

PUBLIC LAW BOARD NO. 1464

Award No. 64

Case No. T-116-75

Parties United Transportation Union (T)  
to and  
Dispute Boston and Maine Corporation, Debtor

STATEMENT OF CLAIM:

"...removal of the twenty-four (24) demerit marks assessed against the record of L. C. McLain and for removal of any reference on the record of a ten (10) day suspension."

"....Payment of the deadheading incidental to traveling Groveton to East Deerfield and return in the amount of 366 miles, plus 366 miles at 12¢ a mile for the use of his car to travel to the hearing at East Deerfield on November 4, 1974."

"....payment of all time lost by L. C. McLain on 6-4-3 on November 4, 1974, account having to lose that time to attend the hearing on November 4, 1974."

"...claim of Freight Trainman L. C. McLain, on the T-152 Common Board at White River Junction, Vermont, dated January 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 1975 for the earnings he lost by being removed from the T-152 Common Board on January 5, 1975, and ordered to begin to serve a ten (10) day suspension sixty-two (62) days after the hearing of November 4, 1974."

FINDINGS:

The Board finds, after hearing upon the whole record and all evidence 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 November 20, 1974, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearings held.

Claimant trainman holds a promotion date of February 4, 1971, as a Conductor. He also, during the time frame herein involved, owned a flagman's position on Trains JU-1/UJ-2 and also held a subject-to-return yard helper's position on the White River Junction, Vermont, 10:30 PM Yard Switcher.

A conductor's vacancy on Local Freight G-4-3 went no bid on bids closing September 25, 1974, whereupon Claimant was assigned to said vacancy for a fourteen (14) day period. He covered this latter assignment to and including Saturday, October 5, 1974. Claimant, after finishing work and arriving at his home, contacted the crew dispatcher at 1:05 AM on Sunday, October 6, 1974, and marked off "sick."

The Chief Crew Dispatcher, apparently because of a shortage of men, tried to contact several men who were off including Claimant, to ascertain if they could work. Claimant's home was contacted at 1:30 AM October 7 and his wife advised that Claimant was still sick and that he was not home (as were the other men called). The Assistant Trainmaster also called on October 7 and left a message with a woman he presumed to be Mrs. McLain, "just tell him that I had called and that we can use him when he can come back to work."

October 10, 1974, the Assistant Trainmaster sent Claimant the following letter:

"On October 5, 1974, you booked off sick with our Crew Dispatcher at East Deerfield, Mass. Since then he has tried to contact you and determine if possible when you would be able to return to work. I, myself, have tried to call on the 8th, 9th, 10th and this date, the 11th, without any answer at your home phone....please advise my office no later than October 16th, the nature of your illness and when you expect to be able to return to work."

Said letter was delivered on October 15th and signed for by Mrs. McLain. Claimant did not contact the trainmaster as requested. Claimant called the crew dispatcher at 4:20 PM on October 20, 1974 and marked back up for work. He thereafter commenced his scheduled two weeks vacation at 12:01 AM October 21, 1974.

The Assistant Trainmaster sent Claimant a notice of investigation dated October 21, 1974, which, in part, read:

"....You are hereby directed to attend a hearing.... on November 4 at 10:00 AM...This hearing will be held.. for your failing to report for work from October 3 to October 20, 1974. You are specifically charged with being in violation of General Rule "N" of the rules of the Operating Department....and being insubordinate (sic) in failing to comply with my letter of October 11, 1974."

As a result of that November 4th investigation, Carrier concluded Claimant guilty as charged and assessed discipline by Discipline Notice No. 185 dated December 3, 1974, as follows:

"24 marks, 10 days suspension, violation of Operating Department Rule "N" and insubordination. You will be advised date suspension will take effect."

Claimant was instructed to serve the aforesaid ten day suspension commencing 12:01 AM, Monday, January 6, 1975.

Rule N reads:

"Employees must not absent themselves from duty, exchange duties with or substitute others in their place, nor engage in other business which interferes with the proper performance of their duties as employees or which is detrimental to or in competition with the railroad."

