

PUBLIC LAW BOARD NO. 4901

AWARD NO. 77
CASE NO. 77

PARTIES TO
THE DISPUTE: United Transportation Union (CT&Y)

vs.

The Burlington Northern and Santa Fe Railway Company
(Coast Lines)

ARBITRATOR: Gerald E. Wallin

DECISION: Claim denied.

DATE: January 30, 1998

STATEMENT OF CLAIM:

Request in behalf of Old Arizona Division Conductor T. J. Rockwood for the removal of the Level 5 dismissal from service and alleged violation of Rules 1004, Form 2629, Std., Safety and General Rules for all Employees, effective June 30, 1993, and Rule 7, Superintendent's Notices, Barstow Division, 1994 from the Claimant's personal record and for his reinstatement to the service of The Atchison, Topeka and Santa Fe Railway Company Coast Lines with seniority and all other rights unimpaired and with pay for all time lost including the payment of Health and Welfare Benefits beginning on October 3, 1994, and continuing until returned to service as a result of the Investigation held at Needles, California on November 18, 1994.

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

At the time of the instant dismissal, Claimant had some 22 years of service with Carrier. It is undisputed that Claimant missed a call on September 17, 1994. Thereafter, he made no attempt to mark up for duty through October 3, 1994, a period in excess of 15 days. Claimant admitted at the investigation that he knew the rules concerning absence from duty and absence without authority. On October 4, 1994, Carrier issued the notice of investigation leading to the

instant dismissal. On October 5, 1994, Claimant commenced serving a Level 4 disciplinary suspension of 90 days for previously missed calls.

According to Carrier's disciplinary policy, the substance of which is not in dispute, Claimant's absence without authority, since it occurred within one year of his Level 4 offense, called for dismissal.

Per the request of the Local Chairman, the instant investigation was postponed until November 18, 1994. On that date, Claimant revealed that he had been "... a disfunctioning person..." and that his "... mind wasn't on the job or working, it was elsewhere ...". He went on to add that he had gone through the employee assistance program and considered himself to be functional once again.

During the handling of the Claim by the parties on the property, the Carrier asserted that Claimant had a poor service record, that Claimant had been assessed previous discipline on several occasions, including several sanctions for attendance related violations, that he had been a habitual discipline problem, that his pattern of misconduct was long and well established, that he had been progressively disciplined over a long period of time, and that he had not lacked for warnings or due process. These assertions were un rebutted.

The Organization raised several objections to the Carrier's discipline. First, it claimed a fatal procedural defect in that Carrier's dismissal letter referenced a "Level 5 dismissal" instead of a Level 6 dismissal. Second, Carrier failed to properly consider Claimant's long years of service. Third, Carrier failed to properly consider the mitigating circumstance of Claimant's attendance in the employee assistance program.

The Organization's first contention must be rejected. The evidentiary record shows that Carrier's disciplinary policy provided for dismissal at Level 5 as of September 17, 1994, when Claimant missed his call and began his unauthorized absence. During the course of his unauthorized absence, the policy was revised to place dismissal action at Level 6. We find no fatal flaw arising from such circumstances. Carrier's disciplinary notification to Claimant clearly informed him of dismissal. The question of whether a Level 5 dismissal or a Level 6 dismissal should have been referenced is of no moment.

As to the Organization's second and third contentions, something must be said about the

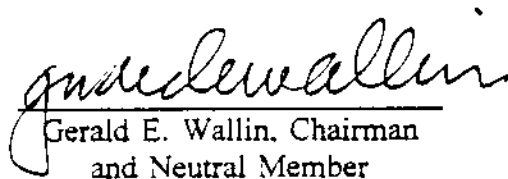
role of a Public Law Board. It is, essentially, an appellate entity. As such, it reviews the handling of the Claim by the parties on the property. The scope of its review is, therefore, limited to the record developed by the parties. The Board may not speculate about what may have happened or what the operative circumstances were. It may not go outside of that record to obtain answers to the questions the Board might have. If such information is not contained in that record, the Board has no way to consider it.


The Organization contends that Carrier did not properly consider mitigating circumstances. When mitigating circumstances are raised as a defense to disciplinary action, it is incumbent upon the party raising the challenge to establish the nature and extent of the circumstances. This is necessary so that the Board has complete and specific detail upon which to evaluate whether Carrier abused its discretion.


On this record, Claimant provided only a vague generalization about the reason for his absence. He gave no complete or specific details about the nature of any underlying problem to the Carrier nor was such information provided to this Board in the record. Claimant provided no complete or specific detail about his participation in the assistance program or his adherence to any followup recommendations. In essence, we do not have, as Carrier did not, any sufficient evidentiary basis for concluding that Claimant has been rehabilitated.

In light of these circumstances, given the nature of Claimant's misconduct under the Carrier's disciplinary policy, coupled with the undisputed nature of Claimant's past disciplinary record, we cannot find that Carrier acted unreasonably in dismissing Claimant.

AWARD: The Claim is denied.


Gerald E. Wallin, Chairman
and Neutral Member


P. L. Patsouras,
Organization Member


Gene L. Shire,
Carrier Member