AWARD NO. 32

Case No. 32

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:

"Carrier's decision to remove former old Plains District Trackman M. C. Harvey from service, effective November 16, 1990, was unjust.

Accordingly, Carrier should now be required to reinstate the claimant to service with his seniority rights unimpaired and compensate him for all wages lost from November 16, 1990. (11-680-120-888/130-13I3-9012)"

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 September 11, 1990, Carrier's Regional Manager wrote the claimant as follows:

> "You are hereby notified to attend formal investigation at the Superintendent's Office,1115 South Taylor Street, Amarillo, Texas at 10:00 AM on September 27, 1990 concerning report that you allegedly were absent without proper authority on August 20, 1990 and, alteration of a doctor's release in connection with a previous injury; so as to determine the facts and place responsibility of Rules 1004 and 1007, Safety and General Rules for All Employes, effective October 29, 1989.
>
> You may arrange for representation in line with the provisions of Agreement or Schedule governing your working conditions and you may likewise arrange for the attendance of any desired witnesses."

The investigation was postponed, eventually commenced on October 12, 1990, was recessed and finally concluded on October 19, 1990. Following the investigation, the Carrier

found the claimant responsible for violation of the rules cited in the notice of investigation and removed him from service for his responsibility in connection therewith.

In claim letter dated December 28, 1990, the Employees contend, in pertinent part, as follows:

"A review of the record reflects that the Chairman failed to hold a fair and impartial Investigation, by asking leading questions of the Carrier's Witness, failing to keep the Investigation within the Scope of the Notice by allowing subject matter of other incidents, allowing unsubstantiated testimony from a Company Claim Agent regarding other topics which were not relevant to the date in question, and testimony regarding a previous injury which in reading the Transcript would certainly make one wonder if the Claimant wasn't on trial for being injured on the job rather than being allegedly absent and altering a Doctor's Statement.

A review of the Claimant's record shows he was disciplined one time in ten (10) years for alleged damage to a rail drill, so it's hard to understand why he was dismissed for missing one days work and the alleged alteration of a Doctor's Slip, which there is no positive evidence in the record. The record further reflects that apparently Doctor Roger's Files are open to Claim Agent Muller and the Doctor's Secretary, Louella Wright, was voluntarily helping said Claim Agent keep track of the Claimant's activities and physical condition in connection with a previous injury.

The record further reflects the Conducting Officer, J. A. Yarbrough was involved and had first hand knowledge of the initial investigation and activity on the property (Page 3 & 4 of the Transcript). The record is full of non pertinent questions by Chairman Yarbrough, which did not pertain to the matter under investigation, as well as many leading questions which exceeded the bounds of propriety and the Scope of the Notice. As a result, the principles of fair play and due process were denied.

We cannot agree that the Carrier acted properly in removing the Claimant from their service and contend the discipline imposed is extreme, unwarranted and is in abuse of discretion and good judgement. Even if they had produced substantial and positive evidence to support the allegations made in the Notice of Investigation, (which they did not.) The discipline

issued is excessive in proportion to the rules which were alleged to have been violated.

We contend the Carrier has violated the current Agreement between the parties particularly but not limited to Rule 13 and Appendix No. 11, by removing the Claimant."

On January 24, 1991, Carrier declined the claim, in pertinent part, as follows:

"Perusal of the transcript of the investigation held on October 19, 1990, fully and conclusively supports and sustains the charges against the claimant that he violated Rules 1004 and 1007 of the Safety and General Rules for all employees for being absent without authority on August 20, 1990, and for altering the doctor's release form dated August 16 wherein the doctor stated that the claimant could return to work on August 17. Claimant altered the document to the extent of changing the return to work date to read August 21 rather than August 17. Claimant transposed the 1 into a "2" and the 7 into a "1" by merely inserting the numeric 2 over and on top of the 1 and the 1 over and on top of the 7.

The sum and substances of the testimony given by the following witnesses:

Gang Foreman R. Phillips (Pages 3-5)
Asst. Roadmaster K. Sumners (Pages 12-14, 23)
Roadmaster A. S. Kiefer (Pages 15-17, 38 & 39)
Claim Agent S. L. Mueller (Pages 18-22,28-32 &34)
Roadmaster R. C. Chilelli (Pages 25-27)

is that, on the morning of August 16, 1990, Claimant Harvey claimed to have hurt his back while pulling spikes. He was given permission to leave his job on that day (August 16) and go to the doctor. Claimant was off on Friday, August 17 and also on Monday, August 20, 1990. When Claimant returned to work on Tuesday, August 21, he furnished Carrier a statement from his doctor, Dr. James F. Rogers, dated August 16, 1990, wherein it stated that the claimant could return to work on 'light' work duties on August 21, 1990 (Carrier's Exhibit 'B').

Claim Agent Mueller testified that, when he was furnished a copy of Carrier's Exhibit 'B', he took said document to Dr. Rogers' office to determine whether the document in question was altered (it appeared that the return to work date had been

altered). The Office Manager, Ms. Louella Rice, got the claimant's medical record out, particularly Dr. Rogers' statement dated August 16, 1990, and compared it with the copy of the statement Mueller furnished her. The statement on the claimant's medical record clearly stated the claimant could return to light duty work on August '17'. Copy of this statement was furnished to Mr. Mueller which was submitted at the investigation and identified as Carrier's Exhibit 'C'. An examination of Carrier's Exhibit 'B' clearly shows that the August 17 date had been altered to reflect a August 21 date on which the claimant could return to work.

