PUBLIC LAW BOARD NO. 4021

Award No. 21
Case No. 21

PARTIES TO DISPUTE

The Brotherhood of Maintenance of Way Employes

and

The Atchison, Topeka & Santa Fe Railway Company

STATEMENT OF CLAIM

1. Carrier's decision to remove Middle Division B&B Helper D. L. Markley from service effective July 18, 1985, was unjust.

2. Accordingly, Carrier should be required to reinstate Claimant Markley with seniority rights unimpaired, and compensate him for all wages lost from July 18, 1985.

FINDINGS

This Board, upon the whole record and all of the evidence, finds that the parties herein are the Carrier and the Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by Agreement dated November 26, 1985, and has jurisdiction over the parties and the subject matter.

Claimant was employed by the Carrier since June 1, 1981, and was working as a B&B Helper at the time of his discharge on July 18, 1985. On July 12, 1985, Claimant was sent a Notice of Formal Investigation:

> . . . concerning your alleged misrepresentation of facts concerning an alleged injury sustained, June 5, 1985, and your argumentative refusal to provide all facts concerning the alleged June 5, incident.

The Notice also cited Rules 2, 14, 16 and 26 of the General Rules for the Guidance of Employes, as being applicable to the charges, and their possible violation was included as a subject of the Investigation. The Investigation occurred as scheduled, and the Claimant was discharged from the service, following its' conclusion.

The record reveals that Claimant was attended by a Company Doctor on June 19, 1985, and filed a Personal Injury Report on June 25, 1985, alleging that he injured his back while on-duty, on June 5, 1985. Claimant asserts that he notified his Foreman on June 17,

1985, and the Foreman insists that his first knowledge occurred on June 19, 1985. It is undisputed that Claimant did not Notify the Carrier between June 5, (the date of the alleged injury) and June 17, 1985.

Whether the Claimant advised his Foreman on June 17 or 19, 1985, is not particularly important to the determination of this case. Whichever date is accepted, it is clear that Claimant did report the injury, and it is clear that he did not report it at the time on which it occurred.

There is additional discrepancy with respect to the location and date on which the injury allegedly occurred. The Claimant completed Personal Injury Form 1421 Standard, asserting that he was injured while working at "Wagon Bridge" on June 5, 1985. Testimony from Claimant's foreman revealed that Claimant and the gang were not working at Wagon Bridge on June 5, 1985. However, the foreman acknowledged that Claimant was working on and around June 5, 1985, and that Claimant's gang had worked at Wagon Bridge before and after that time. Claimant admits that he may have erred

with regard to the date of the alleged injury, but is certain that it occurred at Wagon Bridge.

Claimant also was charged for his "argumentative refusal to provide all the facts concerning the alleged June 5, 1985 incident." This charge stemmed from an interview between Claimant and Safety Supervisor Edington, in which Claimant answered several questions about the incident; but became upset, made an inappropriate remark, and walked out without permission. When asked if he thought that a comment like that is reasonably said to a supervisor of the company, the Claimant replied: "The position they put me in, yeah." The Board disagrees. The record does not contain any indication that Claimant was put in any position which would justify the manner or speech he used toward the Supervisor. Claimant was guilty of an "argumentative refusal to provide all the facts."

Much of the transcript of the Investigation, and the correspondence exchanged on the property is devoted to Claimant's failure to report the injury promptly. Carrier cites Rule 30 of its Gen-

eral Rules, which does require prompt reporting; however, the Claimant was neither charged with violating Rule 30, nor with failing to report the injury promptly. Therefore, that issue is not relevant to this dispute.

The crux of this dispute is whether Claimant "misrepresented" the facts in conncetion with his alleged injury. It is clear that the injury did not occur "at Wagon Bridge on June 5, 1985" as the Claimant indicated on his report; however, Claimant readily admitted at the Investigation that he was uncertain about the date.

The record does not establish whether it occurred on June 5, 1985, whether it occurred at Wagon Bridge, or whether it occurred at all. It also does not establish that the Claimant "misrepresented" the facts, in the sense that his intentions were dishonest or malicious.

Claimant indicated that he had suffered minor injuries in the past, but did not report each injury, because they "worked themselves out." In this case, he contends, he was aware of the in-

jury, but thought it to be minor. The decision whether or not to report an injury normally does not vest itself to employees: the Carrier has a Rule which requires the prompt reporting of all injuries - no matter how slight - and such a Rule is proper and appropriate. However, as stated above, Claimant was not charged with the violation of this Rule. In fact, testimony on the record indicates that the Rule is not strictly enforced on this Division. At page 19 of the transcript, the following exchange occurred between the Claimant's representative and the Division Engineer:

> Q. In other words, each time that an employee is injured, then you want a 1421 filled out, is that correct?
>
> A. It's the employe's option. If he only receives first aid on the job or feels that it is not necessary for medical attention, it's his opinion, not a policy matter whether he fills it out or not.

The Division Engineer's position does not supersede the General Rules, but his lack of enforcement does tend to explain why the Claimant delayed reporting the alleged injury: his actions were

consistent with accepted practice on the Division. Reduced to its essentials, it is clear that Claimant inaccurately reported the facts with respect to his alleged injury, but there is nothing in the record to indicate willfull misrepresentation. It is clear that his report of the injury was motivated, at least in part, by the fact that he received a Notice of force reduction; however, that does not mean, on its face, that his report was fraudulent. In the absence of evidence of fraud or deliberate misrepresentation, the Board cannot find the Claimant guilty of this charge. There is no such evidence in the record.

The record reveals that Claimant had been employed more than four years, and had no prior discipline assessed. While the offense of which he is guilty is of a serious nature, it does not warrant permanent dismissal. We will reduce the penalty to a 90 day suspension.

The discipline assessed Claimant is reduced to a 90 day suspension, and Claimant is restored to the service with seniority and other rights unimpaired. He will be made whole for net wage loss,

if any, during the period he was withheld from service in excess of 90 days.

AWARD

Claim sustained to the extent described in the findings.

C. F. Foose - Concurring
C. F. Foose, Employee Member

L. L. Pope - Dissenting
L. L. Pope, Carrier Member

J. R. Johnson
J. R. Johnson, Chairman
and Neutral Member

Dated: 8/22/86