

PUBLIC LAW BOARD NO. 4244

Award No. 202

Case No. 207

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

Parties to Dispute:

-and-

**THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY**

Statement of Claim:

1. That the Carrier's decision to place a Level 1 - Formal Reprimand on John F. Melton's personal file after the investigation held on August 6, 1996 was unjust.
2. That the Carrier now expunge the Letter of Reprimand from the Claimant's record, because a review of the investigation transcript reveals that substantial evidence was not introduced that indicates Claimant is guilty of violation of rules he was charged with in the Notice of Investigation. We contend the Carrier violated Rule 13 [and] Appendix Number 11 of the Agreement.

INTRODUCTION

This Board was duly constituted by agreement of the parties dated January 21, 1987, as amended, and as further provided in Section 3, Second of the Act, 45 U.S.C. Section 153, Second. This matter came on for consideration before the Board

pursuant to the expedited procedure for submission of disputes between the parties. The Board, upon review of the entire record, finds that the parties involved in this dispute are a Carrier and employee representative ("Organization") within the meaning of the Railway Labor Act ("Act"), as amended.

FINDINGS

On June 21, 1996, the Carrier issued the claimant, John F. Melton, notice of an investigation into possible misrepresentation and conflicting statements with respect to an alleged injury suffered by the claimant on May 23, 1996, in violation of Rules 1.2.7, 1.3.1 and 1.6 of the Safety Rules and General Responsibilities for All Employees, effective January 31, 1996. On August 27, 1996, the claimant was issued a Level I - Formal Reprimand for violation of Rules 1.3.1 and 1.2.7 for failure to provide all the facts and personal actions that led to his claiming an on duty injury. The notice of reprimand further states that "[d]etermining the root cause of your alleged injury has become very difficult, based on conflicting statements in your testimony and testimony of those involved in the initial investigation."

The record reveals the claimant suffered an injury on the morning of May 23, 1996, while working at the Argentine LMIT. The claimant and four other employees were assigned to work the north track of the main line fueling. (Testimony of England). The injury purportedly occurred while the claimant was moving one of the pans, and he suffered a strained muscle or other medical condition that caused lower back pain.

The general equipment supervisor was called and met with the claimant in the lunch room of the shop extension area. At hearing the supervisor testified on direct examination that the claimant stated his back was "hurting," and the supervisor transported claimant to a local hospital for examination. While waiting for x-rays to be taken, and before administration of Demarol, the supervisor inquired of claimant what he was doing at the time of the incident. The claimant responded, ". . . I was working on the north side track from second from second [duplication in text] to third pan from the east end of the short side," and that at the time of the incident "they were just putting the pans back in place." (Testimony of Rodiger). This was the only information the equipment supervisor elicited concerning the incident while transporting and waiting with the claimant in the hospital.

The satellite supervisor described how a track warrant was obtained for approximately an hour and one-half to perform the task of moving the pans into place. He described the task as "basically man handl[ing] them" by dragging the pans and placing them between the rails or between the rail and the concrete ramps on either side. The satellite supervisor had no specific information as to how the claimant actually performed his assignment. The other employees assigned to move the pans testified in general regarding performance of the assignment. Claimant indicated to his coworkers at some point that he hurt his back, but continued to put a smaller pan back into position. (Testimony of Broxterman). A laborer, Navarro, testified that he heard the claimant state, "I think I got

hurt." However, Navarro did not see the injury occur. Another member of the work crew had no first hand knowledge of claimant's injury.

The lead man testified that the work assignment was to reinstall the pans removed a few days earlier. While the lead did not observe the claimant slip, fall or otherwise suffer an injury, he noted the claimant told him he was suffering discomfort in his back after the track was released to the dispatcher at approximately 9:45 a.m.

The claimant testified as to the installation of the pans on the main line, and stated that the injury occurred when he picked up a middle pan to dump out water that had accumulated inside, and he proceeded to drag it to its proper place between the rail. He described the pan as the widest of three pans. Claimant attempted to walk the pain off upon his return to the shop and lunchroom area, but without success.

The hearing officer recalled both supervisors for further inquiry as to the pan claimant was moving at the time of the incident. The satellite supervisor stated his notes reflected that a narrow track pan was involved, although he could not state with certainty how he arrived at that conclusion; that it may have been just an assumption on his part based on the claimant's statement, "the north side." The supervisor asserted he first was informed by claimant during a July 18 meeting concerning the incident that a wide pan was involved. The other supervisor insisted the claimant told him it was a narrow pan while waiting at the local hospital the day of the incident. The claimant stated he simply could not recall stating

the size of the pan due to his pain and subsequent medication until the date of the alleged reenactment on July 18, 1996, when he indicated the pan was wide.

The Board finds insufficient, credible evidence to sustain the charges against the claimant. While the investigation was wide-ranging in nature covering everything from claimant's hobbies to whether he timely filed an accident report, the thrust of the charge before the Board is that claimant withheld information or failed to provide the necessary facts concerning the incident. The only fact or information which the entire investigation even suggests the claimant failed to disclose is the width of the pan he was moving when the injury occurred. The evidence is insufficient to prove that the claimant violated either rule with which he was charged.¹

The equipment supervisor testified on direct examination that during the entire time he was with the claimant the only circumstance the latter indicated about the incident was the injury occurred when he moved the second or third pan from the east end on the short side. There was no probative evidence presented as to whether both such pans are narrow, wide, or represent one of each type. The satellite supervisor testified he made an assumption as to which size pan claimant was moving when the injury occurred. The

1. The portion of Rule 1.3.1 with which the claimant was charged is entitled, "Explanation." (Tr. 4). This provision states: "Employees must ask their supervisor for an explanation of any rule, regulation, or instruction they are unsure of."

claimant testified that he moved small and large pans, but that the injury occurred with a large pan.

Only upon recall did the equipment supervisor insist he was told by the claimant in the hospital that the injury occurred with a narrow track pan. The confusion was compounded by the failure of the hearing officer to maintain separation of witnesses after each had testified despite the timely objections by the Organization that the continued presence in the investigation of witnesses who had testified may influence those same witnesses' subsequent testimony if called for purposes of rebuttal. After careful review of the transcript of the investigation, the Board finds insufficient proof of the charge claimant violated Rules 1.2.7 and 1.3.1.

AWARD

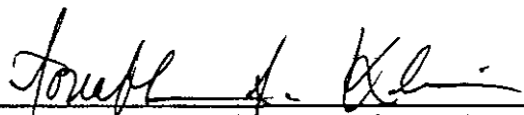
The claim is sustained.



Greg Griffin, Carrier Member



Clarence F. Foose, Employee Member



Jonathan I. Klein, Neutral Member

This Award issued the 13 day of January, 1996/7