

AWARD NO. 8

Case No. 7

PUBLIC LAW BOARD NO. 4823

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

STATEMENT OF CLAIM:

"1. That the Carrier's decision to assess Claimant G. Louis twenty (20) demerits after investigation December 20, 1989 was unjust.

2. That the Carrier now expunge twenty (20) demerits from Claimant's record, reimbursing him for all wage loss and expenses incurred as a result of attending the investigation December 20, 1989, because a review of the investigation transcript reveals that substantial evidence was not introduced that indicates Claimant is guilty of violation of rules he was charged with in the Notice of Investigation."

FINDINGS:

This Public Law Board No. 4823 finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act., as amended, and that this Board has jurisdiction.

On November 20, 1989, Carrier's Division Manager wrote the claimant a letter notifying him to attend a formal investigation on November 27, 1989, concerning a report that he allegedly harassed Welder Helper Frank Todecheeny with hostile remarks, unsafe acts and misconduct, and that he was allegedly in possession of a firearm on company property on November 2, 1989, which acts were alleged to have been in violation of Rules 607 and 608 of Rules, Maintenance of Way and Structures. The investigation was postponed and eventually held on December 20, 1989, following which the claimant was found to have been in violation of Rule 607. For his responsibility he was assessed 20 demerits.

At the outset of the investigation the claimant's representative objected to the notice of investigation on the premise(s) that said notice was vague and indefinite; no rule was cited which has any bearing on the possession of firearms on company property and the rules which were cited were from a rule book which has been superseded. Claimant's

representative asked that all charges be dropped because of these alleged defects in the notice.

As concerns the alleged defects in the notice, the Board finds that the notice was sufficient to advise the claimant of the matter(s) to be investigated and to enable him to prepare a possible defense. While it is true that no rule was cited which specifically pertains to or prohibits the possession of firearms on company property, it cannot be concluded from the record that the claimant was found responsible for having firearms in his possession while on company property. Claimant denied that he had a firearm in his possession and the discipline assessed was for violation of "Rule 607." The Board can only speculate as to what portion of Rule 607 was being alluded to by the Division Manager when he found that the claimant had violated that rule, but it is not unreasonable to conclude from the record that the claimant was at least "Careless of the safety of *** others" on November 2, 1989; which, of course, is a violation of Rule 607. Finally, while rules from a recently superseded rule book were erroneously cited in the notice, Rule 607 of the former rule book and Rule 607 of the current rule book appear to be identical. Accordingly, the Board sees no basis for considering the error as a fatal defect in the notice of investigation.

The transcript of the formal investigation is replete with diametrically opposed testimony; as a result of which the investigating committee was hardpressed to develop even a few morsels of fact about which both the claimant and his principle accuser (Welder Helper Todecheeney) could agree. However, there is some testimony from other witnesses which tends to support Mr. Todecheeney's version of what transpired; i.e., the testimony of Welding Supervisor Mayhill, Trackman Zubia and Trackman Salazar support the conclusion that the claimant, at a minimum, apparently did throw a cleaning rod toward Mr. Todecheeney and apparently also lit his torch very near Mr. Todecheeney, either and/or both acts which might reasonably be concluded to have unnecessarily jeopardized Mr. Todecheeney's safety.

This is not a court of law where guilt must be established beyond a shadow of doubt, or even by a preponderance of evidence. In cases such as this one, we look only at whether the evidence is sufficient for a reasonable person to reach the conclusion that the accused violated the rule(s) cited. The evidence (testimony) in this case certainly meets that criteria. The claimant was properly found responsible for violation of Rule 607.

As concerns the measure of discipline assessed, the Board notes that the claimant has long service, but a somewhat less than pristine discipline record. In deference solely to his long service, and with the hope

that his future service will reflect a new-found appreciation for compliance with the Carrier's rules, it is the decision of the Board that the discipline assessed will be reduced from twenty (20) demerits to fifteen (15) demerits.


AWARD:


Claim denied, except as set forth in the last paragraph of the FINDINGS, above.

ORDER:

The Carrier is directed to comply with the Award within thirty (30) days from the date shown thereon.


G. Michael Garmon, Chairman


Employee Member


Carrier Member

Dated at Chicago, IL:

April 23, 1990