

PUBLIC LAW BOARD NO. 5606

**PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
TO)
DISPUTE) SPRINGFIELD TERMINAL RAILWAY COMPANY**

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The twenty-one (21) day suspension assessed R. J. Henry for his alleged failure to follow instructions and submit a production report on the evening of October 5, 2000 was without just and sufficient cause, excessive punishment and in violation of the Agreement.
2. Track Foreman R. J. Henry shall now have his record cleared of this incident and be compensated for wage loss suffered. (Carrier's File: MW-00-26)

FINDINGS:

The Board, after hearing upon 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; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

On October 10, 2000 Claimant was notified to report for a formal hearing, with the charge reading:

[To] develop the facts and place your responsibility, if any, in connection with an incident on October 5, 2000 at approximately 0830 hours at the Route #23 crossing in Hinckley, ME at Milepost #8 on the Hinckley, ME branch whereby you were given an order to submit your production reports daily, at or near the end of each work day, every afternoon, or you would face the consequences of being sent home, and you did not comply with said orders.

Following the company hearing Claimant was administered the discipline here on appeal, a 21 working days suspension, for what was determined by Carrier to have been a violation of General Rule GR-C and NORAC Rule D.

Rule GR-C provides in part that employees: "must cooperate and assist in carrying out the rules and instructions," and that any "act of insubordination, hostility or willful disregard of the Company interests will not be condoned and is sufficient cause for dismissal."

NORAC Rule D states in part that employees must carry out the rules and special instructions and that acts of insubordination, hostility or willful disregard of the Company's interest are prohibited.

The Track Supervisor who issued the above cited charge, described the events leading to it to have been as follows:

On September 25 at approximately 7:30 AM in Waterville Yard, I had to ask Bob Henry to make sure that he sends in his production report in because at that point, he hadn't yet. I informed him that it must be sent in daily.

On October 5 at approximately 8:30 AM at Rte. 23 crossing in Hinckley at Mile Post 8 on the Hinckley Branch, I informed Bob Henry, Track Foreman for Surface Crew #2732 that I was asked why no production report had been received for the day before. I was instructed by Scott Dyer that he was not going to continue to neglect this duty and that from that point on, the production report will be sent in daily at or near the end of each work day every afternoon or he would face the consequence of being sent home. I completely agreed with him, and on this date and time above, Bob Henry's reply as to why it was not sent in was that he had forgotten and was in the process of doing it at that moment. As I was informed by my superior, I told Mr. Henry that at that point on he will do as he is told and send his production report in on time at the close of work or before for that same day's work or else he will be sent home.

On October 6 at approximately 7:15 Bob Henry called in to office to ask if there were any new instructions for the day. I asked him if he had called in his report at the end of the workday the day before and his reply was that he did not and that he had sent it in before he called me that morning. I reminded him that he did not do as he was told and that it would not be tolerated anymore. I instructed him to leave the crew and to go home and the matter would be dealt with.

On October 5 that afternoon, Foreman Henry gave up his Form D at 15:13 (3:13 PM), leaving sufficient time to get to the nearest phone to call in the production report for that day. All he has to do is take the time to call it in. He is no different than any other production foreman that finds the time to call theirs in.

There is no question, as urged by the Organization, that the Carrier committed procedural error in violation of Rule 26.2 in withholding Claimant from service pending a hearing. This rule reads in part here pertinent as follows:

An employee may not be suspended pending a hearing except when the act or occurrence to be investigated is of serious nature such as Rule G, insubordination, extreme negligence, dishonesty, or when continuing an employee in service may constitute a threat to Carrier personnel, carrier property, or property entrusted to the custody of the Carrier. Suspension pending a hearing will not be considered as prejudicial to the employee and will be used sparingly by the Carrier.

It is evident that the actions of Claimant were not originally deemed to be serious in nature or, principally, insubordination, an infraction that is subject to suspension under Rule 26.2. This is evidenced by the fact that the charge of record did not accuse Claimant of insubordination. Nor does the record show that Claimant was told that a failure to follow instructions that give rise to the dispute would constitute an act of insubordination. Claimant's supervisor admitted at the hearing that he was not knowledgeable of the provisions of Agreement Rule 26.2 as concerns offenses that are identified as cause to suspend an employee pending a hearing. Moreover, as concerns his having sent Claimant home on October 6, 2000, the last day of his workweek, when asked if he expected Claimant to be off the following week or weeks, Claimant's supervisor said, "No."

In many respects it seems to the Board that in providing that suspension pending a hearing be for major offenses, and used sparingly, that Rule 26.2, among other things, intended to protect employees from situations whereby an employee withheld from service for other than a major offense would be adjudged guilty and arbitrarily assessed discipline in an amount of time equal to the number of work days out of service to the date of administration of discipline, regardless of the hearing record calling out for the imposition of a lesser penalty or no penalty at all.

