

PUBLIC LAW BOARD NO. 2774

Award No. 167
Case No. 167

PARTIES Brotherhood of Maintenance of Way Employees
TO and
DISPUTE: Atchinson Topeka & Santa Fe Railway Co.

STATEMENT "1. That the Carrier violated the provisions of the
OF CLAIM: current Agreement when on March 14, 1986 it
dismissed Machine Operator D. L. Tankersley
immediately following an investigation which was
neither fair nor impartial, said action being an
abuse of discretion.

2. The Claimant now be reinstated to former position
with seniority and all his rights restored,
unimpaired, and 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 employed by Carrier in 1971. On the date in question December 6 (as well as 16 and 18) 1985, Claimant was assigned as a machine operator on a weed mower in the Fort Worth, Texas area. By letter dated January 17, 1986 he was notified to attend an investigation in order to determine whether or not he had violated certain Carrier rules in that he had absented himself from duty without proper authority on December 6, 16 and 18 and

also falsely claimed eight hours' pay on each of those dates. Following an investigation held on March 14, 1986, Claimant was adjudged guilty of the charges and dismissed from service.

The record of investigation reveals (by virtue of Carrier witnesses) that Claimant did not have authority to be absent on the days involved and he was indeed absent on those days. Furthermore, his machine was not operated on any of those days. In addition, there was no report that the machine was out of service, nor did an inspection of the machine reveal any defects which would make the machine inoperable. In addition, the evidence is clear that Claimant in fact claimed eight hours' pay on each of the days involved when no service was performed. Claimant's response to this evidence was that he had been off on certain errands and was involved in the maintenance of his equipment and, therefore, was not absent at all on the days described by Carrier. Claimant sought to have his story confirmed by evidence. One of the witnesses whom he desired to be present at the investigation was unavailable and he requested that the Hearing Officer call a second witness. The Hearing Officer refused to do so, stating "I have to decline that because it is too irregular". Claimant had indicated that the witness whom he proposed to call had left with him on one of the days in question and that he could attest to his whereabouts on that workday.

Claimant did not have a good work record. In fact, he had been cited on numerous occasions for being absent without authority in the past, and at the time of the incident involved herein, had some 50 demerits on his record. In no instance in the previous infractions did Claimant challenge the propriety of the discipline meted out to him.

The Board is considerably concerned with the Hearing Officer's conduct of investigation of this matter. To deny the Claimant a witness who is critical to his position is considerably beyond the appropriate conduct of an investigation. The investigating officer in all such cases is bound to seek all evidence which might cast light on the critical incident. His mission is truth, not "conviction". Having denied the Claimant a "key" witness because it was thought "irregular" was the height of indiscretion on the part of the Hearing Officer. Under normal circumstances, this would be sufficient to reverse in its entirety the conclusion reached by Carrier with respect to the Claimant. However, in this instance, in view of the egregiousness of the infractions, and the clear evidence that Claimant did not indeed operate his machine on the days in question, and in light of previous records, that would seem an inappropriate conclusion. Therefore, it is determined that Mr. Tankersley will be reinstated on a last chance basis to the position of Trackman with all rights unimpaired, but he will not be reinstated as an Independent Machine Operator until such time as he demonstrates to the Carrier's satisfaction that he can

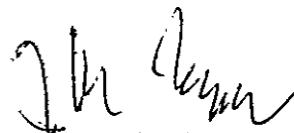
perform as an Independent Machine Operator. He, of course, will not be compensated for time lost, which will be considered to have been a disciplinary lay-off.

AWARD

Claims sustained in part. Claimant will be reinstated to the position of Trackman on a last chance basis with all rights unimpaired but without compensation for time lost until such time as he can demonstrate to the Carrier's satisfaction that he can perform as an Independent Machine Operator.

ORDER

Carrier will comply with the Award herein within thirty days of the date hereof.



I. M. Lieberman, Neutral-Chairman



G. M. Garmon
Carrier Member



C. F. Foose
Employee Member

Chicago, Illinois
July 12, 1988