

PUBLIC LAW BOARD NO. 4021

Award No. 37
Case No. 37

PARTIES
TO
DISPUTE

The Brotherhood of Maintenance of Way Employees
and

The Atchison, Topeka & Santa Fe Railway Company

STATEMENT
OF CLAIM

1. Carrier's decision to remove former Plains Division Trackman G. E. Green from service effective October 29, 1984, was unjust.
2. Accordingly, Carrier should be required to reinstate Claimant Green to service, with his seniority rights unimpaired, and compensate him for all wages lost from October 29, 1984.

FINDINGS

This Board, upon the whole record and all of the evidence, finds that the parties herein are the Carrier and the Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by Agreement dated November 26, 1985, and has jurisdiction over the parties and the subject matter.

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Claimant was employed by the Carrier as a Trackman, on the Plains Division, for less than one year. On October 29, 1984, he was sent the following, via Certified Mail:

Please be advised that in connection with application of Appendix 11 of the Maintenance of Way Employees Agreement, your seniority and employment with the AT&SF Railway Company are hereby terminated account being absent without authority from 10-22-84, to the present.

Also, please be advised that you have a right to request a formal investigation under the provisions of Rule 13 of current Maintenance of Way Employees Agreement, provided you do so within twenty days of this notice.

Claimant requested an Investigation pursuant to the second paragraph of the letter quoted above, and an investigation was scheduled to be held on December 4, 1984. The Claimant did not appear at the scheduled time and place for the investigation, nor did he request a postponement or communicate with the Carrier in any way prior to December 4, 1984. Therefore, the Carrier cancelled the investigation, and let the termination of October 29, 1984 stand.

On that date, however, the Division Engineer sent a letter to the

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Claimant, stating his understanding that Claimant was interested in working on another Division of the Railway, and tendered an offer to permit the Claimant to resign, in lieu of his termination. Claimant declined to execute the resignation form, and an appeal was filed on Claimant's behalf by the Organization.

There is no dispute in the record that Claimant was, in fact, absent without authority as specified in the Carrier's notice dated October 29, 1984. Rather, the Organization asserts that the procedure was invalidated by the Carrier's subsequent actions: specifically, by its failure to conduct the investigation as requested, and by offering to permit the Claimant to resign after the Carrier asserted that Claimant had been terminated.

We will deal first with the issue of the proffered opportunity to resign. The record discloses that the correspondence relating to the termination was issued by the Division Superintendent, and the correspondence relative to the resignation was issued by the Division Engineer. The Division Engineer lacks the authority to alter the decision of his superior, and, since Carrier maintains

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that it was not his intent to do so in any event, the Division Engineer's letter of December 4, 1984, has no bearing on this dispute.

The Board finds that the other argument lacks merit as well. The Agreement between the parties clearly grants Claimant with the right to request an investigation, and he exercised that right in a timely fashion. Likewise, Carrier scheduled that investigation in a timely fashion, as required by the agreement. The sole issue in dispute, however, is not is not specifically treated by language in the Agreement: whether Carrier is obliged to hold such an investigation if Claimant fails to appear.

The Arbitration history with respect to disciplinary investigations under Rules such as this Rule 13, has held that an investigation is an employee's right, but he is not required to exercise that right in all cases. For example, employees may waive their right specifically, or investigations may be held in absentia. In either case, the employee makes that election at his own peril. In such cases, however, the investigation is required by the contract before discipline is assessed.

In this case, the Agreement specifically grants Carrier the right to terminate employees without first holding an investigation, and the employee's request for an investigation acts to stay the termination until the investigation is concluded.

In the absence of clear contractual language, we must seek to discover the intent of the parties, and apply an interpretation which most closely satisfies that intent. It is not reasonable to conclude that the parties intended to permit the termination to be obviated by a mere request for investigation, with no intent to appear. Such an interpretation would likely result in automatic requests, and the practical elimination of the Rule.

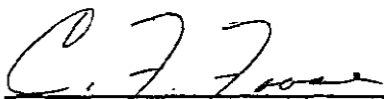
The Board finds more merit in Carrier's explanation of the intent and purpose of the investigation provided in this rule. It contends that the purpose is to permit the employee to present evidence which contests the accusation that he was absent without authority, or mitigating circumstances, which would justify setting the termination aside.

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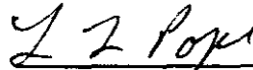
With that view of the Rule, the Board agrees with the Carrier, that it was not required to conduct a pro forma investigation when Claimant failed to attend, because nothing would be produced which would further the purposes of the procedure or the parties. In other words, although the investigation must be conducted as provided in Rule 13 if it is held, it is not required to hold such an investigation in abstentia.

AWARD

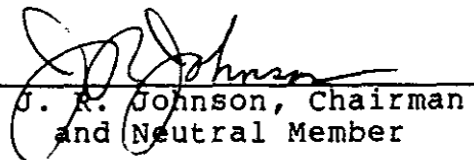
Claim denied.



C. F. Foose, Employee Member



L. L. Pope, Carrier Member



J. R. Johnson, Chairman
and Neutral Member

Dated: January 20, 1987

