

PUBLIC LAW BOARD NO. 4021

Award No. 5
Case No. 9

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 Colorado Division Trackman L. A. Sena from service during the period February 5 through March 15, 1985, and assess his record with 30 demerits, was unjust.
2. Accordingly, the Carrier should be required to compensate him for all wages lost from February 5 through March 15, 1985, and to remove the 30 demerits assessed his record.

FINDINGS

This Board, upon the whole record and all the evidence, 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 by Agreement dated November 26, 1985, and has jurisdiction of the parties and the subject matter.

Claimant had surgery on his left wrist in December, 1984, and was released to return to service on December 25, 1984. This period was covered by an approved Leave of Absence. Claimant returned to duty, and on January 2, 1985, advised his Foreman that his hand was swollen, and that he was going to see his Doctor. On January 11, 1985, Claimant submitted Carrier's Form 1516 Standard to his Roadmaster, with a copy to his Foreman, requesting Leave of Absence from December 30, 1984, through January 30, 1985.

Carrier neither approved nor denied Claimant's request for Leave; but, rather, notified Claimant by letter dated January 21, 1985, that his seniority and employment were terminated, due to his being absent without proper authority since January 2, 1985; but that he could request an investigation within twenty (20) days, pursuant to Rule 13, Appendix No. 11 of the Agreement between the parties. Claimant requested an Investigation by letter dated February 5, 1985, and it was scheduled by letter dated February 5, 1985, to be held on March 1, 1985. At the request of the Organization, the Investigation was rescheduled to be held on March 18, 1985. Following the Investigation, Claimant was assessed thirty (30) demerits for his violation of Carrier's General Rules for the Guidance of Employees.

Carrier's Rule 13, the principal Rule involved, provides in pertinent part:

Employees must not be absent from duty without proper authority, and when authorized absence is in excess of ten (10) calendar days, entire absence must be authorized by formal leave of absence (Form 1516 Standard) except for scheduled vacation period.

Claimant testified that he notified his Foreman of his condition, and received permission to be absent on January 2, 1985. Claimant further testified that he attempted to submit the requisite form shortly thereafter, and requested one from Operator Henry Ortiz. The Operator explained that Agent Lucero had the Forms, but she was on Vacation, and her office was locked. Claimant reached Agent Lucero at her home, and was referred by the Agent to the Roadmaster's Clerk. Claimant contacted the Roadmaster's Clerk, who agreed to send Claimant a copy of the Form, which he submitted as soon as he received a copy. Claimant also testified that he made repeated attempts to contact the Roadmaster, both at home and office, but was unable to reach him. None of this testimony was challenged on the record; in fact, the Foreman, Agent, Operator and Roadmaster's Clerk were not called to testify at the

Investigation. Therefore, we must accept Claimant's testimony as fact.

The sole Carrier witness was Roadmaster Wilmer. He confirmed that he did receive Claimant's request for Leave, that it was accompanied by a Doctor's Form, that it was forwarded to Division Offices, and that the Claimant's Foreman was notified as Claimant contended. He testified that the content of the Doctor's Form which accompanied the Request for Leave, was not sufficiently detailed to support approval of the Leave, and that he told the Clerk at Pueblo to so advise Claimant. However, his testimony reveals that he made no attempt to contact the Claimant himself, or to ascertain whether the Clerk did advise the Claimant as he instructed.

Carrier contends that it is Claimant's responsibility to obtain an approved Leave of Absence, and that Claimant's doctor's statement "should have indicated he was unable to perform his duties during the period involved." The Board finds that Claimant did not merely "assume" that his Leave was granted. The record clearly shows that Claimant made repeated and diligent attempts

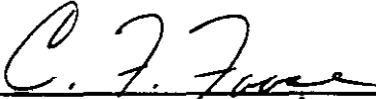
to secure an approved leave, with no communication from the Carrier that his application was not in order, or that his leave was denied. Under these circumstances, Claimant was not "negligent and indifferent to duty." While the Claimant does have the responsibility to obtain authorized Leave, his power to do so is limited. When an employee does everything within his power to discharge such a responsibility, but is frustrated from meeting it by the inaction of the Carrier, the employee may not be held to be derelict in his duty. If the Carrier required additional statements from Claimant's Doctor, it should have asked for such statements. The Board finds on the basis of the record before it that the Claimant did not violate Rule 13, that the discipline assessed was not warranted, and that the thirty (30) demerits will be removed from Claimant's record.

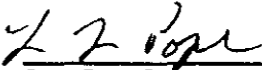
With respect to the monetary portion of the claim, Carrier contended during the handling of the claim on the property, that Claimant was compensated from February 1, through March 1, 1985, and, this assertion was uncontested by the Organization. Carrier also asserted, again without challenge by the Organization, that Claimant was not compensated from March 1 through March 15, 1985,

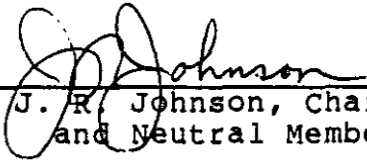
due to the Organization's agreement to postpone the Investigation until March 15, 1985 "without further liability to the Carrier." Therefore, we will deny the monetary portion of the claim.

AWARD

Claim Sustained to the extent described in the findings.


C. F. Foose, Employee Member


L. L. Pope, Carrier Member


J. R. Johnson, Chairman
and Neutral Member

Dated: February 18, 1986