

SPECIAL BOARD OF ADJUSTMENT NO. 959

METRO-NORTH COMMUTER RAILROAD COMPANY :
 :
 "Carrier" :
 : Case No. 106
 and :
 : Award No. 106
 THE BROTHERHOOD OF LOCOMOTIVE :
 ENGINEERS :
 :
 "Organization" :
 : (J. Sorrentino)
 :

STATEMENT OF CLAIM

Appeal on behalf of Engineer James Sorrentino for full reinstatement and back pay for dismissal relating to Claimant's alleged violation of Rule D of the Metro-North Rules of the Operating Department.

OPINION OF THE BOARD

On September 22, 1991, Claimant J. Sorrentino was performing services for Carrier. As a result of his injury, Claimant did not return to work until May 7, 1993. Carrier ultimately compensated him a large number of sick days in connection with his injury and absences related to its reoccurrence.

Claimant subsequently pursued his rights to recover for his injury under the Federal Employers Liability Act (FELA). On June 6, 1995, a jury awarded Claimant \$25,025.00 for past wages and benefits; \$14,370.00 for past medical expenses for disc injuries; \$2,472.00 for medical expenses for a thyroid injury and \$13,000

for pain and suffering, for a total amount of \$54,864.00.

In a motion progressed subsequent to the award, Carrier sought to offset the amount of jury awarded damages with medical benefits that had already been paid to Claimant. This motion was denied in an order dated June 16, 1995. On June 22, 1995, Carrier filed a motion for reconsideration. The motion for reconsideration was also denied and it was ordered that the judgement be rendered in the amount of \$54,867.

A series of additional legal motions were made involving Carrier's asserted right to offset Claimant's sick leave payments. On November 14, 1995, District Court Judge Goettel denied Carrier's motion to satisfy from the judgement defendant's lien for sick leave benefits.

On December 8, 1995, Carrier's General Superintendent of Transportation wrote Claimant demanding reimbursement of the funds at issue. Specifically, the letter stated as follows:

Pursuant to the provisions of Rule 44, Section 3(b) of the collective bargaining agreement between Metro-North and the Brotherhood of Locomotive Engineers, you received an advance of your salary in the amount of \$38,427.34 on account of time lost from work while incapacitated by an injury received in the course of the performance of your duties as an employee of Metro-North. Metro-North is entitled to reimbursement of that amount from the proceeds of the judgement you obtained against Metro-North in connection with your FELA claim arising out of that injury, as provided in Section 6 of that Rule.

We expect reimbursement of the \$38,427.34 advanced to you within ten days of your receipt of this letter. If you fail to make reimbursement within that time period, we will take all appropriate action to recover that amount, as well as appropriate disciplinary action.

Claimant did not remit these monies in response to Carrier's

letter of December 8. Accordingly, by letter dated January 2, 1996, Carrier instituted charges against Claimant as follows:

Arrange to attend a formal investigation at 10:00 a.m. Monday, January 8, 1996, in the Trainmaster's Office, 4th Floor, New Haven, CT, to develop the facts and determine your responsibility, if any, in connection with:

Your alleged failure to reimburse Metro-North for salary advance of \$38,427.34 by December 28, 1995, as ordered in my letter to you of December 8, 1995, which you received on December 18, 1995 (copy attached).

Rule D of the Metro-North Rules of the Operating Department may be involved.

You may arrange to have duly accredited representation and/or witnesses present in accordance with your schedule agreement.

The investigation was subsequently postponed on a number of occasions while the parties engaged in discussions concerning the matter. The Organization offered to arbitrate, in an expedited fashion, the issue of Claimant's obligation to reimburse Carrier, and if so, the amount of the debt. Carrier agreed to arbitration of the issue of Claimant's obligation to repay the debt, outside of a disciplinary hearing, with the condition that a promissory note be executed to insure Carrier an avenue to collect such monies if it prevailed at arbitration. Claimant refused to agree to this condition.

Accordingly, by letter dated May 24, 1996, Carrier reinstituted disciplinary proceedings against Claimant. After several additional postponements, the investigation was eventually conducted on August 14, 1996. Claimant was not present and the investigation proceeded in his absence over the

objection of the Organization.

Carrier subsequently found Claimant guilty as charged and dismissed him in all capacities. The letter of dismissal stated as follows:

Your failure to reimburse Metro-North for salary advance of \$38,427.34 (amount consequently amended to \$29,216.52), or any portion thereof, by December 28, 1995, as ordered in Superintendent of Transportation M. J. Kiniry's letter to you of December 8, 1995, which you received on December 18, 1995, all in violation of Rule D of the Metro-North Rules of the Operating Department.

The Organization appealed Claimant's dismissal. Carrier denied the appeal. The matter was then placed before this Board.

