

Special Board of Adjustment No. 956

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employees
and
New Jersey Transit Rail Operations, Inc.

STATEMENT
OF
CLAIM:

The dismissal of Trackman Carl L. Cartwright was without just and sufficient cause. He shall be reinstated without loss of compensation, overtime from the date of his release, seniority or vacation rights or any of the other benefits enjoyed by him prior to his dismissal.

FINDINGS:

Claimant, a trackman with 11 years service with Carrier and its predecessor, was dismissed for being absent without permission for a period of 20 consecutive days beginning December 9, 1985.

The record establishes that claimant was arrested on December 6, 1985 and charged with first degree assault. These charges were subsequently reduced to three counts of third degree assault and one count of reckless endangerment. All charges were dismissed on January 30, 1987 by the City Court of Port Jervis, New Jersey.

After claimant's arrest and while court proceedings were dragging on with delays and postponements not attributable to claimant, he was incarcerated. He was notified of his dismissal from Carrier's

-2-

service on January 8, 1986, while imprisoned. About one month later, by letter of February 10, 1986, claimant advised Carrier that the charges against him stemmed from his defense against a robbery attempt and that he was under the impression that he had been granted, in response to his telephone call to his supervisor on December 9, 1985, a 30-day leave of absence.

Carrier has remained firm in its refusal to reinstate claimant despite dismissal of all charges against claimant. Its position is that claimant clearly violated Rule 27(b) since he was absent for a period of 20 days without receiving permission from his supervisor.

Rule 27(b) reads as follows:

"Except for sickness or disability, or under circumstances beyond his control, an employee who is absent in excess of 14 consecutive days without receiving permission from his supervisor will forfeit all seniority under the agreement. The employee and the General Foreman will be furnished a letter notifying them of such forfeiture of seniority. The employee or his representative may appeal such action under Rule 26, Section 3."

In Carrier's view, Rule 27(b) is self-executing and requires Carrier to terminate the seniority of any employee who has violated Rule 27(b) unless absence is due to "sickness or disability, or under circumstances beyond his control."

Contrary to Carrier's position, this Board is satisfied that claimant's absences were due to circumstances beyond his control. His incarceration, the only reason realistically before us for his

-3-

absence, was a circumstance beyond his control since the charges for which he was imprisoned were all dismissed, and there is no showing in this record that he was guilty of any crime for which he should have been imprisoned. Carrier should reasonably have been aware that it was taking a chance in dismissing claimant for absences caused by imprisonment when he had not as yet ever been convicted of any crime and, in any event, would have well established rights of appeal from any conviction that might eventually follow.

Claimant is clearly entitled to reinstatement with seniority rights unimpaired. The only question that remains is as to remedy concerns back pay.

It would be improper, in our judgment, to require Carrier to compensate Claimant for wage loss suffered prior to January 30, 1987, when all evidence of the court decision was presented. It would likewise be remiss if we did not question the Claimant's reasoning for not immediately presenting the court's decision of September 10, 1986, as the Carrier forcibly argued in this case.

Although the Carrier erred in its decision on January 30, 1987, in not returning the Claimant to work, no evidence was presented explaining why the Claimant waited from September 10, 1986 until January 30, 1987, to return to work. Therefore, in review of the entire record and without prejudice to future cases similar in nature, this claimant, having not been dealt with in bad faith, is not entitled to receive back pay.

AWARD

Claimant shall be reinstated with full seniority, but without back pay for time lost. To be effective within 30 days.

Adopted at Newark, N.J. July 1, 1987.



Harold M. Weston, Chairman



Carrier Member



Employee Member