

PUBLIC LAW BOARD NO. 4021

Award No. 9
Case No. 7

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

STATEMENT
OF CLAIM

1. Carrier's decision to remove Southern Division Trackman Timothy Ray from service effective February 28, 1985, was unjust.
2. Accordingly, Carrier should be required to reinstate Claimant Ray to service with seniority rights unimpaired, and compensate him for all wages lost from February 28, 1985.

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.

On January 22, 1986, Claimant was sent a Certified letter advising that, since he had been absent without proper authority in excess of ten days, his seniority and employment were terminated pursuant to the provisions of the Agreement. The letter also advised Claimant that he could request a formal investigation within twenty days, if he so desired. Claimant requested an investigation on February 2, 1985, and it was scheduled by letter dated February 12, 1985, to be held on February 22, 1985.

The investigation was held as scheduled, and the Claimant was found guilty of violating Rules 13 and 15 of Carrier's General Rules for the Guidance of Employees, and was dismissed from the service.

The Organization raises several objections with respect to the conduct of the investigation, and contends that it was not fair and impartial. Specifically, it objects to the fact that the Claimant was not represented at the investigation, and that the Carrier failed to call his Foreman as a witness. The Board has considered these objections, and finds them without merit.

The letter scheduling the investigation included charges of the alleged Rule violations, and advised Claimant that:

You may arrange for representation in line with the provisions of Agreement or schedule governing your working conditions and you may likewise arrange for the attendance of any desired witnesses.

Although the language quoted above specifically advised Claimant of his rights, he arrived at the investigation without a representative. At the beginning of the investigation, the following exchange took place with the Hearing Officer and the Claimant:

Mr. Johnson: Do you have a representative?

Mr. Ray: No.

Mr. Johnson: Do you desire representation?

Mr. Ray: I believe it would be best for me to have one.

Mr. Johnson: Did you request representation?

Mr. Ray: No.

Mr. Johnson: Would you like to waive representation at this point?

Mr. Ray: Yes.

Mr. Johnson: Would you sign this waiver of representation?

Mr. Ray: Yes.

Mr. Johnson: We will make this a part of the record.

The Claimant did execute a written waiver, and it is a part of the record. The Organization seizes upon the single statement by the Claimant that it would be best for him to have a representative, but ignores the advance written notice, the other questions asked and, most importantly, the signed waiver. It is apparent that the Claimant might have requested a representative if the Hearing Officer had urged him to do so, but that is not his responsibility. Carrier met its responsibility when it reminded the Claimant of his rights in the advance notice, and provided an opportunity to arrange for representation at the investigation. Claimant was aware of his rights, and chose to waive them. He must bear the consequences of his decision.

The Organization's second objection concerned the failure of the Carrier to have Claimant's Foreman testify at the investigation. Carrier contends that the charges concerned Claimant's failure to secure a leave of absence, and did not involve the Foreman in any

way. There has been no showing that the Foreman had any direct knowledge of events related to the charges, and the Claimant did not request, or even suggest at the investigation, that the Foreman be called to testify. Therefore, the Carrier was not required to arrange for his testimony. The Board will reject the Organization's objection.

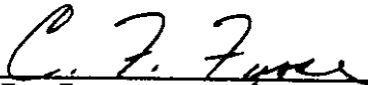
The Organization's final procedural objection is that the Carrier violated the Agreement by failing to provide it with a copy of Claimant's service record along with the transcript of the investigation. The Agreement does require that the Organization be provided with a copy of the service record when the transcript is delivered. However, the Carrier explained that the failure was "purely by oversight", and did ultimately provide said record. The Organization's objection is valid, and failure to provide the service record can have a significant effect upon the Organization's basis of appeal. However, such a defect is not fatal to the Carrier's case when, as here, it promptly provided a copy when the failure was brought to its attention.

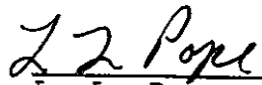
The record is clear with respect to the merits of the case. The Rules require employees to secure official Leave of Absence when they are going to be absent for more than ten days. Claimant was absent more than ten days, and made no attempt to comply with the Rule. His sole defense is that he did not understand the requirement of the rule. Awards of Boards too numerous to mention have held consistently that employees are responsible to know and understand the rules, and that ignorance of the rules is not a valid excuse. In this case, the Rules involved were read into the record by the Hearing Officer, and the Claimant was then asked whether he had any questions regarding the Rules. Claimant responded "no." Claimant is guilty as charged.

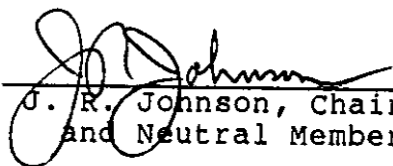
The sole issue before this Board is the propriety of the measure of Discipline assessed. The Agreement provides that employees who are absent without permission for more than five days may be terminated. Further, prior to this offense, Claimant had a balance of fifty demerits on his record, many the result of similar offenses. Under the Brown System of Discipline, the assessment of another ten demerits would result in dismissal. In view of Claimant's past record, the discipline was appropriate.

AWARD

Claim denied.


C. F. Foose, Employee Member


L. L. Pope, Carrier Member


J. R. Johnson, Chairman
and Neutral Member

Dated: March 31, 1986