

PUBLIC LAW BOARD NO. 2774

Award No. 46

Case No. 55

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employees
and
Atchison, Topeka and Santa Fe Railway Company

STATEMENT
OF CLAIM

- "1. That the Carrier's decision to remove Plains Division Trackman, Byron W. Cook, from service March 13, 1981, was unjust.
2. That the Carrier now compensate Trackman Cook for all wage and benefit loss from March 13, 1981 until April 8, 1981 and/or otherwise made whole."

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant was employed by Carrier as a Trackman on April 30, 1980. On March 3, 1981, Claimant received Notice of Investigation which charged him with falsifying his employment application by responding on that application that he had never been convicted of a crime which Carrier alleged might not have been correct. The certification on the employment application indicated that the answers were true and correct, and any misrepresentation would be sufficient cause for dismissal.

Following the investigation, held on March 13, 1981, Claimant was

dismissed from service as being guilty of the charges. Subsequently, on April 8, 1982, Claimant was reinstated to service without pay for time lost. Thus the dispute herein involves pay from March 13th to April 8, 1982, only.

The record reveals, in his employment application, Claimant Cook responded to the question that he had never been convicted of a crime affirmatively. The investigation reveals further that the Claimant was charged and arraigned in Randall County Texas, on August 25, 1978, for intentionally and knowingly possessing a useable quantity of marijuana. As a result of the hearing, the Judge granted Claimant probation, under the Texas' Misdemeanor Probation Act. This probation of eight months lasted until May of 1979, upon which Claimant Cook was released from probation by a Judge.

The Texas' Misdemeanor Probation Act (Article 42.13, Chapter 42 of Texas Penal Code) provides:

Effect of Probation

"Sec.A.(a) When a defendant is granted probation under the terms of this Act, the finding of guilt does not become final, nor may the court render judgement thereon, except as provided in Section 6 of this Article.

(b) The court shall record the fact and date that probation was granted on the docket sheet or in the minutes of the court. The court shall also note the period and terms of the probation, and the details of the judgement. The Court's records may not reflect a final conviction, however, unless probation is later revoked in accordance with Section 6 of this Article."

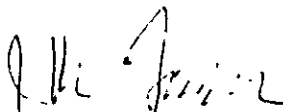
At the hearing, Claimant consistently and repeatedly denied that he had been convicted of a crime and thus, stated that he had not falsified his application for employment. From the total record and the statute cited above, it is clear that Carrier erred in determining that Claimant was convicted of a crime and hence had falsified his application. The statute itself indicates that the probation will not result in conviction unless it is revoked following any kind of arraignment under that aspect of the Texas' Penal Code. For the reasons indicated, the claim must be sustained.

AWARD

1. Claim sustained.
2. Claimant will be made whole for all loss of compensation for the period he was out of work due to improper dismissal.

ORDER

Carrier will comply with the Award herein within thirty days from the date hereof.



I. M. Lieberman, Neutral Chairman



G. M. Garmon, Carrier Member



S. E. Fleming, Employee Member

February 8 , 1983
Chicago, IL