The Employee contend (1) the Notice of Investigation was defective because it refers therein to the Boston and Maine Railroad which ceased to exist as a corporate entity long before October 1, 1974, and Claimant is not an employee thereof. (2) "insubordinant" had no meaning or explanation in the dictionary. (3) that Claimant, contrary to the charge, worked October 3, 4, and 5, 1974 and October 6 was his off day and hence the notice lacked specificity as to the dates that Claimant was in violation of Rule "N". (5) that Assistant Trainmaster Gindras preferred the charge and was a witness against Claimant. (6) that Carrier did not present witness Trainmaster Gindras as the beginning of the hearing, but rather, after Claimant had testified. (8) Claimant supported his marking off "sick" with a Doctor's statement without any contradiction thereon. (9) Carrier's crew dispatchers were harrasing Mrs. McLain by constantly calling claimant's home. (10) the hearing officer testified and also shut off the Local Chairman's questioning. (11) Carrier refused to provide the Local Chairman with a copy of the transcript to permit an appeal and Claimant was required to serve the discipline sixty (60) days after completion of the hearing on November 4, 1974.

These are not court proceedings which require rigid adherence to the rules of evidence. Merely raising hypertechnical points while appealing a discipline case without showing a causal relationship to how the due process rights of Claimant were thereby impaired does not require this Board to pass judgement thereon. This is especially so where such points were not raised or objections entered by the Claimant or his representative at the investigation. Further, such points may well run counter to the purpose served by the arbitration process.

The Board notes that Claimant responded to the notice of investigation and that he, as well as his representative, accepted same without protest. The Board finds that the improper inclusion of certain dates within a specified time frame only serves to effect and minimize that degree of time in which Claimant was alleged to have

been in violation of Rule N. It does not nullify the remaining period of time. Carrier's use of Trainmaster Gingras as a witness was appropriate to the basis of charge and the order in which he was used was not shown to have been prejudicial to Claimant. Carrier controls the holding of the hearing which includes a determination of the order of presentation of its witnesses and its evidence. Yet, while it may be considered more preferable for Carrier to initially make its case and present all its witnesses; there was no showing here, by rule or otherwise, as to how or why Claimant was injured.

The Board finds that there is no basis for concluding that the allegation of "harrassment" is other than that. It remains as only an allegation.

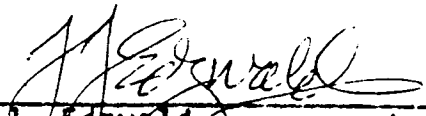
Despite the fact that there might well have been merit to the question of whether Claimant, in fact, was insubordinate by not complying with Assistant Trainmaster Gingras' order of October 11, 1974, the Board is precluded from reaching the merits of this case because of the prejudicial procedural errors committed by Carrier representative. The record shows that the Claimants representative, the local chairman, requested a copy of the transcript. Not only was the transcript not furnished him, but he was advised that it would not be given to him. Carrier's action constituted an arbitrary view and an action violative of paragraph (d) of the discipline rule, resulting in a denial of due process. The Board's observation that the notice of discipline was vague and that the discipline imposed was required to be served some two months after the hearing is viewed only as indications of the attitudinal tone reflected in this case.

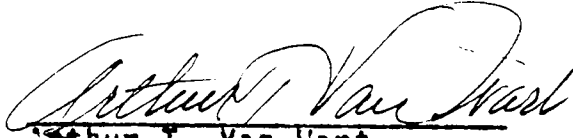
Consequently in the circumstances, without passing judgement as to the monetary aspects of the claim because of no argument thereon, we are constrained to sustain claim.

AWARD: Claim sustained.

ORDER: Carrier shall make this Award effective within thirty (30) days of date of issuance below.

  
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J. L. Scanlan  
Employee Member

  
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F. J. Edzwald  
Carrier Member

  
\_\_\_\_\_  
Arthur T. Van Wart,  
Chairman and Neutral Member

Issued at Billerica, Massachusetts, January 31, 1977.