

PUBLIC LAW BOARD NO. 4021

Award No. 32
Case No. 28

PARTIES
TO
DISPUTE

The Brotherhood of Maintenance of Way Employees

and

The Atchison, Topeka & Santa Fe Railway Company

STATEMENT
OF CLAIM

1. The Carrier's decision to remove Group II Trackman H. Cody from service, effective May 9, 1985, was unjust.
2. Accordingly, Carrier should be required to reinstate Claimant H. Cody, with seniority rights unimpaired, and compensate him for all wages lost from May 9, 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 System Steel Gang Trackman, since 1979. On April 11, 1985, the Division Engineer was called to the Bunk Cars because Claimant allegedly was under the influence of alcohol, and acting in a belligerent manner. An Investigation was held on May 6, 1985, at which Claimant was charged with the violation of certain Carrier rules. Claimant did not attend the Investigation, or respond to the Notice in any way. Claimant was discharged from the service following the Investigation.

The Organization raises several procedural arguments. First, it asserts that the Investigation was improper, because Claimant did not receive the Notice until after the Investigation was held. The record discloses that the Notice was sent to Claimant's last known address on April 18, 1985, via Certified Mail - Return Receipt Requested. The Notice was sent from the office in Winslow, Arizona, to Claimant's address in the same city, nearly three weeks prior to the date of the Investigation. It is stipulated that Claimant did receive the Notice, but failed to claim his mail for three weeks. Such failure on Claimant's behalf cannot

be used as a valid objection to the proceedings, or its conduct in abstentia. The Carrier met its responsibility with respect to proper Notice.

Next, the Organization objects to Carrier's alleged failure to promptly provide a copy of the transcript and Claimant's service record, and asserts that such failure impeded its right to appeal the decision. It is a fact that Carrier is obliged to furnish such documents, and their failure to do so may be a valid basis on which to overturn its decision. However, such a defect may be remedied, and is not necessarily fatal to the case. The key fact is whether the failure to provide documents did serve to deprive the Organization of its rights under the contract.

In this case, the documents were provided promptly to the Organization as soon as the failure was brought to the attention of an appropriate Carrier officer, and there is nothing in the handling of the appeals which indicate that the Claimant or Organization was disadvantaged by the failure. Therefore, the Board finds that the defect was remedied, and the objection is denied.

The record of the Investigation contains scant evidence with respect to the merits of the case. The sole testimony is that of the Division Engineer, which is ex parte. In that testimony, he asserts that Claimant was under the influence of alcohol, that the Claimant admitted to him that he was under the influence of alcohol, and that Claimant was quite belligerent. The Claimant was not there to refute the testimony, so it must stand as fact. Moreover, the Division Engineer's testimony was not challenged at any time during the handling of the case on the property. Therefore, the evidence - although scant- is sufficient to support a finding of guilt.

Reporting for duty under the influence of alcohol is a serious offense, and this offense was compounded by Claimant's belligerent action. In view of the nature of the offenses, the discharge was warranted.

AWARD

Claim denied.

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C. F. Foose
C. F. Foose, Employee Member

L. L. Pope
L. L. Pope, Carrier Member

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

Dated: January 20, 1987