Here, Claimant was removed from service on October 6, 2000; the notice of hearing was dated October 10, 2000; the hearing was conducted on October 20, 2000; and, a notice of discipline issued on November 3, 2000. The notice of discipline stated: "An entry of twenty-One (21) Working Days from October 6, 2000 through the Close of Work on November 3, 2000 has been entered into your discipline record" for violation of General Rule GR-C and NORAC Rule D. In other words, discipline was assessed equal to the same number of workdays that fell between the date of removal from service and the date of discipline, irrespective of the hearing record showing that it was only intended that Claimant "be sent home" for but one day and that the matter of an overall failure to follow instructions would be dealt with at a formal hearing.

Before proceeding to the merits of the case, the Board will address a further objection of the Organization, i.e., that it was prejudicial to the interests of Claimant for the hearing officer to have permitted at the commencement of the hearing, introduction of a letter that issued to Claimant on September 21, 1998 pertaining to then missing production reports. While the Board agrees that the letter should not have been introduced at the start of the hearing, we find that it was proper for the letter to have been made a matter of record, albeit we believe it should have been referenced at the close of the hearing. That the letter was properly a part of the record is evidenced by the fact that it constitutes a past warning about a need to submit production reports in a timely manner, or the same subject of the instant dispute, cautioning Claimant with the statement: "This letter is to remind you that failure to comply with these procedures may result in disciplinary action."

As concerns a further protest by the Organization that it was prejudicial and improper for the hearing officer to have permitted introduction into the transcript what are known on the property as STOP notations. The Organization argues that the STOP program was introduced by the Carrier as a non-discipline program, and asserts, "Carrier Officials assured the Organization and the employees that the STOP program would not be used in a discipline nature." Further, the Organization submits that the two STOP notations that were placed into the record are not germane to the subject of the investigation. In this same respect, it is noted that upon being asked at the investigation if he "has any good STOPS in his record," Claimant offered the following undisputed statement: "Yes, I probably have about 10 or 15 times as many good ones as I do the 2 bad ones that they submitted as evidence against me." Certainly, even it was to be assumed, *arguendo*, that the STOP program does not prohibit introduction of STOP notations at a disciplinary hearing, it would have to be considered that the hearing officer failed in a responsibility to assure placement into the record all matters both favorable and unfavorable to the accused employee. However, despite its concerns about such matter, the Board does not find this particular matter sufficient to conclude that Claimant was denied benefit of a fair and impartial hearing. Study of the rather extensive hearing record shows that Claimant was accorded full opportunity to defend against the charge.

The above determinations concerning the procedural objections of the Organization aside, the Board turns to the second aspect of the dispute, i.e., that in addition to having told Claimant that he would face the consequence of "being sent home" in a failure to submit production reports at the end of each workday, that the supervisor also told Claimant that "the matter would be dealt with," or, principally, that he would be subjected to a disciplinary hearing.

Turning, therefore, to this second aspect of the dispute, the Board finds the record to support the conclusion that Claimant failed to adhere to a long recognized principle in the employee-employer relationship, namely, that an employee is duty bound to follow instructions of supervisory officials so long as obedience to such orders does not affect the safety of the employee or others. That Claimant's immediate supervisor instituted

report procedures that differed from those of other supervisors did not extend to Claimant a unilateral right to disregard the instructions of his supervisor. If Claimant was of a belief that he was being unfairly singled out in that certain other foremen were being permitted to turn in their reports at times other than at or near the end of each work day, i.e., just prior to the start of a next tour of duty, then he should grieved such matter under the grievance rules. He did not have the right to take it upon himself to disregard the clear and precise instructions that had been given to him by his supervisor as to when the latter wanted production reports to be submitted. Moreover, the record supports the conclusion that Claimant was specifically directed to submit his production reports by the end of his work day because of what the Carrier submitted had been past failures to get production reports in on time so that they could be forwarded to company headquarters for morning meetings of managerial officials.

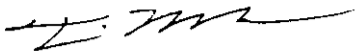
In the light of the above considerations, the Board will direct that Claimant be compensated for the period of time that he was suspended from service to the date of hearing, i.e., October 6, 2000 through October 19, 2000. At the same time, the Board will hold that the balance of the period of time, October 20, 2000 through November 3, 2000 (11 work days), constitute a rather lenient discipline for the failure on the part of Claimant to comply with instructions of supervisory officials.

AWARD:

Claim disposed of as set forth in the above Findings.



Robert E. Peterson
Chair & Neutral Member



Timothy W. McNulty
Carrier Member



Stuart A. Hulburt, Jr.
Organization Member

North Billerica, MA

Dated FEB 6, 2002