

Award No. 55
Case No. 57

PUBLIC LAW BOARD NO. 4244

PARTIES) ATCHISON, TOPEKA AND SANTA FE RAILWAY CO.
TO) AND
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

STATEMENT OF CLAIM: Carrier's decision to remove former New Mexico Division B&B Helper F. S. Apodaca from service, effective January 12, 1989, was unjust.

Accordingly, Carrier should be required to reinstate Claimant Apodaca to service with his seniority rights unimpaired and compensate him for all wages lost from January 12, 1989.

FINDINGS: This Public Law Board No. 4244 (the "Board") finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended. Further, the Board has jurisdiction over the parties and the subject matter involved.

In this dispute former New Mexico Division B&B Helper F.S. Apodaca (the "Claimant") was notified to attend a formal investigation on February 2, 1989 concerning his alleged quarrelsome and hostile behavior towards a fellow employee at 11:00 a.m. while on duty on January 11, 1989 and then on company property at 7:00 a.m. on January 12, 1989. The Carrier further alleged that the Claimant's conduct was in violation of Rules A and 1007 of the Carrier's Safety and General Rules for all employees. The investigation was postponed and held on February 14, 1989. Pursuant to the investigation the Carrier determined that the Claimant violated the cited rules and he was removed from service.

The record shows that the facts of this case concern two incidents between the Claimant and B&B Mechanic W.L. Turner. The first incident occurred on January 11, 1989 and the second on January 12, 1989.

On January 11, 1989, the Claimant was assigned to a B&B gang that was building a retaining wall at a bridge on the El Paso Subdivision. The Claimant was assigned to operate the pile driver when needed and to assist the gang as a B&B Helper. B&B Mechanic W. L. Turner testified that he needed a bolt and instructed the Claimant to get one from the boom truck. The Claimant refused to do so stating that he did not have to take orders from a B&B Mechanic but only from his foreman. Turner testified that he and the Claimant continued to argue over the matter but agreed to solicit Foreman J. Shetter's opinion.

Shortly thereafter Shetter joined the crew, and Turner and Shetter began to discuss the matter without the Claimant present. According to Turner, when the Claimant, who was at the boom truck, returned, Shetter asked him why he didn't respond to the mechanic's orders. At that point the Claimant confronted Turner immediately and challenged him to a fight. After a brief exchange of words Shetter told both individuals to drop the matter which they did.

On January 12, 1989, at approximately 7:00 a.m., the Claimant entered the bunk car where the crew had gathered to report for work. He began to offer a general apology for his actions the previous day when the matter developed into another confrontation between the Claimant and Turner. The Claimant declared that Turner better watch out when the Claimant got on the pile driver. In response, Turner attempted to explain his position that a mechanic is in charge of the work crew when the foreman is absent but the Claimant challenged Turner "to step off the property" to resolve their differences. Turner replied that he would not fight the Claimant. Their argument continued for several minutes until Foreman Shetter intervened. Shetter then instructed the Claimant to report to Deming, New Mexico for work that day.

The Board has reviewed the evidence and testimony of record. It is the Board's opinion that the Claimant was quarrelsome and hostile towards a fellow employee while on duty on January 11 and 12, 1989. However, it the Board's opinion that mitigating circumstances exist and the Claimant should be given one last opportunity to return to the Carrier's service.

Although the Claimant is accountable for his behavior and his conduct in this case was in violation of the cited rules, it is clear from the record that Turner contributed to the cause of the first incident. B&B Mechanic J. Cebeda testified that the crew had been joking around all morning on January 11, and just prior

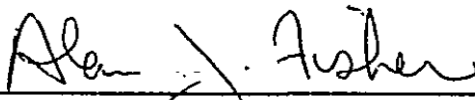
to the initial confrontation, Turner told Cebeda to watch the Claimant's response when Turner approached Shetter. Second, it is clear from Turner's testimony that he knew that the Claimant would probably respond in the manner that he did.

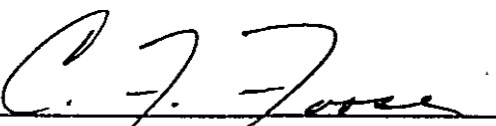
Further, Shetter should have exercised his authority at an earlier juncture during the incidents. It is the Board's opinion that both confrontations could have been circumvented or minimized by Shetter's intervention. Moreover, Shetter as a supervisor, should have anticipated the Claimant's response under these circumstances.


Last, the Board notes that Turner did not perceive the Claimant's verbal assault to be threatening. Although the Claimant's behavior was inexcusable, Turner testified at the investigation that the Claimant had a reputation for acting in this manner.

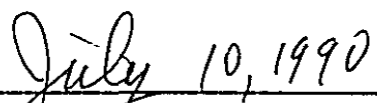
In view of the above the Claimant will be reinstated to service but without pay for time lost. The Claimant is advised that the reinstatement is a last chance opportunity for the Claimant to demonstrate to the Carrier that he can be a responsible employee and abide by the Carrier's rules.

Award: Claim sustained as set forth in the Findings.


Alan J. Fisher
Chairman and Neutral Member


C. F. Foose
Organization Member


Lyle L. Pope
Carrier Member

Dated: 
Chicago, Illinois