

Award No. 91
Case No. 80

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 Southern Region Welder Leroy Smoot from service, effective October 5, 1990 was unjust.

Accordingly, Carrier should now be required to reinstate the claimant to service with his seniority rights unimpaired and compensate him for all wages lost from October 5, 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 Southern Region Welder Leroy Smoot (the "Claimant") was sent a proper notice to attend a formal investigation on October 16, 1990 concerning his alleged personal use of a Carrier credit card assigned to Carrier vehicle AT 93934 in September, 1990, and his alleged appropriation of Carrier material (batteries, paper towels and oil) for personal use at various times during 1990 in possible violation of Rules A, B, 1007, 1009, 1013, 1018 and 1028(b) of the Carrier's Safety and General Rules for All Employees. The investigation was postponed by the Carrier and rescheduled for November 8, 1990. The investigation was held as rescheduled, but the Claimant did not appear at the investigation. Pursuant to the investigation the Carrier determined that the Claimant violated the cited rules, and he was removed from service.

Prior to presenting the facts of this case, the Organization argued to the Board that the Claimant did not receive a fair and impartial hearing. In summary, the record showed that Phil Wolfersberger, the Organization's Assistant General Chairman,

was present at the hearing to represent the Claimant and request a postponement because the Claimant was in a hospital for surgery. However, the Carrier's hearing officer denied the request. Moreover, the hearing officer then excused Wolfersberger from the hearing room and refused to allow him to participate in the hearing. The Organization alleged that such action violated Rule 13 (a) of the Agreement which provides that an employee is entitled to representation at a hearing.

The Organization also argued that the Claimant never received proper notice of the investigation and the investigation was not held within 30 days of the date of the Claimant's suspension.

The Carrier responded to the allegations in detail and denied any procedural violations based on the facts and circumstances of the matter. The Carrier argued to the Board that the Carrier made every effort to notify the Claimant of the pending investigation, the postponement and the rescheduled date. Such notices were timely posted and sent certified mail. In fact, the Carrier declared that the Claimant did whatever he could to prevent service of the notifications. The Carrier offered evidence to show that the Claimant refused to accept the various certified letters mailed to his correct postal address by the Carrier. Further, when the Carrier attempted personal service at the Claimant's residence on November 5, 1990, he locked himself in his motor home and refused to answer the door.

After hearing the procedural issues and arguments presented by both parties, the Board finds that once the Organization representative appears at a formal investigation and informs the Carrier orally or in writing [Rule 13 (a) does not require the notice to be in writing] that he is the Claimant's duly authorized representative, the Carrier cannot exclude or refuse to allow the representative from participating in the formal investigation. It is the Board's opinion that the representative must be given the opportunity to offer evidence on the merits of the charge and to confront and cross-examine witnesses. Such safeguards are essential to a fair and impartial investigation. See Second Division Award 10409, Referee Jonathan Klein, on this property.

The Board also finds that the Claimant cannot make a deliberate attempt to circumvent the arbitration process and then allege that a procedural violation demands that the claim be sustained. To sustain a claim under these circumstances would undermine the integrity of the arbitration process and result in complete chaos in the administration of the labor agreement.

4244

Award No. 91

Page No. 3

Accordingly, the Board concludes that the only fair and equitable resolution is to remand the case to the parties and order the Carrier to conduct a *de novo* formal investigation. In this case, the Claimant is not entitled to any lost compensation because the record shows that he has claimed a physical disability which has resulted in the Claimant not being unavailable for service during the time that he has been withheld from service. The Board will retain jurisdiction of this case until the Award and Order are complied with by the parties to the Board's satisfaction.

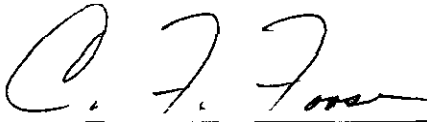
AWARD: Claim sustained as set forth above.

ORDER: The Carrier is directed to comply with the Award within thirty (30) days of the date of the Award.




Alan J. Fisher

Chairman and Neutral Member



C. F. Foose

Organization Member



Lyle L. Pope

Carrier Member

Dated:

May 4, 1992
Schaumburg, Illinois