Agreement provisions cited by the parties include the following:

Collective Bargaining Agreement executed on December 21, 1982. Rule 44, Section 6.

In the event an employee initiates any action or proceeding against Metro-North, or any individual or Insurance Carrier, on the basis of any alleged injury received in an off duty accident or in the performance of duty for which sick leave allowance hereunder has been paid by this Company, the Carrier shall have a lien against and is entitled to be reimbursed or to deduct from any recovery or settlement resulting from such action or proceeding up to the extent of the benefits so paid.

Memorandum of Understanding dated December 19, 1994-
Article VII On-The-Job injury Medical Payments

Metro-North will have the right to offset health and welfare benefits paid against any right of recovery an employee injured on duty may have against Metro-North.

Carrier argues as follows: the trial was properly held in absentia. There is no question that Claimant was given a reasonable opportunity to appear at trial. The record is also clear that pursuant to Rule 44, Section 6 of the Agreement, Carrier is entitled to reimbursement of the sick leave monies expended on behalf of Claimant. While the Organization has argued that Carrier's right to collect its lien was waived because the lien was not timely filed with the court, Carrier's right to reimbursement of sick leave benefits is a contractually negotiated entitlement which is not governed by a judicial procedure and cannot be waived by a procedural error in litigation. In addition, the issue of sick leave benefits was never substantively addressed by the Court. It is further clear that Claimant has not complied with the directive contained in the letter dated December 8, 1995 to repay the money at issue. Claimant has therefore been insubordinate in fulfilling his basic employment obligation to reimburse Carrier for money he received and to which he is not entitled. Claimant was also completely uncooperative when discussions were held to resolve the issue in arbitration. Carrier's requirement that a bond be posted in order to assure payment in the event it won the case was entirely reasonable since the Carrier was attempting to avoid having to litigate a collection procedure in court if it won. To the extent the Organization is disputing the monetary amount owed in this case, it is not addressing the Claimant's insubordination. If Claimant is claiming that there is a legitimate dispute

regarding the amount of money at issue, the appropriate response would be for Claimant to have tendered payment of a lesser amount. Finally, dismissal is an appropriate penalty for Claimant's misconduct. In effect, Claimant is guilty of the embezzlement of \$29,000 from the Company and must, therefore, be punished accordingly. Claimant had ample opportunity to take actions that could have preserved his employment and could have allowed him to continue to contest the matter. As Claimant did not allow that to occur, termination was Carrier's only option.

The Organization argues as follows: Claimant was denied due process in a number of ways. First, he was not properly notified of the charges against him as required by Rule 23 (c)(1)(A). Second, Claimant was not afforded an opportunity to defend himself against the charges brought by Carrier when Carrier improperly held the investigation in absentia. The Organization is unaware of any engineer who has had serious discipline imposed against him or her in absentia. Third, the hearing officer deliberately suppressed evidence. Fourth, Claimant was not afforded a fair and impartial investigation, as two high level Carrier officials prejudged Claimant. As to the merits of this case, Carrier did not prove the charges against Claimant. The issue of Claimant's obligation to repay sick time was already addressed as part of his FEIA action and Carrier was collaterally estopped from proceeding against Claimant in this matter. Thus, this is not the type of instruction an employee is ordinarily obligated to obey and subsequently grieve if exception thereto is

taken. The instruction placed such an extraordinary burden on Claimant, one which he could not possibly meet, at least not in the time frame initially allowed, that it was simply unreasonably on its face. Additionally, it was impossible for Claimant to comply with this instruction inasmuch as the amount demanded, even using the lesser of the amounts, which is still not clear on the record, far exceeded the amount of the judgement with respect to the portion of the judgement on which Carrier based its alleged offset right. Thus, Carriers' demand in this regard was tantamount to "shaking down" Claimant for the privilege of working. In addition, it is clear that Carrier had other less drastic means available to resolve this dispute. The Organization offered to bring the issue to expedited arbitration. In addition, Carrier routinely garners engineer's pay to satisfy prior payments. It is therefore clear that Carrier was interested in retaliating against Claimant for bringing an FEHA action, not recovering money from him. Finally, the discipline assessed against Claimant is excessive. Claimant was a 25 year employee with only one contested formal reprimand in his record. The Board must therefore issue a sustaining award in favor of the Organization and reinstate Claimant with full back pay including interest, penalties, and reimbursement for medical coverage and seniority fully restored.

The Board has determined that the claim must be sustained.

At the root of this matter is a dispute over Agreement interpretation. More specifically, Carrier asserts that it

maintains a right under the Agreement to deduct from Claimant's FELA recovery the value of the sick leave allowance it has paid to Claimant as a result of his injury. Claimant and the Organization contend that Carrier does not possess such a right of recovery against Claimant.

