

AWARD NO. 21

Case No. 21

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 assess Claimant Smith thirty (30) demerits and remove Claimant Sanchez from service was unjust.

2. That the Carrier now expunge thirty (30) demerits from Claimant Smith'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; and that the Carrier now reinstate Claimant Sanchez with seniority, vacation, all benefit rights unimpaired and pay for all wage loss as a result of investigation held May 21, 1990, 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 May 24, 1990, Carrier's Division Manager wrote the claimants, in pertinent part, as follows:

"You are hereby notified to attend formal investigation in the Division Office, Winslow, Arizona, at 1:30 PM, M.D.S.T., Monday, June 11, 1990, concerning your alleged violation of Rules A, B, I, 1007, 1028(b) and 1615, Safety and General Rules for all employees, Form 2629 Standard, October 29, 1989, when you allegedly tried to

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start section truck, while Mr. Sanchez poured gasoline directly into the carburetor, and Mr. Smith turned the ignition switch, resulting in a fire and personal injury, on May 18, 1990, while employed as trackmen on the Dalies Section, on Highway 85 opposite MP 922.4, Glorietta Subdivision, New Mexico Division, so as to determine the facts and place responsibility, if any, involving possible violation of the aforementioned rules."

The investigation was held as scheduled. Claimant Sanchez attended the investigation, however, Claimant Smith did not attend.

Following the investigation, Carrier issued the following decision:

"IT IS THE DECISION THAT MR. J. F. SANCHEZ BE CONTINUED OUT OF SERVICE, AND MR. J. R. SMITH'S PERSONAL RECORD BE ASSESSED THIRTY (30) DEMERITS FOR THEIR RESPONSIBILITY IN VIOLATION OF THE AFOREMENTIONED RULES."

Claimant Sanchez's representative at the investigation issued the following dissenting decision:

"I DISSENT (TO) THE DECISION OF THE CARRIER, BASED ON THE FACT THAT MR. SANCHEZ AND MR. SMITH WERE ATTEMPTING TO REMOVE THE TRUCK FROM THE HIGHWAY BY THE ONLY MEANS THAT WAS READILY AVAILABLE TO THEM AT THE TIME OF THE INCIDENT.

TESTIMONY REVEALED THE TRUCK HAD STALLED ON THE HIGHWAY, AND WOULD NOT START. LEAVING THE TRUCK ON THE HIGHWAY WOULD HAVE CREATED A DANGEROUS SITUATION INVOLVING BOTH COMPANY PROPERTY AND THE GENERAL PUBLIC UTILIZING THE HIGHWAY.

DISMISSAL OF MR. SANCHEZ, AND THE ASSESSMENT OF 30 DEMERITS TO MR. SMITH, IS MOST CERTAINLY EXCESSIVE DISCIPLINE AS AN ATTEMPT WAS BEING MADE TO PROTECT NOT ONLY THE PUBLIC, BUT ALSO COMPANY PROPERTY."

The testimony developed at the formal investigation indicated Claimant Sanchez, accompanied by Claimant Smith, was driving a company section truck between Belen and Albuquerque, New Mexico, on Highway 85, when the vehicle stalled. The stalled truck, in Claimant Sanchez's opinion, was dangerously close to the highway. He allegedly attempted to contact his foreman by radio, to no avail. He then drained some gasoline from the gas tank into a plastic

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bottle, poured a few drops into the carburetor, put his hand over the carburetor (to choke it) and Claimant Smith attempted to start the vehicle. According to Claimant Sanchez, "Smith turned the key and some fire just blew out of the carburetor and *** burned my right hand." Claimant Sanchez suffered second degree burns on his hand and arm. He was off work for about a week. There apparently was some fire under the carburetor and from gasoline which was spilled near the truck, but there is no indication from the record that the truck was damaged.

The dissenting decision of Claimant Sanchez's representative asserts that a dangerous situation existed (a stalled truck on the highway), in view of which claimants' attempt to start the truck by pouring gasoline in the carburetor should be considered as an effort to protect the public and company property, as well as a mitigating factor justifying violation of the Carrier's rules. The Board might be inclined to agree, except for the fact that too much of Claimant Sanchez's story is vague and uncorroborated. For instance, Claimant Sanchez contended that the truck was dangerously close to the highway, but the proximity of the truck to the traffic lanes, whether the stalled truck was on a hill or curve, whether the highway was four-lane or two-lane, etc., was not established. Claimant Sanchez contended he was unable to contact his foreman by radio, yet on Pages 6 and 7 of the transcript he testified as follows:

"Q. What...after the explosion and you burned your arm, were you taken for medical attention?

A. Yes.

Q. Where was that at?

A. At Los Lunas, Presbyterian Plaza at Los Lunas.

Q. Is that a doctor's office or clinic or hospital?

A. It's a, like a clinic.

Q. How did you get there?

A. J. R. Chavez took me there.

Q. The foreman took you there?

A. Yes.

Q. How long after the incident happened did Mr. Chavez get there?

A. About 20 minutes, or 15-20 minutes, around there.

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Q. So, how did Mr. Chavez become aware of that, that the incident had happened, do you know?

A. No.

Q. Was he called on the radio, did you call him on the radio again, or try to?

A. No, I just got him one time on the radio.

Q. You said you called him one time?

A. One time before, yeah, before I put gas in the ..."

Also, Claimant Sanchez's representative contends in his dissent that claimants were attempting to remove the truck from the highway by the "only means that was readily available to them at the time of the incident." Assuming, for arguments sake, that the stalled truck did create a dangerous situation as alleged, the Board is still reluctant to accept that attempting to start the truck by pouring gasoline in the carburetor was the "only means" to move the truck off the highway. (It might have been possible to move the truck off the highway with the starter motor; if the truck stalled on a hill, it might have been possible to put the transmission in neutral and let it roll off the highway; if the truck stalled on the pavement, it might have been possible for the claimants to have pushed it off the highway, etc., etc.)

In discipline cases, the burden of proof is on the Carrier to establish responsibility of the claimant(s) for violation of the rule(s) cited. In the instant case, Carrier has met it's burden of proof. When the Employees contend, as in the instant case, that mitigating factors were involved which warrant setting the discipline aside, the Employees must assume the burden of proof to establish the existence of said mitigating factors. The Employees have failed to meet their burden of proof in that regard.

Based on the degree of responsibility established for each claimant and their respective discipline records (Claimant Smith had been assessed demerits on two previous occasions and Claimant Sanchez had been assessed demerits on eight previous occasions, totaling 160), the Board finds that the discipline assessed was entirely appropriate.

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Notwithstanding that stated above, under the circumstances involved in this particular case, the Board finds that the discipline assessed Claimant Sanchez has now served it's purpose. He shall be reinstated without pay for time lost.

AWARD: Claim sustained in part in accordance with the last paragraph of 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:

August 7, 1990