

Award No. 62
Case No. 96

PARTIES
TO
DISPUTE

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

STATEMENT
OF CLAIM

- "1. That the Carrier violated the Agreement, particularly Rule 13 thereof, when on March 2, 1982, they dismissed welder-helper D. W. Goodman on the basis of frivolous and unproven charges in connection with which claimant was also denied due process.
- "2. That the carrier shall reinstate claimant, D. W. Goodman, to his former position with seniority, vacation and all other rights unimpaired and, additionally, compensate him for loss of earnings suffered account of Carrier's improper action."

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 herein was dismissed following a formal investigation held on March 1, 1982. He was charged with the following infraction: ".... You were allegedly sleeping while on duty as welder-helper, approximately 2:00 P.M., on February 2, 1982, and also to investigate certain irregularities concerning the personal injury claimed by you that allegedly occurred approximately 11:00 A.M., February 2, 1982" Claimant was found guilty of sleeping on duty but not of any irregularities concerning his personal injury claim.

First, with respect to the procedural issues raised by Petitioner, they fall into two categories:

1. That the Notice of Hearing and Charge was vague and indefinite, and
2. That the Hearing Officer's conduct immediately prior to the hearing was improper and prejudicial.

The Board views the charge objected to by Petitioner as being perfectly appropriate

under the circumstances. The language contained in the charge was clear and obviously precise enough to afford Claimant an opportunity to defend himself without difficulty. Concerning the second procedural issue raised, it is clear from the evidence that Claimant's representative objected to the conduct of the Hearing Officer, who conferred with three witnesses immediately prior to the start of the investigation. He was requested to disqualify himself from participation as a result of this conduct, which request was denied. While the Board is in accordance with Petitioner's view that a Hearing Officer's conduct should be irreproachable and beyond question, there does not appear to be any evidence of prejudice on the part of the Hearing Officer in the conduct of the investigation. Thus, the particular objection appears to be unfounded.

With respect to the transgression which Claimant was accused of, on the day in question, February 2nd, a severe snowstorm occurred involving a wind-chill factor of between 40 and 45° below zero in the area in which the Claimant's gang was working. The severity of the snowstorm resulted in the gang being directed away from their normal duties to that of clearing and cleaning snow from switches in the area. On that same day at about 11:00 A.M., Claimant, while wading through deep snow drifts, detected sharp pains in his right groin and leg area. This was reported to his foreman who told him that it was possibly not too serious and he could have pulled a muscle because of the extreme cold. Claimant persisted in his complaints over the next several hours. At approximately 2:00 P.M. at the same location, he was instructed by his foreman to remain in the truck while the remaining members of the gang proceeded to clean the west switch. Shortly thereafter, when the gang members returned to the truck, Claimant was found allegedly asleep in the truck. At that particular time, he denied that he was sleeping.

As the Board views it, there is no doubt but that the Claimant had permission from his foreman to go back to the truck and cease working and rest in the early part of the afternoon. Whether or not he was asleep when the gang returned, is the sole question which must be resolved. Assuming that the credibility findings of the Carrier Officer were correct and this Board must do so, it is obvious that Claimant then was sleeping in the truck. However, it is also noted that he had permission to be there resting at the time. Should this have warranted the ultimate penalty of dismissal? The Board thinks not. Under the circumstances, even though Claimant was indeed asleep while on duty, it was during a period in

which he was given permission to rest in the vehicle while the gang was working. Thus, the penalty of dismissal was unduly harsh and excessive. For that reason, Claimant will be reinstated to his former position with all rights unimpaired but without compensation for time out of work.

AWARD

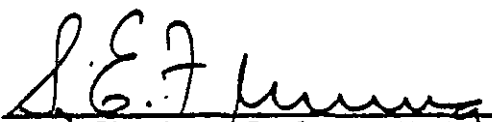
Claim sustained in part; claimant will be restored to his former position with all rights unimpaired but without compensation for time lost.

ORDER

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



I. M. Lieberman, Neutral-Chairman



S.E. Fleming, Employee Member



G.M. Garmon, Carrier Member

Chicago, Ill.
May , 1983