PUBLIC LAW BOARD NO. 2774

Award No. 163
Case No. 163

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes
and
The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: "1. That the Carrier's decision to dismiss Welder Helper, Mr. F. S. Benolken, from its service for allegedly accepting other employment was without just and sufficient cause and in violation of the current Agreement.

2. The Carrier will now be required to restorer Claimant to his former position with seniority and all other rights restored, unimpaired, with compensation for all wage loss suffered."

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant had been involved in a work-related injury in November of 1984. In September of 1985, a recurrence of problems related to the injury occurred and, after his last day of work on September 20, 1985, Claimant sought medical attention on September 23rd. Prior to his absence on September 23rd, Claimant contacated Carrier's claim agent, who gave Claimant permission to be absent from duty to seek medical care. He was advised at that time that he would need to present a statement from his doctor

setting forth the nature of the problem and the length of time he would need to be off. It is apparent from the record that Claimant felt that he was on a bona fide leave of absence from September 23 until October 18, the date he received notice of a formal investigation. During the period that he was off duty, he had been observed by Carrier officers as involved in another business activity. Further, the record also indicates that Claimant was involved in his own business, which he had had for some two and one-half years and which Carrier's officials were well aware of prior to the incident involved in this dispute.

By letter dated October 10, 1985, Claimant had been charged with the following infraction and requested to attend a formal investigation:

> "Hereby notify to attend a formal investigation ....to develop all facts and place responsibility, if any, regarding report alleging that during your absence from work you have been involved in outside business activities. This occurred after you verbally advised the Division Engineer that you were unable to perform work because you were alleging complications due to an on duty injury you claimed occurred in 1984. ...."

Following investigation, Carrier adjudged Claimant guilty of the charges and dismissed him from service.

During the handling of the matter on the property, Carrier cited the following rule as being applicable to this dispute:

> "Rule 22-(d). Accepting other Employment while on Leave of Absence. Employees on Leave of Absence or absent under doctor's recommendation who accept other employment without written permission from the ranking officer in the department in which employed, shall be considered to be absent without authority.
>
> The General Chairman will be notified in writing by the General Manager when employees are granted Leave of Absence with permission to accept other employment. Leaves of Absence to accept other employment will not exceed ninety (90) days without approval of the General Chairman."

After a careful evaluation of the record of this dispute and the contentions of the parties, several facts emerge. First, it is apparent that Claimant was under the misapprehension that he had a leave of absence which, in fact, he had never secured formally. Additionally, however, Carrier's allegation that Claimant accepted other employment while on Leave of Absence cannot be sustained in view of the fact that no formal Leave of Absence had been granted to him. In addition, even though Claimant may well have been involved in physical activity in his other operation (his own business), this is not relevant necessarily to the conclusions reached by Carrier official with respect to whatever

disabilities he may have been laboring under. The record also reveals that Claimant never properly submitted the doctor's statement indicating the nature of the treatment he was undergoing or the length of absence it would require until after the investigation of charges had been scheduled.

It is the Board's view that this situation can best be considered to have been confused and, at most, Claimant was guilty of not properly securing a Leave of Absence for the period involved. An appropriate penalty should have been imposed for this infraction, but not the penalty which Carrier imposed for an entirely different infraction. For that reason, it is the Board's view that the appropriate response to the dispute should be that the penalty which Claimant has suffered from being out of work for a substantial period of time has served the disciplinary purpose intended. He shall, therefore, be reinstated to his former position with all rights unimpaired, but his time out of service shall be considered to have been a disciplinary layoff. In addition, upon his return to service, his record will indicate a current total of 50 demerits. This conclusion was conveyed to the parties on an interim basis by letter dated April 17, 1987.

AWARD

1. Claimant shall be reinstated to his former position with all rights unimpaired.

2. His time out of service shall be considered to have been a disciplinary layoff and, in addition, upon his return to service, he shall return with 50 demerits currently as his balance.

I. M. Lieberman, Neutral-Chairman

G. M. Garmon,
Carrier Member

C. F. Foose,
Employee Member

Chicago, Illinois

March 31, 1988