

PUBLIC LAW BOARD NO. 4823

PARTIES) THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
TO) versus
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

STATEMENT OF CLAIM:

"1. That the Carrier's decision to remove New Mexico Division B&B Painter C. T. Gonzales from service was unjust.

2. That the Carrier now reinstate Claimant Gonzales with seniority, vacation, all benefit rights unimpaired and pay for all wage loss as a result of investigation held April 12, 1990, continuing forward and/or otherwise made whole, because the Carrier did not introduce substantial, creditable (sic.) evidence that proved that the Claimant violated the rules enumerated in their decision, an (sic.) even if Claimant violated the rules enumerated in the decision, permanent removal from service is extreme and harsh discipline under the circumstances."

FINDINGS:

This Public Law Board No. 4823 finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction.

On March 6, 1990, Carrier's Division Manager wrote the claimant as follows:

"As you are aware, your leave of absence expired on February 26, 1990. You were advised that if you desired an extension to this leave, you were to submit an additional Form 1516 Std. to reach this office at least one week in advance of the expiration of present leave. To date, you have not done so. Please be advised in connection with application of Appendix 11 of Maintenance of Way Employees Agreement, your seniority and employment with the ATSF Railway Company are hereby terminated account being absent without authority from February 27, 1990, to the present. Also, please be advised that you have the 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. Yours very truly, /s/ R. P. Benson, Division Manager."

Claimant requested a formal investigation and on March 26, 1990, Carrier's Division Manager wrote the claimant notifying him of formal investigation to be held concerning the claimant's alleged absence without proper authority commencing February 26, 1990, in possible violation of Rules A, B and 1004 of Carrier's Safety and General Rules for All Employees.

Following the investigation, Carrier found Claimant responsible for failure to renew his leave of absence, in violation of the rules cited. His removal from service pursuant to Letter of Understanding dated July 13, 1976 (contained in Appendix 11 of the Maintenance of Way Agreement) was upheld as a result thereof.

In his letter requesting a formal investigation, Claimant stated, in pertinent part -

"Please have claim agent to furnish Medical Records regarding to my injury on February 29, 1988 to present."

The Board notes that there were no medical records introduced as evidence in the formal investigation.

Carrier's witness in the investigation testified that Claimant was on a medical leave of absence prior to February 26, 1990, and Claimant was aware that his leave of absence expired on February 26, 1990, because on the bottom portion of the application for leave of absence (Form 1516), signed by Claimant, it states he is responsible for renewing his leave of absence. (There was no copy of the leave of absence introduced as evidence in the formal investigation.)

Carrier's witness also testified to the effect that the last time Carrier had heard from Claimant was on October 13 or 14, 1988, and that for the first year of a leave of absence due to injury, doctor's statements are sufficient authority for the absence; after the first year, if an employee is unable to return to work, it is necessary that he apply apply for a leave of absence, which is normally for a year at a time, but which length of duration should be based on the recommendation of his doctor. Normally, according to Carrier's witness, the leave of absence in question would have run from August 30, 1989, to August 29 of 1990. (Again, however, there was no leave of absence

form signed by Claimant - or even a blank leave of absence form - introduced as evidence.)

Claimant testified that he had been off work since the date he allegedly incurred an on-duty injury, February 29, 1988. He testified that he had been granted just one leave of absence during the interim - the leave of absence in question - and he did not return to work or request another leave of absence at its expiration because he thought it was good for a year. Claimant also stated that he would not have been able to return to work at the expiration of said leave of absence; in fact, Claimant indicated he was still unable to return to work on the date of the investigation, April 12, 1990. Additionally, Claimant testified to the effect that the Carrier was aware that he was unable to return to work because his doctor had told him he had sent the Carrier letters stating that he could not return to his previous job. (Again, none of the alleged letters alluded to by Claimant were introduced as evidence in the formal investigation.)

The parties have provided the Board with a copy of a so-called "Transcript of Record," which contains a record of Claimant's service, discipline, personal injuries and leaves of absence. Under "leaves of absence," the leave of absence in question (or the last leave of absence) is shown as covering the period from 10-13-88 to 03-06-90. Accordingly, the only evidence of record appears to contradict the testimony of Carrier's witness to the effect that Claimant's last leave of absence covered the period August 30, 1989, through February 26, 1990. As indicated previously, the record is lacking a copy of the leave of absence in question, therefore, the Board is not able to determine any reason for the discrepancy.

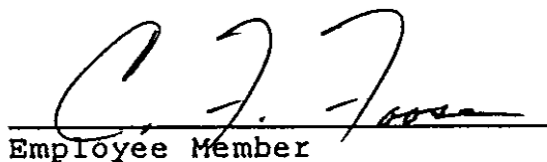
A formal investigation ostensibly is held to develop all the facts and place responsibility, if any. The formal investigation in the instant case, however, fails to meet that basic prerequisite. It provides the Board with nothing but unsubstantiated allegations upon which to evaluate the propriety of Carrier's conclusions as to Claimant's responsibility.

The burden of proof is on the Carrier in discipline cases. Based on the record before it, the Board finds that the Carrier has failed to establish Claimant's responsibility for violation of the rules cited.

AWARD: Claim sustained.

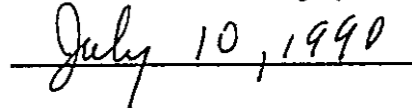
ORDER: Carrier is directed to comply with the Award
within thirty (30) days from the date shown
thereon.


G. Michael Garmon, Chairman


Employee Member


Carrier Member

Dated at Chicago, IL:


July 10, 1990