PUBLIC LAW BOARD NO. 4021

Award No. 25
Case No. 32

PARTIES TO DISPUTE

The Brotherhood of Maintenance of Way Employes

and

The Atchison, Topeka & Santa Fe Railway Company

STATEMENT OF CLAIM

1. That Carrier's decision to assess Claimant J. R. Bargas thirty (30) demerits, after investigation May 21, 1986, was unjust.

2. That the Carrier now expunge thirty (30) demerits from Claimant's record, reimbursing him for all wage loss and expenses incurred as a result of attending the investigation May 21, 1986, because a review of the investigation transcript reveals that substantial evidence was not introduced that indicates Claimant is guilty of violation of rules he was charged with in the Notice of Investigation.

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 nearly 15 years. On April 11, 1986 he notified the Chief Clerk that he was hospitalized and in traction, but that he did not know the origin of his injury. On April 13, 1986, Claimant telephoned his Road-master at home, and advised him that he had injured himself while on-duty on April 4, 1986. Claimant was charged with the possible violation of several rules, and an Investigation was held in May 21, 1986, to determine the facts and place responsibility, if any, for violation of said rules. Claimant was notified on June 6, 1986, that he had been found guilty, and that his record would be assessed thirty (30) demerits.

The Organization raised several procedural objections at the investigation. First, the Organization asserted that the Notice of Investigation was inadequate, and that it was unable to adequately prepare its defense. The Notice specified the matter which was to be the subject of the investigation, the time and date it allegedly occurred, and cited the Rules which covered the situation. The Board finds that the Notice was adequate.

Next, the Organization objects to the introduction of a written statement from a Medical Doctor (transcript Exhibit IV), on the grounds that it is hearsay, and that the Doctor was not present and available for cross-examination by the Organization. The contested evidence involves a statement which Claimant allegedly made to the Doctor that ". . . he says that it (the pain) started just prior to him coming in at work." Testimony with regard to statements allegedly made to a witness by a Claimant is not hearsay; however, the Board finds other merit to the Organization's objection. The Carrier does not have the power to command the presence of witnesses who are not employees; however, that does not absolve it of the obligation to make an effort to arrange for their presence, or at least attempt to seek specific affirmation from such witnesses. The statement here involved was not solicited by the Carrier for this investigation, but merely was taken from a medical report prepared at the time of Claimant's examination. It was not a central feature of the report, but was written in the report. If Claimant did make such a statement to the doctor, that fact would have significant impact on the case; but merely citing such a statement is not sufficient to enable it to overcome a direct challenge by the Claimant.

Finally, the Organization objected to several written statements from Carrier employees who were not available as witnessed at the investigation. The statements were not particularly important to the case, because they merely asserted that Claimant did not tell them that he was injured; but they will be rejected by the Board nonetheless. The Organization pointed out Carrier's right and obligation to arrange for employees to appear and give testimony at the investigation, but Carrier made no attempt to do so. Such statements will not be considered by the Board.

With respect to the merits of the case, Claimant was charged with the falsification of an injury, as well as the violation of certain Carrier rules. There is no evidence in the record that Claimmant falsified the injury, and the assessment of thirty demerits reflects that Claimant was not found guilty of that charge by the hearing officer. Such an offense would warrant discharge. The other rules deal with the prompt reporting of all personal injuries, and the issue here is whether Claimant violated those rules.

The record discloses that the alleged injury occurred on April 4, 1986, but was not reported by the Claimant until April 11 and 13, 1986. Claimant offers several reasons for his failure to report the injury earlier. The reasons include the fact that the Road-master was on vacation, that there were no supervisors on duty at the time the injury occurred, and that he first believed that it was merely an aggravation of a prior injury, which would clear up with a few days rest.

It is clear from the record that Claimant knew he had hurt his back on April 4, 1986, and that he communicated that fact to others. It is also clear that he could have reported the alleged injury sooner, but failed to do so. It is not important whether the pain was the result of a "new" injury or an aggravation of a previous injury. The Rules require employees to report promptly, and the rules are appropriate. The Board finds that Claimant did violate the Rules.

In view of the Claimant's failure to report his injury within a reasonable time, the Board finds that the discipline assessed was appropriate.

AWARD

Claim denied.

C. F. Foose, Employee Member

L. L. Pope, Carrier Member

J. R. Johnson, Chairman
and Neutral Member

Dated: 9/30/86