

Award No. 64
Case No. 66

PUBLIC LAW BOARD NO. 4244

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

STATEMENT OF CLAIM: Carrier's decision to remove former New Mexico Division Machine Operator F. P. Urioste and Foreman F. E. Urioste from service, effective April 10, 1990, was unjust.

Accordingly, Carrier should be required to reinstate the Claimants to service with his seniority rights unimpaired and compensate them for all wages lost from April 10, 1990.

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 F. P. Urioste and Foreman F. E. Urioste (the "Claimants") were notified to attend a formal investigation on March 16, 1990 concerning their alleged misappropriation of Carrier material and unauthorized possession of Carrier property, in possible violation of Rules 1007, 1009, 1013 and 1018 of the Carrier's Safety and General Rules for All Employees. At the request of the Organization the formal investigation was postponed and then held on March 30. As the result of the investigation the Carrier determined that the Claimants violated the cited rules, and they were removed from service.

It was established in the record that Claimant F. E. Urioste received permission from the Carrier to remove scrap screenings from Carrier property and use the ballast to raise his driveway. On February 23, 1990, the Claimant secured a Liability Release from the Carrier which entitled him to enter onto Carrier property and remove the scrap ballast. The Claimant testified that he removed ballast on February 23, 24 and 25, and the following weekend of March 3 and 4. He further testified that Roadmaster J. C. Shurson was aware of this activity.

The record further showed that the Claimant solicited help from his neighbor, Mike Douglas, and his father, Claimant F. P. Urioste, and together utilizing Douglas' truck, they removed 60-65 dump truck loads of ballast. Approximately 30 loads were dumped on the Claimants' property, 21 loads on Douglas', and 14 loads on two other properties.

Special Agent W. L. Hanna testified that he received an anonymous phone call on March 5, 1990 asking how the caller could obtain ballast that was being removed from Carrier property and dumped at local residences. That afternoon Bruce Patterson entered Hanna's office asking to see Shurson regarding the purchase of used railroad ties. Hanna stated that he questioned Patterson regarding dumping activity in his neighborhood and was advised that the Claimant F. E. Urioste was selling ballast. Patterson stated that he had purchased six loads from the Claimant at \$50 a load. Hanna then obtained a sworn statement from Patterson describing his purchase from the Claimant. After obtaining the statement, Hanna and Shurson went to the area described by Patterson and viewed the dumped ballast. During their viewing, Hanna and Shurson saw several items of Carrier property on the property of Claimant F. P. Urioste.

Concerning the Carrier property in the Claimants' possession, during the investigation of this matter, Hanna and Special Agent R. A. Merrick discovered a pair of tie tongs, a box of 8 locks, cleaning fluids and chainsaw oil, a rotary pump and a chain at the residence of F. P. Urioste. The agents discovered a shovel, pick, tape measure and a fire extinguisher at the residence of F. E. Urioste.

There is no dispute that the Claimants had the property itemized above in their possession. Further, the Claimants acknowledged that approximately 65 loads of ballast were removed from the Carrier property and unloaded on various properties.

In the handling of this case the Organization vigorously argued that the Claimants' actions were not in violation of any rules. Concerning the ballast, the Claimants obtained permission from Roadmaster Shurson to remove the scrap ballast and there was no limitation placed on the amount they could remove. In fact it was established to the Board's satisfaction that the material had no redeemable value to the Carrier because it could not be reused. Further, when the ballast was removed originally from the road bed three years earlier, the Carrier was making every effort to have the material removed from the property at no cost to the end user.

Regarding the issue of possession of Carrier property by the Claimants, it was established in the record the Claimants' job responsibilities required them to have most of the items in their possession. The Organization argued and the Carrier affirmed that Claimant F. P. Urioste utilized his truck on the job and was paid for doing so by the Carrier. Moreover, most of the items in Claimant Urioste's possession were commonly used by the Claimant in his normal duties as a machine operator.

The Organization advanced a similar argument on behalf of Claimant F. E. Urioste. The Claimant was a Foreman and Relief Track Supervisor subject to emergency calls. Thus, he was required to have certain tools in his possession.

After reviewing the testimony and evidence of record it the Board's opinion that although the Claimants sold Carrier property for their benefit, the Board does not believe that the Claimants' intentions were to misappropriate Carrier property in direct violation of the Carrier's rules. However; under the circumstances of this case, the Board finds that the Claimants were guilty of taking a very open position regarding the permission granted to them by Roadmaster Shurson then they failed to disclose to Shurson their intentions regarding the utilization of the ballast.

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The Board further finds that the Organization demonstrated to the Board's satisfaction that the Claimants were not guilty of possession of Carrier property which merited their discharge. The items found were of such nature that it would not be uncommon for employees with their responsibilities to have such items in their possession.

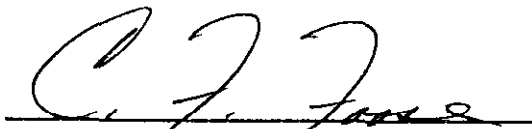
Hence, after due consideration of the Claimants' personal records the Board finds that the Claimants should be given the opportunity to return to the Carrier service with their seniority rights unimpaired, but without pay for time lost. Further, Claimant F. E. Urioste must relinquish his Track Supervisor's rights until he demonstrates to the Carrier that he can be a responsible employee. Such review will take place no later than one year from the date of the Claimant's reinstatement to service. The Board will retain jurisdiction on the issue of Claimant Urioste's Track Supervisor rights in the event the Organization challenges the Carrier's determination on this issue at a future date.

AWARD: Claim sustained as set forth above.



Alan J. Fisher

Chairman and Neutral Member



C. F. Foose

Organization Member



Lyle L. Pope

Carrier Member

Dated: November 12, 1980
Chicago, Illinois