

AWARD NO. 36

Case No. 36

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 Colorado District Trackman Paul D. Zwick from service, effective June 14, 1991, 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 June 14, 1991 (Files 910110213/140-13D2-915)"

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 June 5, 1991, Carrier's Regional Manager wrote the claimant as follows:

"You are hereby notified to attend Formal Investigation in Assistant Superintendent's Office, 402 Santa Fe Avenue, La Junta, Colorado 81050, at 9:00 AM, Friday, June 14, 1991, concerning your alleged removing material from Company property on May 24, 1991; and in addition, the removal and sale of material from Company property prior to May 24, 1991, so as to determine the facts and place responsibility, if any, involving possible violation of Rules B, 1007, and 1013, of the 'Safety and General Rules for All Employees', Form 2629 Std.

You may arrange for representation in line with the provision of Agreement or schedule governing your working conditions, and you may likewise arrange for the attendance of any desired witnesses."

The investigation was held as scheduled, following which 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.

Initially, the claimant's representative at the formal investigation (Assistant General Chairman P. C. Wolfersberger) properly objected to that part of the notice of investigation reading, in pertinent part, "*** in addition, the removal and sale of material from Company property prior to May 24, 1991, ***." That part of the notice is much too vague, indefinite and lacking in specificity to afford the claimant and his representative an opportunity to prepare a defense. However, there is no indication from the "REPORT OF BOARD OF INVESTIGATION" that the "DECISION" was based on "the removal and sale of material from company property prior to May 24, 1991." (Emphasis supplied.) The Decision reads "It is the decision that effective June 14, 1991, trackman P. D. Zwick be removed from service for violation of Rules B, 1007 and 1013 of the 'Safety and General Rules for All Employees', Form 2629 Std."

The testimony developed at the formal investigation clearly established the claimant's responsibility for "removing material from company property on May 24, 1991" without proper authorization, in violation of the rules cited both in the notice of investigation and the Decision of the Report of Board of Investigation. This one incident or violation is sufficiently serious in nature to warrant imposition of the ultimate penalty; i.e., permanent removal from service.

The claimant's testimony is essentially an admission that he took the ties in question without written authority, albeit allegedly with the understanding that they belonged to someone other than the railroad and that they were not on railroad property at the time he took them, although he was not sure about ownership of the ties or of the property on which they were located. Claimant's testimony in this regard appears to be pretextual in nature and, as a defense, it is more one of form than of substance. He also testified to the effect that he had previously taken scrap ties from this area and "two other areas on the railroad" without written or verbal authorization from either the railroad or the person he allegedly thought was owner of the ties in question, and that he understood the proper procedure for securing authority to take company material off of railroad property.

After careful consideration of all the testimony of record, the Board finds no basis for either setting aside or modifying the discipline assessed. The claimant was properly found to have violated the rules cited in the notice of investigation and his removal from service was appropriate for his responsibility in connection therewith.

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AWARD: Claim denied.

Michael Garmon
G. Michael Garmon, Chairman

C. F. Foster
Employee Member

L. L. Pope
Carrier Member

Dated at Chicago, IL

January 3, 1992