

PUBLIC LAW BOARD NO. 4021

Award No. 23
Case No. 23

PARTIES
TO
DISPUTE

The Brotherhood of Maintenance of Way Employees
and

The Atchison, Topeka & Santa Fe Railway Company

STATEMENT
OF CLAIM

1. Carrier's decision to remove Northern Division Trackman Wesley Johnson from service effective August 30, 1985, was unjust.
2. Accordingly, Carrier should be required to reinstate Claimant Johnson, with seniority rights unimpaired, and compensate him for all wages lost from August 30, 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 as a Trackman for more than eight years. On August 27, 1985, an Investigation was held to determine whether Claimant had failed to comply with the instructions of his Foreman, and whether he verbally threatened that supervisor. The Investigation was held in a timely fashion, and no substantial procedural objections have been raised. Claimant was discharged from the service by letter dated August 30, 1985.

Several witnesses testified at the investigation. There was some controversy about the date of the alleged offenses, as well as the location. Claimant and several witnesses contend that the gang was working at North Fort Worth, rather than at Saginaw on the date involved, while the Foreman (and Company records) state that the gang was, indeed, at Saginaw. This controversy is not of particular import to this dispute, because it is clear from the record of the investigation that the discrepancy did not affect the progress of the case or the ability of all parties to recall and testify to the events which gave rise to the charges. Whether they took place at North Fort Worth or Saginaw is of little significance.

Of greater significance to the case is the direct conflict in the testimony of the parties. Foreman Gray is the sole witness who supports the contention that Claimant was guilty of the charges, while Claimant asserts that he did comply with Foreman Gray's instructions, and denies that he threatened Foreman Gray in any manner. Trackmen Foley and Bass supported Claimant's contention that he did perform the work as instructed, and Mr. Foley testified as follows with respect to the conversation between the Claimant and the Foreman:

Q. Did you hear Mr. Johnson threaten Mr. Gray?

A. I heard Mr. Johnson tell Mr. Gray that if he continued to harrass him, he would call his lawyer.

Q. Did Mr. Johnson say anything else to Mr. Gray?

A. He asked Mr. Gray why he was harrassing him, was it a personal thing, or did he want to fight or was it a problem between them.
(Emphasis added)

Trackman Bass offered no testimony with respect to any conversation between Messrs. Gray and Johnson.

The testimony of Messrs. Gray, Johnson and Foley, makes it clear that a conversation did take place, and that it was unfriendly. The exact content of the conversation cannot be ascertained from the sterile record, without the opportunity to gauge the credibility and demeanor of the witnesses. While this Board does not have that capacity, the Hearing Officer was in a position to do so, and he resolved the conflict in favor of the Foreman. The right of the Hearing Officer to make such a determination has been upheld in a long line of Awards, and this Board will follow that principle. The Board finds that the Claimant was guilty of the charges.

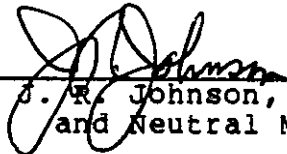
Having made that determination, the sole issue before us is whether the measure of discipline assessed was warranted. In this case, the matter was serious, and the Claimant's past record contains other similar infractions. Moreover, his record stood with a balance of thirty demerits prior to this offense, and as few as thirty additional demerits would have subjected him to discharge for excessive demerits. In view of these considerations, the penalty was warranted.

AWARD

Claim denied.


C. F. Foote, Employee Member


L. L. Pope, Carrier Member


J. R. Johnson, Chairman
and Neutral Member

Dated: 8/22/86