

AWARD NO. 18

Case No. 18

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 Trackman H. Payton from service was unjust.

2. That the Carrier now reinstate Claimant Payton 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, and 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 February 13, 1990, Carrier's Division Manager wrote the claimant as follows:

"Your leave of absence expired on December 27, 1989. You have made no effort to renew this leave of absence.

Be advised in connection with application of Appendix 11 of Maintenance of Way Employees Agreement, your seniority and employment with the ATSF Railway is hereby terminated account of being absent without authority beginning December 28, 1989, to the present.

You have the right to request a formal investigation under the provisions of Rule 13 of the Maintenance of Way Employees Agreement, provided you do so within twenty days of this notice."

Claimant requested a formal investigation and on March 9, 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 from December 28, 1989, to February 13, 1990, in possible violation of Rule 1004 of Carrier's Safety and General Rules for All Employees. This investigation was scheduled for March 16, 1990, but was subsequently cancelled.

On March 16, 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 December 28, 1989, in possible violation of Rules 1, 2, 13 and 15 of the General Rules for the Guidance of Employees, effective January 1, 1978. This investigation was scheduled for March 27, 1990, but was postponed until April 12, 1990.

Following the investigation, Carrier found Claimant responsible for violation of Rules 13 and 15, and he was removed from service as a result thereof.

During the formal investigation, Carrier's witness testified that prior to February 13, 1990, Claimant was on leave of absence. According to said witness, that leave of absence was issued December 20, 1988, and expired December 27, 1989. The reason for the leave of absence was illness and personal injury. Carrier's witness also testified that Claimant did not return to work following expiration of the leave of absence and it was his responsibility to do so. (There was no copy of the leave of absence in question included in the evidence of record.)

Carrier's witness testified to the effect Claimant had been on leave of absence since December 18, 1985, and that he did not receive a letter from Claimant requesting an extension to his leave of absence.

Claimant testified adamantly to the effect that he wrote the Division Manager prior to expiration of the leave of absence. (He did not introduce a copy of any letter to that effect, to corroborate his testimony.) He also testified, beginning at the bottom of Page 7 of the transcript of the investigation, in pertinent part, as follows:

*** in '87 I got a letter stating that I would have to request the necessary paperwork to be able to obtain a leave of absence myself after that one expired. I've done this both years, I've requested this leave of absence in writing to

R. P. Benson's office in Albuquerque. Last year I wrote them, they sent me papers, I sent them back in. They did not send me a leave of absence. This year I wrote to get a leave of absence, I haven't heard anything from them. ***"

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"Q. Are you saying, then, you requested an extension to your leave of absence prior to the expiration of the one that expired...

A. I have requested both years, yes, sir, I have.

Q. And you never got anything from a reply from that request?

A. I never got...last year I did, but they never sent me a leave of absence. I didn't even know if I was on leave of absence or what. But I have retained all of my letters and things to make sure. This year I sent one and I don't even know if my leave was approved or not. I sent another this time, I didn't hear from them, but my mistake was not sending it registered like I know that I should have because I knew something like this would come up. I've had this problem with the railroad.

Q. Then you realized prior to the 27th of December that you needed something to cover you?

A. That's right."

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"Q. When nothing happened, did you attempt to call anybody or talk to Mr. Stone or any of his clerks?

A. Well, in '87, '88 I sent in for my leave of absence, they sent me the papers, but they never approved or disapproved, at least I don't know of any if they did or not. And then this year I sent it again and I didn't get anything. The thing that I'm questioning is he's showing you this, everything I've gotten from the railroad has been registered, why wasn't my leave approved and sent to me registered you know? I knew that this was going to come up.

Q. Did you ever receive a copy of your...

A. I haven't received a copy of anything.

Q. But how did you know that your leave of absence had been approved prior to...that you were covered prior to the 27th of December?

A. I did not know that, but I knew that it was time for me to write because I have the letter there also to write and try to get another one even if that one was approved or disapproved. I knew that it was time to do that.

Q. What address did you mail that letter to?

A. It was on Jefferson Street in Albuquerque. That's where I mailed the last two that I've sent. I've only requested two of them, and that was when they told me I was going to have to request it myself and I mailed both of them to Jefferson and I see he's got a copy where this was approved, it was never sent to me, I didn't even know if I was approved for leave of absence, and then this last one that I sent I never got anything back from it."

The Board notes again that none of the documents alluded to in the above testimony were introduced as evidence, to corroborate the testimony. Likewise, no evidence and/or testimony was introduced to establish whether the "Jefferson Street" address alluded to was (is) the proper address for requesting leaves of absence.