The claimant altered this document to cover his absence on August 20, 1990, when he took that day off without obtaining permission.

Claimant denied that he altered the document. He testified that he not only went to the doctor's office on August 16 but also on August 20, 1990. He stated that the document he gave to the Carrier with the August 21 date (the altered date) shown thereon is the document he received from the doctor. He had no explanation for Carrier's Exhibit 'C'. Further Mueller testified that, when he visited the doctor's office to determine the validity of the document in question, there was no indication in the claimant's medical file that he was in Dr. Rogers' office on a date other than August 16. It was further determined that, if the return to work date had been changed from August 17 to August 21, a new statement would have been prepared. In fact, if the claimant had been in Dr. Rogers' office on August 20 as he alleged, and received a doctor's statement at that time, it would have been dated August 20, 1990. Clearly the claimant's allegation does not comport with the evidence of fact.

Clearly, the claimant violated Rules 1004 and 1007 for being AWOL on August 20, 1990, and for altering a document.

In view of the seriousness of the matter with which the claimant was charged, dismissal in his case was warranted and justified."

As concerns the Employees' contentions to the effect that the discipline should be set aside due to alleged improprieties in the conduct of the investigation, the Board finds as follows:

FIRST: Several questions asked by Carrier's conducting officer were phrased in such a way as to constitute leading the witness(es). None, however, were so serious or flagrant to warrant setting aside the discipline. (Also, it is noted for the record that the claimant's representative asked at least one leading question.)

SECOND: The questioning and/or cross-examination of witnesses was not confined strictly to the subject matter under investigation. This was not only true of the Carrier's conducting officer but also of the claimant's representative. Again, however, the Board does not consider this relatively minor flaw in the investigation as serious enough to warrant setting the discipline aside.

THIRD: Conducting Officer Yarbrough's prior knowledge of certain alleged facts and circumstances surrounding the incident did not in and/or of itself prevent him from conducting a fair and impartial investigation. Overall, the Board finds the investigation was conducted in a fair and impartial manner, nothwithstanding the aforementioned relatively minor deficiencies.

FOURTH: Even if it could be concluded in the instant case that the alleged improprieties in the conduct of the investigation were so serious and/or flagrant as to constitute a basis for setting aside the discipline (and they were not), the Board would be reluctant to do so for the reason that the Employees did not take issue with the alleged improprieties in a timely manner. (The time to take issue with the alleged improprieties would have been during the investigation, not after the investigation had been concluded.)

While Claimant's representative at the formal investigation did not take issue with the alleged improprieties mentioned in the Employees' claim letter of December 28, 1990, he did object to the testimony of Claim Agent Mueller (regarding a conversation Mr. Mueller had with the Office Manager of Claimant's Doctor), as well as a statement covering said conversation which the Carrier introduced as evidence. His objection was based on the premise that such was hearsay evidence, inasmuch as the witness (the Doctor's Office Manager) was not present at the investigation to cross-examine. While the objection was well taken and timely, the investigation was not a court of law, but rather a procedure for developing the facts concerning the Carrier's allegation(s) that its unilaterally

promulgated rules had been violated. Following the objection, the testimony and/or evidence of record indicates the investigation was recessed and an attempt was made to have the Doctor's Office Manager appear at the investigation for cross-examination. She was either unable or unwilling to do so, but did provide the Investigating Committee with a notarized statement, verifying the testimony of Claim Agent Mueller as to her concersation with him. It, therefore, appears to the Board that the Carrier made a good-faith effort to make the Doctor's Office Manager available at the investigation for cross-examination, to no avail.

A formal investigation to develop the facts concerning an alleged rule violation is not required to meet the same evidentiary tests as a court of law. Statements from individuals who are not employed by the railroad are deemed as admissable evidence in such proceedings. (Such evidence is given about the same weight as circumstancial evidence, but is not always sufficient in and/or of itself to satisfy the Carrier's burden of proof.)

As indicated in previous awards of this Board, arbitration in this forum is not like a court of law. That is to say, it is not necessary to prove responsibility beyond a shadow of doubt or even by a preponderance of evidence. Evidence sufficient to lead a reasonable person to an unequivocal conclusion as to the employee's responsibility is all that is required for a carrier to satisfy its burden of proof. Accordingly, after careful consideration of all testimony and/or evidence of record in this case, the Board finds that the claimant was properly found to have violated the rules cited in the notice of the investigation, and his removal from service was appropriate for his responsibility in connection therewith.

Notwithstanding that stated above, the Board finds that in view of the claimant's relatively good discipline record during approximately ten years of employment with this Carrier, that the discipline has served its purpose. The claimant, therefore, will 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.

Michael Garmon
G. Michael Garmon, Chairman

Employee Member

L Z Popl
Carrier Member

Dated at Chicago, IL:
March 5, 1991