

PUBLIC LAW BOARD NO. 4021

Award No. 42
Case No. 42

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 former Middle Division Trackman E. J. Hakenholz from the service, effective October 24, 1985, was unjust.
2. Accordingly, Carrier should be required to reinstate Claimant Hakenholz with seniority rights unimpaired, and compensate him for all wages lost from October 24, 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.

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Claimant was employed by the Carrier as a Trackman since 1973. On August 21, 1985, he submitted a note from a Doctor which indicated that Claimant was under his care, and was unable to work at that time. The note also indicated that Claimant was to return to the Doctor on August 27, 1985, for further examination. As a result of this note, Claimant was issued a Leave of Absence by the Carrier for the period commencing August 22, 1985, through October 6, 1985. The Doctor released Claimant to return to duty on September 16, 1985, and he did return to duty on September 17, 1985.

On September 24, 1985, Claimant received a letter dated September 23, 1985, instructing him to report for a formal investigation to determine whether he violated several Rules by failing to follow instructions and being absent without authority. The letter further indicated that the alleged violations were due to his engaging in outside employment while on Medical Leave of Absence.

At the investigation, Assistant Division Engineer Yarbrough testified that he observed Claimant in a liquor store (which later was determined to be owned by Claimant's wife) on two occasions.

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On September 3, 1985, he merely noticed that Claimant was there, but he did not see the Claimant engaged in any activity. On the second occasion, September 12, 1985, he observed the Claimant taking money from two patrons. The Assistant Division Engineer did not enter the store, but made his observations from a vehicle parked outside the store.

Roadmaster Gabriel also testified that he observed Claimant in the liquor store on two occasions. He testified that he noticed the Claimant in the store on August 30, 1985, but neither stopped his vehicle, nor observed the Claimant's activities. On the second occasion, September 12, 1985, the Roadmaster and a Special Agent entered the store, and the Claimant made change for them by opening the cash register drawer.

Based on this testimony, the Carrier determined that "Clearly, Claimant Hackenholz was engaged in outside employment while on a medical leave," and Claimant was discharged from the service.

The Organization raises several arguments and defenses, and provided testimony from two witnesses that Claimant did not engage

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in employment while on Leave. First, the Organization points out that Claimant did not request a Leave of Absence and, therefore, the cited Rules are inapplicable. Next, it argues that the Carrier did not establish that Claimant was engaged in employment or violated the Rules in any other way. Finally, the Organization contends that the discipline was excessive.

The Board agrees with the Organization. The record indicates that the Claimant provided a Doctor's note as provided in the Agreement, indicating that he was unfit for service for an unspecified time. Rule 22(b)-4 of the Agreement provides that:

A doctor's recommendation which does not specify a period of time the employe should be allowed to remain off duty will be considered as authority for the employe to remain off duty for a period not to exceed forty-five (45) days from the date of said recommendation.

Claimant provided the appropriate doctor's recommendation, and, therefore, was not "absent without proper authority." However, the Claimant also was charged with "failure to follow instructions" and "engaging in outside employment while on medical leave

of absence." Again, the Board agrees with the Organization, that the Carrier failed to prove those charges.

The record shows that the Claimant followed all appropriate instructions. He provided the requisite doctor's recommendation prior to his absence, he provided a doctor's note prior to his return, and he returned to work immediately thereafter. Unless it can be shown that Claimant engaged in "outside employment" during the leave, the Claimant is not guilty of anything.

The Carrier did not challenge the validity of the doctor's note, nor did it contest the assertion that Claimant was off due to "sinusitis", and could not perform his railroad duties because he was under medication. There is no assertion that Claimant falsified his medical condition, or that he was, in fact, fit for Carrier service during his absence. The sole contention is that the Claimant "engaged in outside employment." The Carrier did not prove this charge.

the record clearly shows that the liquor store was owned by the Claimant's wife, and she testified that he was neither an owner

nor an employee of the store. Claimant and his wife testified that he often visited her at the store, and, indeed, the Rule is not intended to prohibit such action. The Board has seen no evidence which indicates that employees on leave must avoid business establishments which they or their relatives own, while they are on leave of absence.

Moreover, the evidence of Claimant's outside "employment" is not sufficient to prove the charge. Two of the four dates on which he was observed, were mere "drive-bys", on which he was not observed doing anything. On the other two, he "made change" for a Special Agent, and was observed taking money from two patrons, by a witness outside the establishment. Such observations are insufficient to establish "employment"; rather, they seem to indicate that he was "helping-out" while at his wife's establishment, which is exactly what he admitted.

If it had been shown that Claimant was fit for Carrier service during the Leave, or that he sought the Leave in order to work at his wife's business, discipline would be appropriate. However,

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none of those things were established in this record. We will sustain the claim.

AWARD

Claim sustained.

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

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

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

Dated: January 20, 1987

