Agreement dated April 10, 1987, oral hearing by the parties, including Claimant, has been duly waived.

Claimant Trackman Larry G. Woods was suspended from service for forty-five (45) days, December 19, 1987 to February 22, 1988 after hearing held on January 19, 1988 to ascertain the facts and determine his responsibility, if any, in connection with his being dismissed from service of Burlington Northern Railroad on December 18, 1987, by Roadmaster Larry Locke for his alleged insubordination by failure to comply with instructions, and his absence from duty by walking off the job at 12:30 hours on December 18, 1987, while assigned to Rail Gang #1 working at Francis, Oklahoma.

Discipline was based on Rules 564 and 470 of the Safety Rules and General Rules. Rule 564 reads as follows:

"Employees will not be retained in service who are careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious or who conduct themselves in such a manner that the railroad will be subject to criticism and loss of good will."

Rule 470 reads as follows:

"Employees must report for duty at the designated time and place. They must be alert, attentive, and devote themselves exclusively to Company service while on duty. They must not absent themselves from duty, exchange duties with or substitute others in their place without proper authority."

The transcript of investigation shows the following testimony of the Roadmaster:

"Q. Did you have conversation with Mr. Woods during the course of that day?

A. Yes. I, about 12:20, I got a message that, that somebody wanted to talk to me back-to-back the gang and I's up the front so I said I'll be back there so I went back there but Larry wanted to talk to me and I asked him if he had a problem and he wanted to know how long we was gonna work in the rain and I said well, we're gonna, we gotta get this track in and I said we get off at four o'clock, that's when we'll probably quit. Then I asked him, I said, are you refusing to work in the rain. I said, if you are we'll cut your time and dismiss you from the railroad and he went back to work. And then about a couple minutes later he come up to me and said cut my time, I'm not gonna work in the rain and I said okay. I said you're dismissed from the railroad and Rail Gang 1 and I have not talked to him since. (Tr., p. 5).

Q. Did any other member of your gang refuse to work after they came back from lunch?

A. Not to my knowledge.

Q. Did Mr. Woods, any time during your conversation, refer to you that he wasn't feeling well, had a flu, or cold or just in general wasn't feeling good?

A. No, not on this particular day, no. If he had of I would have let him went.

Q. If he'd a told you he was sick, you would have let him go with an authorized absenteeism then?

A. Probably would of. Haven't turned nobody down yet." (Tr., p. 6).

The transcript of investigation shows the following testimony of the Relief Foreman on Rail Gang #1:

- "Q. Did you have any further conversation with Mr. Woods that morning?
- A. Well, no more than, uh, when it started raining. Uh, several of em ax me let's get in out the rain, so, uh, I said well, fellas the track's tore out and we need to get it back in. Mr. Locke and the mechanic are going to town and I told 'em I said I can't call no raid today, Mr. Locke has to do that. So, we worked in the rain a while and then I said uh, it's gettin to hard, let's go to the bunk car and it would slack up, we come back out and I said let's put the track back in. So we all, we did quit all went to the bunk car, put on, I put on some more dry boots myself and they changed clothes some of 'em, I guess. After thirty minutes the rain quit, come on back out and went to work. Then, the shower come back again so some say they want to quit, I did too, but we had a track out and we had to get that track back in there. So, uh, by this time Mr. Locke come and I's up on the front end so, uh, then D. D. Savoie called me on the radio and told me to tell Mr. Locke to come down this other guy wanted to talk to him. So, he got worried that way to where he got a witness, so I don't know what they made a decision about it then. I was up on the north end, I mean south end of the track.

- Q. And Mr. Locke told you and other members of the gang that the track had to be put back into service the night of December 18th, is this correct?
- A. Yes, sir.

