

Award No. 41
Case No. 42

PUBLIC LAW BOARD NO. 4244

PARTIES) ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
TO) AND
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

STATEMENT OF CLAIM: Carrier's decision to remove New Mexico Division Machine Operator A. L. Benavidez from service was unjust.

Accordingly, Carrier should be required to reinstate Claimant Benavidez to service with his seniority rights unimpaired and compensate him for all wages lost from December 15, 1988.

FINDINGS: This Public Law Board No. 4244 (the "Board") finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended. Further, the Board has jurisdiction over the parties and the subject matter involved.

In this dispute former New Mexico Division Machine Operator A. L. Benavidez (the "Claimant") was notified to attend a formal investigation on December 6, 1988 concerning his alleged failure to give all the facts, and his dishonesty by misrepresenting the facts and making false statements concerning a personal injury he allegedly sustained between Watrous and Shoemaker in 1988 while getting off a machine. The notice further stated that the Claimant's actions in this regard were in violation of Rules B, E, 1007, 1018 and 1027 of the Carrier's Safety and General Rules for all Employees. The investigation was postponed and held on December 15, 1988. As a result of the investigation the Carrier determined that the Claimant violated Rule 1007, and he was removed from service.

The evidence of record showed that on November 7, 1988, the Claimant requested and completed Form 1421, Report of Injured Person, in which he alleged he sustained a twisted ankle while getting off his machine in "1988". The Claimant testified at the formal investigation that he incurred the injury on June 2, 1988 at approximately 9:00 a.m. He further testified that he reported the injury to Foreman A. D.

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Lopez, his supervisor, and that he did not request medical attention. That evening the pain continued so he went to the emergency room doctor at the Northeastern Regional Hospital, Las Vegas, New Mexico, where a plastic splint was placed on his ankle. The Claimant reported for work the next day and he remained on the job. Moreover, he testified that when he reported for work Lopez made no further inquiry regarding his injury even though his ankle was in a splint. The Claimant offered a copy of the June 2, 1988 emergency room report into the record in support of his testimony.

Trackman J. Murrujo corroborated the Claimant's testimony. Murrujo testified that although he could not remember the specific dates, on or about June 1, the Claimant twisted his ankle while climbing down from a Ballast Regulator. At the Claimant's direction he then operated the regulator to where Lopez was working, and so that the Claimant could report the injury to Lopez. He further testified that the next day the Claimant reported for work with a wrapping around his ankle. Later that morning Lopez came to their work site, observed the Claimant and permitted his continued presence on the job even though the Claimant was working without a shoe on his right foot.

The Carrier witnesses' testimony deviated from that of the Claimant and Murrujo. Lopez testified that on June 1, 1988 the Claimant reported to him that he had twisted his left knee when he slipped off the Ballast Regulator. The Claimant declined Lopez's offer of medical attention. On June 2, Lopez observed the Claimant at approximately 3:00 p.m. with his right ankle wrapped heavily. He declared that he and Track Supervisor F. Medina approached the Claimant to discuss the matter. During their conversation the Claimant informed them that he had suffered an off-duty injury but requested that he be allowed to remain on the job on account he could not afford to lay off. Both Lopez and Medina agreed to the Claimant's request provided that he would not claim an injury against the Carrier.

Lopez stated that he recorded this matter in his daily log which was read into the record at the formal investigation. Medina's testimony essentially supported that offered by Lopez.

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After a review of the evidence and testimony of record the Board finds that the Carrier failed to establish that the Claimant violated Rule 1007 as charged. It is the Board's opinion that considerable weight must be given to the Claimant's testimony and the supporting testimony of Trackman Murrujo.

There is no dispute that the Claimant suffered an ankle injury on June 2, 1988 and received emergency medical attention for the injury. Both the Claimant and Murrujo testified that the injury happened when the Claimant climbed off the Ballast Regulator, and the injury was reported to Lopez. The Carrier offered no substantive evidence to rebut the Claimant's testimony.

The Board further notes that the Carrier's supervisory personnel were remiss in their failure to investigate the circumstances surrounding the Claimant's alleged injury of June 1, and the June 2 ankle injury, after such injuries were reported. Moreover, the fact that the Claimant was permitted to return to work with his ankle in a splint raises several unanswered questions which only cloud Lopez's and Medina's credibility. It appears to the Board that their handling of the incident was not in accordance with the Carrier's established policies and procedures.

The Board notes that the Claimant did not comply with the Carrier's rules when he failed to file Form 1421 Std. at the time of the injury. However, the Board concludes that based on the evidence of record the Claimant attempted to fulfill his responsibilities under the rules when he reported the ankle injury to his supervisors. The Board's conclusion on this issue is strictly limited to the facts of this case.


Last, the Board finds that the Claimant exercised poor judgment in filing an injury claim in November 1988. Regardless of the Claimant's motive in filing his claim, the fact remains that the Carrier failed to prove the charges against the Claimant. Accordingly, the Claimant will be reinstated to service with his seniority rights unimpaired and compensated for all wages lost from the date of his removal from service.

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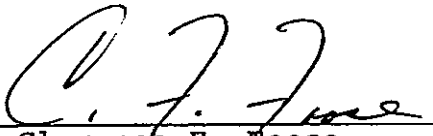
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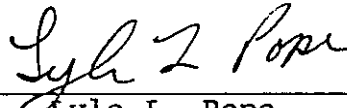
AWARD: Claim sustained.



Alan J. Fisher, Chairman
and Neutral Member



Clarence F. Foose
Organization Member



Lyle L. Pope
Carrier Member

Dated: October 20, 1989
Chicago, Illinois