The instant claim, however, is not one directly involving this matter of Agreement interpretation. Rather, the instant claim involves a matter of discipline. More specifically, Carrier discharged Claimant for failing to reimburse Carrier for salary advance as ordered in the letter of December 8, 1995.

In analyzing and deciding the claim filed in response to Claimant's termination, the Board first makes the important observation that the outcome of the disciplinary matter is not dependent upon resolution of the dispute over Agreement interpretation. More specifically, assuming, without deciding, that Claimant's interpretation of the Agreement is correct and Carrier's incorrect, it would not necessarily justify Claimant's refusal to comply with a direct order. It is well established that with rare exception employees are obligated to comply with a direct order and then file a claim in protest of that order. Ultimately, if the employee's interpretation of the Agreement is found to be correct, an appropriate remedy may be granted. Conversely, if the Board assumes, without deciding, that Carrier's interpretation of the Agreement is correct and Claimant's incorrect, it would not automatically follow that Carrier properly terminated Claimant for failure to comply with

the direction set forth in the letter of December 8, 1995 were the Board to find that order arbitrary, unreasonable, and/or impossible to comply with.

It is critical that all parties fully understand this principle. Employees cannot have any understanding that they are normally privileged not to follow an instruction from Carrier merely because they perceive that instruction is not based upon a sound interpretation of the Agreement.

In order to make this principle clear, the Board finds it not only unnecessary, but inadvisable, to here resolve the Agreement interpretation issue concerning Rule 44 as the bedrock for its determination concerning the propriety of the Claimant's discharge. Rather, the Board will at this time express no opinion as to the Agreement interpretation issue but rather limit its analysis for purposes of this case to the propriety of the discharge irrespective of whose interpretation of the Agreement is correct.

Turning to that matter of discipline, it is only after careful consideration that the Board determines that the claim should be sustained. While it is true that Claimant did not reimburse Carrier \$38,427.34 within ten days of receipt of Carrier's letter of December 8, 1995, as directed therein, the Board finds that under the totality of the circumstances here present the order was arbitrary, unreasonable and/or impossible to comply with.

More specifically, it is clear that Carrier was attempting

to use the threat of discipline and termination solely for the purpose of compelling Claimant to comply with its interpretation of the Agreement. The Organization persuasively argues that in effect Claimant was being placed in a position whereby he was being required to provide Carrier with a large sum of disputed money in order to maintain his employment. Within the Board's experience, this simply is not a method recognized as appropriate for resolving disputes over Agreement interpretation.

The Organization also persuasively argues that Carrier had far less drastic options available to it in order to seek to enforce its perceived rights under the Agreement. For example, it could have sought to garnish Claimant's future wages in a reasonable fashion, as it has apparently done on other occasions with employees with whom it believes owe money. If the Claimant was in disagreement with the garnishing of wages, he then could have filed a claim, properly bringing the dispute to the Board as a matter of Agreement interpretation.

Furthermore, as stressed by the Organization, Carrier had available to it the option of proceeding to expedited arbitration on this matter. Carrier rejected this option solely because Claimant would not meet its precondition that he execute a promissory note to insure Carrier an avenue of collection if it prevailed at arbitration. Within the Board's experience, this is not a recognized reasonable precondition for proceeding to arbitration. There are many disputes which proceed to arbitration over disputed monetary amounts where there may be

some question whether the charged party, usually the carrier, will pay the amount owed if the charging party prevails. Nonetheless, the Board is aware of no case where a promissory note needed to be posted as a precondition to arbitrate.

Finally, the Board believes that it was unnecessary and unfortunate that Carrier proceeded forward with the investigation in the absence of Claimant. While Claimant's exact physical condition at the time of the investigation is not altogether clear, it is clear that when the investigation occurred Claimant was off duty due to an injury. Rule 23 (d)(3) allows for extension of all time limits when the principal is off due to temporary disability. Moreover, the Board is unaware of any reason which required urgency in bringing the matter to conclusion in August, 1996.


In sum, Claimant, a 25 year employee with a virtually unblemished work record, should not have lost his means of livelihood as a result of Carrier trying to enforce its interpretation of the Agreement. The instant claim will therefore be sustained, absent interest and penalties.

Finally, the Board recognizes that its determination leaves unresolved the Agreement interpretation dispute concerning whether Carrier maintains a right of reimbursement against Claimant, and if so, how much. These are matters which the Board is willing to address promptly should they properly be placed before it for resolution.

SBA NO. 959
AWP NO. 106


AWARD

Claim sustained.



M. Doyle
Organization Member

A. Paul
Carrier Member



S. Buchheit
Neutral Member