Pages 10, 11 and 12 of the transcript of the investigation contain the following testimony:

"Q. Looking at these leave of absence Forms 1516 from '85 and '86, they refer to just an extension of your leave, which was due to the problem as outlined by Dr. Maron that we've talked about. You evidently continued, correct me if I'm wrong, but did you continue to request leaves of absence for one year periods of time from that time on to the present?

A. From '84 on?

Q. Right.

A. No, I did not. '85 I requested to return to work. They sent me this automatically, this leave of absence, I did not request it. '86 I'm still hassling with them, why can't I go back to work, they automatically sent me a leave of absence. '87 the same thing. Then all of a sudden I'm taken off the seniority roster because I did not request it. I don't understand this. It was so convenient for them to send them to me before I

I asked to return to work, then when I asked to return to work, then it's my responsibility.

Q. Your're telling me, though, that according to yourself, you're ready to perform normal duties, you're back in good health?

A. Well, as far as I'm concerned I am. I was then.

Q. Then why did you continue to sign leave of absence forms to cover your leave of absence for the last five years if you didn't need a leave of absence, when according to the leave of absence form...

A. Because this is a game that they play, see. Had I not filed, asked for a leave of absence, then I would have been terminated again, so I was informed that I had better continue to send them in or else I would be terminated, so I kept sending in asking, but I'm asking the question is why do I need a leave of absence if I've been released for work, can you explain that to me, please?

Q. *** Mr. Payton, how long have you been off work now for this injury?

A. Nine years.

Q. And you have been renewing a leave of absence every year?

A. Yes, sir, I have.

Q. Were you removed from service once before for failure to renew your leave of absence?

A. Yes, I was.

Q. And was an investigation similar to this one held?

A. No, it wasn't.

Q. What happened then?

A. They say that I hadn't renewed my leave of absence, which I had sent it in, I know it's on file, they should have that also, and then I wrote to my Congressman and let them know what happened and all of a sudden I get a letter back stating that I'm put back on the seniority roster.

Q. And from that time on when you were placed

back on the seniority roster, was that in a leave of absence status similar to the previous ones?

A. Yes, they sent me a leave of absence then.

Q. Do you remember what year that was approximately?

A. '87.

Q. And you got a leave of absence for '88 and '89 that expired this last December?

A. I don't know if I got a leave of absence or not. I requested a leave of absence.

Q. Mr. Stone said that you had a leave of absence that was good through December 17, 1989.

A. Well, I wasn't made aware of this, but I did request another and I haven't been made aware of the status of this one up until they tell me I'm removed from the seniority roster again.

Q. OK, and you're saying that you made no attempt to renew this leave of absence, is that correct?

A. Yes, I asked to renew this leave of absence, this one and the other one. I didn't even know this one was in existence, I knew that I had requested it, but I did not know if it was approved or disapproved. So when this one expired in December, every December I have to renew it, on the 27th of December as a matter of fact. I wrote and asked for another and I still haven't heard from them up until I was removed from service again. This is the second one and I did not know that this one exists and I asked for another one and I questioned why did they not send me an official something stating that I was authorized a leave of absence, I didn't know my status at the time.

Q. Would you have applied for another leave of absence had one been mailed to you?

A. I would have applied if one had been mailed to me, but since one wasn't mailed to me, they told me I had to write and request them and this is what I did both years. They should have that in the file also, both years.

Q. Do you feel that if you were given another physical, you would be approved to return to work?

A. I know that I would be."

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Again, the correspondence alluded to in the above-quoted testimony was not introduced as evidence in the formal investigation.

On Page 13 of the transcript of the investigation, Carrier's witness testified as follows:

"Q. Mr. Stone, is it possible that in the shuffle the paperwork may have gotten lost?

A. This being expired December 27, 1989, and the availability of his PR file, it should not have been lost.

Q. Should not or could not?

A. Anything's possible, but no, there's no excuse for it to be lost during this period of time."

Beginning on Page 15 of the transcript of the investigation, Claimant testified as follows:

"Q. Does anybody here have anything further they would like to add?

A. Yes, I would like to ask a question. This leave was granted, I wasn't made aware of it. Did you ever get a letter on this one asking permission for this form here? I didn't see that when they had my file here, when he was going through that, either. And that's the only way I got this one, I wrote a letter and asked for this one just like I asked for the other one. I haven't seen either one of them on file.

Q. This Form 1516 Std. of which that's a copy, I believe, covers the leave you are referring to.

Mr. Stone: You should have been mailed the bottom of that.

