

SPECIAL BOARD OF ADJUSTMENT NO. 280

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
TO)
DISPUTE) ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

AWARD

STATEMENT OF CLAIM:

"1. Carrier violated the effective Agreement when North of Texarkana Welder Helper R. G. Free was unjustly dismissed and was not afforded a fair and impartial hearing.

2. Claimant Free shall now be paid for all lost time commencing September 16, 1986, and on a continuing basis until such time he is allowed to return to duty with seniority, vacation and all other rights restored intact." (MW-86-50 CB)

OPINION OF BOARD:

At the time of the incident, Claimant, a Welder Helper, had twelve years of service with the Carrier. By letter dated August 8, 1986, Claimant was charged with being absent from duty without authority in alleged violation of Rule 604. After investigation held on September 9, 1986 and by letter dated September 16, 1986, Claimant was dismissed from service.

The record shows that on July 23, 1986, Claimant reported for duty at Lewisville, Arkansas and was working under the supervision of Welder E. C. Thomas. According to Claimant, his knee was bothering him and "I asked Welder E. C. Thomas if I could take the day off [and] Mr. Thomas told me it would be okay if I took off that day." Claimant then took off the balance of that day.

Claimant testified:

"q. Following that conversation with Mr. Thomas on the morning of July 23, 1986, did you contact any supervisor or official on the railroad to request permission to be off on any

day other than July 23, 1986.

* * *

- a. On July 24 approximately 7:00 AM, I called [Roadmaster] F. M. Reinhart's office [and] I talked to Pat McMurrrough, I asked him to have F. M. Reinhart call me back and I never received another call. So to answer your question, I did not contact any officer.
- q. Following this above mentioned attempt to contact Mr. Reinhart, did you make any further attempts at contacting the railroad about your absence.
- a. No I did not'

Claimant did not report for duty at any time after July 23, 1986.

McMurrrough denies receiving a call from Claimant on July 24, 1986. Reinhart denies giving Claimant permission to be off on July 23, 1986 or any day thereafter.

During the period May 2, 1980 through April 26, 1983, Claimant's prior disciplinary record shows five letters of instruction, two five day suspensions and the assessment of thirty five demerits, all resulting from being absent without authority.

Rule 604 states, in pertinent part:

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

Initially, we agree with the Organization that the record evidences confusion concerning who has authority to grant time off. This confusion was recognized by the Hearing Officer as shown by the following exchange with Roadmaster Reinhart:

- "q. Mr. Reinhart, reading from page 4 of the transcript you were asked, 'Do you require employees under your supervision to get your personal authority to be absent from duty' and your answer was, 'Yes'. You were then asked just above on page 5 'The foreman can give him permission to be off' and you answered, 'Yes', would you please explain this apparent contradiction.
- a. I'd be happy to. Everyone on my district knows it is necessary for me to give them authority to be off. Now obviously that is not 100% possible at all times. If a man knows in advance he needs to be off account personal

problems or whatever the reason, my foremen are instructed by me to make me aware of this fact for my approval or disapproval. If an employee is sick or if an employee has, for example death in the family, etc., and I am not available the foreman also understands, as per my instructions to him, that he may give a man authority to be off under this unusual circumstance so as to keep the man out of trouble. Now that may appear to be a contradiction, but sounds clear to me."

Reinhart's explanation is not clear to us, however, especially in light of the following testimony by Reinhart:

- "q. Doesn't the rule book state that in order for an employee to be off he must receive permission from his supervisor, is that correct
- a. Yes, it says that"

Further, Reinhart's requirements do not appear to be clearly disseminated to the employees. Reinhart testified:

- "q. How are the foremen under your supervision made aware of your rule, is this a verbal instruction or do you put out instructions on paper
- a. This is a verbal instruction"

Thus, we are satisfied that with respect to July 23, 1986, the record shows sufficient confusion concerning the requirement of receiving permission to be off from the Foreman as opposed to Roadmaster Reinhart. If anything, the breakdown in communication occurred between Thomas and Reinhart. The record sufficiently shows that Claimant sought and received permission to leave early on July 23, 1986 from the individual supervising him and we therefore conclude that the Carrier has not carried its burden of demonstrating substantial evidence to support a Rule violation for that date.

If Roadmaster Reinhart desires to operate under the guidelines that he specified in his testimony, it will first be necessary for him to clearly convey to the employees who are expected to abide by the rules precisely what those requirements are concerning who can grant permission to be off. Whether or not Reinhart can ultimately require that permission to be off can only be granted by him in light of Rule 604's requirement of "proper

authority" and Reinhart's testimony concerning the Rule Book's requirement that a supervisor can give such permission is an issue that we need not address in this award.

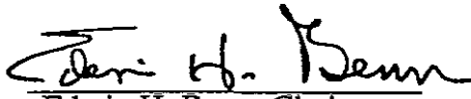
However, we are of the opinion that substantial evidence does exist to support the Carrier's conclusion that Claimant did not have authority to be off for the days after July 23, 1986. We note by Claimant's own testimony that on July 23, 1986, he asked for and received permission to take off only for "*that day*" [emphasis added]. Even by Claimant's own testimony, he did *not* receive permission from Thomas to take off on the following days. Further, Claimant admits that he did not have permission from Reinhart or any other supervisor to take off on the days following July 23, 1986. Giving Claimant the benefit of the doubt that he attempted to call Reinhart on July 24, 1986 (which we note is denied by McMurrough), we are not satisfied that Reinhart's alleged failure to return the call was either explicit or implicit permission for Claimant to take off on all days after July 23, 1986, especially after Claimant admittedly made no further attempts to contact the Carrier. We are therefore satisfied that Rule 604 was violated by Claimant commencing on July 24, 1986.

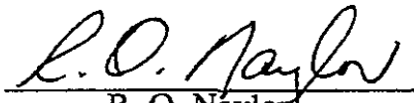
In this case, we believe that dismissal is excessive. We note that Claimant has a past history of discipline for the same misconduct as in this case. However, we further note that Claimant's record has been clear for over three years. We must further take into account that the Carrier has not sustained its burden with respect to the July 23, 1986 allegation. Considering the foregoing, we shall require that Claimant be returned to service with seniority and other benefits unimpaired. If Claimant was not compensated for July 23, 1986, then we shall require that he be paid for that day. Otherwise, return to service shall be without compensation for time lost.

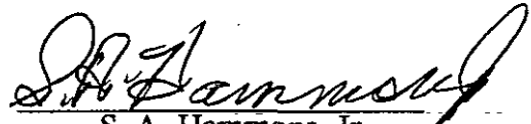
Since we have sustained the Claim for the July 23, 1986 allegation, we find it unnecessary to address the Organization's argument that Claimant was not afforded a fair hearing due to Thomas' failure to testify.

AWARD:

Claim sustained in accordance with the Opinion. Claimant shall be returned to service with seniority and other benefits unimpaired. If Claimant was not compensated for July 23, 1986, then we shall require that he be paid for that day. Otherwise, return to service shall be without compensation for time lost.


Edwin H. Benn, Chairman
and Neutral Member


R. O. Naylor
Carrier Member


S. A. Hammons, Jr.
Organization Member

Houston, Texas
April 29, 1988