- Q. You don't recall telling me, or Steve McGuffee that you can go in any time you want to?
- A. No, I do not. Well, hold on, I, I if I, if I did say it, I said you guys can go in if you want to any time you want to, but you said well, you gonna fire me if I do that. I said no, I can't fire you. Those are the words I said to you. Go any time you want I said, then you said, you said, well, you might fire us, and I said I kain't fire you. I said, Mr. Locke have to do that. Those are the words I said, do you remember?" (Tr., pp. 12-13).

The transcript of investigation shows the following testimony of the Claimant:

- "Q. Were you familiar with the procedures on the Rail Gangs as to working in the rain completing track when they were removed and having to get them back into service before quitting time?
- A. No, sir, I wasn't that was the first time I worked on a rail gang. I worked on tie gangs previously. (Tr., p. 14)

- Q. And at that time did you go back to work?
- A. Yes, I did. I went back to work for a couple of minutes and then I turned around and I told him well, just cut my time I'm gonna go in for the day cause I don't feel like working in the rain and I guess I assumed he knew I was on medication and had a root canal because when I returned to work from the dentist I went over to the truck and told him I'd been to the dentist's office. I called your office the day previous and told Carol to relay to Mr. Locke that I was going to be a day longer than I thought I was going to be. I was off the 14th, 15th and 16th and I reported to Mr. Locke the morning of the 17th and I told him I'm sorry it took me a day longer than I thought and he says that's okay, you told me it's gonna take you a couple of days and I said he started the process of a root canal and drilled it out. I said I got some pills I'm taking.
- Q. At approximately 12:20 to 12:30 on December 18th, did you tell Mr. Locke that you were not feeling well that you were under medication and requested to leave?
- A. No, sir, I didn't.
- Q. Mr. Woods, did you ever give Mr. Locke a reason why you didn't want to work in the rain?
- A. I said I didn't feel like it, I should of went further and been specific I suppose, but I had told the assistant foreman earlier that my tooth was bothering me.
- Q. But you did not make any statements in that regard to Mr. Locke, is that correct?
- A. No, I didn't, I was under the assumption that since the head foreman had said you can go in any time you want to that I could just tell him to cut me time and go in." (Tr., pp. 15-16).

- Q. Would you explain the situation?
- A. Well, I had been to the dentist and he had started a root canal. He had drilled it out and packed it with some antibiotic material, a temporary filling and I'd been running a fever and I was drenched after working half a day in the rain and I just felt that my health was more important than the track that I thought could be put in tomorrow.
- Q. Why did you not relate this to Roadmaster Locke?
- A. I assumed he understood my circumstances since he had given me permission to leave duty for three days to go to the dentist." (Tr., p. 17).

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The record is clear that the Roadmaster informed the Claimant that if he refused to work in the rain "we'll cut your time and dismiss you from the railroad." (Tr., p. 5). Claimant knew from his discussion with his Relief Foreman that he could be fired if he left his job: "...but you said well, you gonna fire me if I do that...then you said, you said, well, you might fire us....". (Tr., pp. 12-13). The record shows substantial probative evidence in support of the Carrier's determination that Claimant violated Rules 564 and 470 of the Safety Rules and General Rules.

Insubordination is a grave offense and in a proper case may justify dismissal, or, as in the present case, the forty-five (45) working days suspension. Mitigating circumstances, however, are present in the present case. Claimant was suffering from his dental problems, was under medication, and he testified that he was running a fever and that his tooth was bothering him. The Claimant testified that he assumed that the Roadmaster knew of his condition, although the Claimant also testified that he did not tell the Roadmaster of this. The Roadmaster testified that Claimant would not have been required to work in the rain if the Claimant had informed him of his condition. The Claimant's assumption that the Roadmaster already knew was not a correct assumption. He should have told the Roadmaster of his condition, plainly and clearly. In the special circumstances of this particular case, the suspension of forty-five (45) working days should be mitigated to a suspension of ten (10) working days.

A W A R D

Claim shall be disposed of Per Findings.

Order: The Carrier shall implement this Award within thirty days of date of Award.

JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER

Dated: October 30, 1989