Q. The bottom half is missing, and that's the half that would have been mailed to you, so evidently it was mailed to you..

A. What about this half here?

Q. The top half is what's retained on the file. The bottom half is what should have been mailed.

A. Why didn't I get a copy of this one?

Q. That's what I'm saying. It's missing from the form, the original bottom half is missing from the file copy, which indicates it was mailed to you, you would have gotten this original.

A. Where is it in my file there that I wrote and asked for this? I had to write and ask for this one just like I did the other one. Is a copy of my handwriting in there, because it was hand-written by me both times I requested it. They were not typed, they were hand-written.

Q. Did you send it by certified mail?

A. This, no, I didn't, I think the other one I did, I mightn't have, maybe I didn't either.

Q. I have this envelope here indicating you request a letter or sent us a letter December 19, 1988.

A. That was for the first one, but it was hand-written and there's no letter in there to that effect.

Q. This envelope is hand-written.

A. Yes, and the letter was hand-written also. Both letters, this last one and this also.

Q. You're telling this committee, then, that you requested this leave of absence by hand-written letter.

A. Yes, I did, both times.

Q. In '88 that expired in '89?

A. Yes, the last time and this time in hand-writing."

Again, none of the letters, envelopes, etc., alluded to in the above-quoted testimony were reproduced for the record.

Due to the failure of the parties to make a part of the record copies of the leaves of absence, letters and other documents referred to in the testimony, the Board has nothing but unsubstantiated allegations to consider in determining the propriety of Carrier's conclusions as to Claimant's responsibility.

The claimant contends that he requested an extension to the leave of absence in question, but no copy of any written request was produced for the record, to substantiate his contention. Claimant also indicates, at various points in the transcript that he does not trust the Carrier. For instance, he states that he "knew something like this would come up. I have this problem with the railroad" and "this is a game they play, see ***." If he "knew" there would be trouble over the request for an extension to his leave of

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absence, as he alleged, then it appears to the Board that he should not only have sent the request for the extension to his leave of absence via Registered Mail, return receipt requested, but also he should have checked with the Division Manager's office to see why he had not received the necessary papers before his leave of absence expired. Under the circumstances, his failure to do so undermines the credibility of his testimony to some extent.

On the other hand, the Board's concern regarding the lack of any evidence being introduced to substantiate the testimony is only heightened by the fact that important documents are apparently missing from the Carrier's personal record file on Claimant; i.e., documents which might help to corroborate or refute (at least circumstantially) the claimant's contentions as to his alleged request for an extension to his leave of absence. If the Carrier had produced a copy of Claimant's letter requesting the previous extension to his leave of absence (testimony indicated Carrier's file contained only the envelope in which letter was sent), and Carrier had been able to establish that it's records pertaining to Claimant were current and complete, such evidence might have caused the Board to question further the credibility of Claimant's testimony (to the effect he had written the Carrier requesting a subsequent extension).

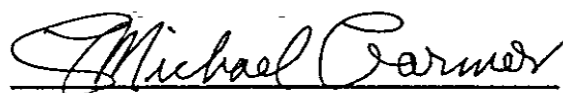
This Board is reluctant to make it's findings based on the credibility of testimony (Determining the credibility of witnesses is generally considered to be the domain of the Carrier). However, since the burden of proof is on the Carrier in discipline cases, it is primarily the Carrier's responsibility to develop the facts in such cases. If there are documents available to help establish the facts in a discipline case, Carrier's failure to introduce such documents into the evidence of record undermines the testimony of Carrier witnesses as to the alleged facts, particularly when such testimony is refuted. Carrier not only has the obligation to document the facts (It bears the burden of proof) in such cases, but also the means and resources. In the instant case, the Carrier has failed to meet it's burden of proof and the claim must be sustained, except as set forth below.

The Board cannot give any weight to Claimant's testimony to the effect he is (and has been) physically able to return to work. The issue or question before the Board is whether or not Claimant was properly found responsible for failure to protect himself with a leave of absence. On this issue, the Board finds in favor of the claimant; he shall be reinstated and placed on leave of absence. The

Board's findings do not address the claimant's physical qualifications for return to active duty.

AWARD: Claim sustained in part in accordance with the findings above.

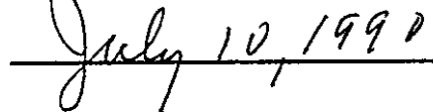
ORDER: Carrier is directed to comply with the Award within thirty (30) days from the date shown thereon.


G. Michael Garmon, Chairman


Employee Member


Carrier Member

Dated at Chicago, IL:


July 10, 1990