

PUBLIC LAW BOARD NO. 2206

AWARD NO. 3

CASE NO. 3

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

- and -

Burlington Northern, In.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Section Laborer J. W. Traver effective November 18, 1976, was without just and sufficient cause and wholly disproportionate to the alleged offense (System File S-S-123C).
- (2) Section Foreman J. W. Traver be returned to service with all rights unimpaired because of the violation referred to within Part (1) of the claim.
- (3) That J. W. Traver now be compensated for all time lost and the discipline be stricken from his record."

OPINION OF BOARD:

Claimant was on vacation from October 4-22, 1976 and October 25, 1976 was a holiday. He was due to report to his job as Section Foreman on October 26, 1976 but he did not appear. Following due notice and timely hearing he was found guilty by Carrier of being absent without authorization and he was dismissed from service effective November 18, 1976. The facts surrounding his absence are, for the most part, not refuted. His absence is conceded on and after October 26, 1976, but the Organization maintains that his absence was unavoidable and justifiable. The Organization asserts that Carrier should not have disciplined him and also violated Rule 15 of the Agreement by not granting him a leave of absence. In addition, the

Organization alleges several prejudicial defects in the hearing procedure. We do not find these latter assertions persuasive and decide the case on its merits. Criminal charges were lodged against Claimant in August 1976 arising out of an incident with an eight-year-old girl in June 1976. On October 4, 1976, while on vacation, Claimant entered a plea of guilty to taking Indecent Liberties and he was remanded to County Jail for psychiatric testing and counselling prior to sentencing. On or about October 22, 1976 Claimant's criminal attorney contacted Mr. Traver's immediate superior, Assistant Superintendent C. G. Carlson. A leave of absence for Claimant was discussed between the lawyer and the supervisor, but the two men have directly conflicting recollections as to whether any commitment was made to give Claimant such a leave. The evidence is virtually irreconcilable on that point. In the mean time, Claimant did not report to work, psychiatric tests were conducted while he was confined in County Jail and, on October 29, 1976 he was remanded to a State Hospital for 90 days of further observation to determine whether he was a sexual psychopath. Thereafter, on November 3, 1976, Carrier served Claimant at the State Hospital with notice of an investigation regarding his absence from duty without proper authorization since October 26, 1976. In the mean time, by letter dated November 2, 1976, Claimant's attorney transmitted to the Superintendent, Spokane Division, a request for leave of absence from October 23, 1976 to February 15, 1977. Our records do not show whether Carrier responded to that request but Claimant subsequently was notified of his dismissal.

We turn first to the allegations that Claimant's absence was "unavoidable" and should not form the basis for disciplining him. A long line of cases from several arbitral tribunals has held that incarceration and detention for criminal misconduct is not justification for an employee being absent from

work. In the facts of this case, we believe that principle to apply fully herein. See First Division Awards 12021, 14692, and 18244; Second Division Awards 4689, 6606 and 7067; Third Division Awards 12992, 18816 and 19568. The summary teaching of these cases is that while the detention made his attendance at work impossible, the situation in which Claimant found himself was not "unavoidable" and he cannot be exculpated by such a bootstrapping argument.

As for the alleged violations of Rule 15, the record is too flatly contradictory to permit a determination whether an oral commitment was made to the attorney or whether an estoppel should lie on the basis of the conversation between Claimant's lawyer and Assistant Superintendent Carlson. It is clear, however, that no written request was received for the long-term leave of absence until after Claimant had been charged with unauthorized absence. Even if that request had been timely, we cannot say with certainty on this record that Carrier would have been arbitrary or unreasonable in withholding approval.

Based upon all of the foregoing the claim must be and is denied.

FINDINGS:

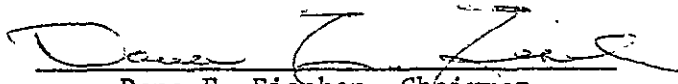
Public Law Board No. 2206, upon the whole record and all of the evidence, finds and holds as follows:

1. That the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;
 2. that the Board has jurisdiction over the dispute involved herein;
- and
3. that the Agreement was not violated.

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AWARD

Claim denied


Dana E. Eischen, Chairman


F. H. Funk, Employee Member


L. K. Hall, Carrier Member

Dated: 4/25/79