AWARD NO. 2

Case No. 2

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:

Claim on behalf of Trackman O. Perez, Texas Division, seniority date March 1, 1966, for reinstatement to his former position with seniority, vacation and all benefit rights unimpaired and compensation for all wages lost and/or that he be made whole beginning February 9, 1988 continuing forward until the claimant is restored to his former position.

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 9, 1988, the Carrier's Texas Division Superintendent wrote the claimant a letter, pursuant to Letter of Understanding dated July 13, 1976, advising him that his seniority and employment were terminated account he had been absent without proper authority in excess of five days. The letter also advised the claimant that he could request a formal investigation within 20 days, if he so desired, but he did not do so. The claimant had 30 demerits on his record at that time; he had been issued a total of 100 - all for being absent without proper authority or failure to report for duty.

The Employees contend that Carrier's removal of the claimant was "extreme, unwarranted and unjustified", and "not supported by the flagrant abuse of any of the Carrier's rules." The Employees state further "Even if the Carrier could provide evidence to support their chaarges, the termination of seniority and employment is excessive discipline in proportion to the alleged allegation." They also contend that the Carrier failed to comply with Rule 13 and Appendix No. 11, but no basis is provided for that statement.

The Carrier contends that the claim was not timely submitted and, therefore, it should be barred. The Board finds that it is not necessary to decide this case on the issue of alleged procedural irregularities.

The overriding factor weighing against the claimant is his failure to request a formal investigation when notified that his seniority and employment had been terminated due to his being absent without proper authority. Had the claimant requested such an investigation, the wheels of justice would have been loosened to grind out a possible defense. For instance, the termination notice is clearly deficient from the standpoint of specificity; it did not identify the days or period of time the claimant is alleged to have been absent without proper authority. In order for an employee to be able to prepare a defense to a charge of absence without authority, normally, a carrier would be required to identify at least the first day of an alleged unauthorized continuing absence; eg., "beginning July 15, 1988." If the alleged absence without authority has been broken, a carrier would be required to identify both the first and last day of the alleged unauthorized absence(s). To simply state, as in this case, that the employee has been absent without proper authority in excess of five days is far too vague to afford the employee due process; i.e., an opportunity to prepare a plausible defense.

A formal investigation not only would have afforded the claimant an opportunity to defend against the charge on the basis that the notice was deficient but also any mitigating factors involved in his absence could have been recorded in the transcript. However, the claimant in this instance has deprived the Board of the opportunity to consider any possible defense (including but not limited to the improper notice) or mitigating factors, if any, which may have contributed to his absence. He has left us with the barest of records upon which to determine the propriety of his dismissal.

From the record which does exist, the Board notes that from time to time over the years the claimant had been issued demerits for being absent without authority; he had been issued a total of 100 such demerits, with a balance of 30 standing on his record at the time of his dismissal. He obviously was aware of the requirement that his absences be authorized, as evidenced by the fact that he had obtained four (4) leaves of absence in recent years. From all indications, therefore, it may be reasonably concluded that the claimant was no longer interested in working for the Carrier. (The clearest evidence that such was the case is the claimant's failure to request a formal investigation.) The only evidence of the claimant's intentions which could be considered more clear would have been a resignation.

Certainly, however, his failure to request a formal investigation had the same effect as a resignation.

It has been well established that a Carrier has the right to expect it's employees to report for duty as assigned and absence from duty without authority is a serious offense. The Employees in this instance have recognized those well established principles by negotiating the self-executing agreement (the Letter of Understanding dated July 13, 1976) under which the claimant was terminated. The premises on which the Employees claim is based, therefore, appear to arise more from their mandate to represent than from a factual analysis of the case.

In any event, the Board does not agree with the contentions of the Employees in this case. Based on the record before it, the Board finds no basis for overturning the Carrier's decision in this case.

AWARD: Claim denied.

G. Michael Garmon, Chairman

Employee Member

Carrier Member

Dated at Chicago, IL:
February 5, 1990