

SPECIAL BOARD OF ADJUSTMENT NO. 279

Award No. 488

Case No. 488

File 900380

Parties to Dispute: Brotherhood of Maintenance of Employees and Union Pacific Railroad Company (Former Missouri Pacific Railroad)

Statement of Claim:

1. Carrier violated the Agreement, especially Rule 12, when he was dismissed from service on May 10, 1990, without a fair and impartial hearing.

2. Claim in behalf of Mr. Brooks for eight (8) hours each work day, including overtime and holidays that would have accrued to him had he not been dismissed, claim beginning April 13, 1990, and continue until he is reinstated to service with seniority, vacation and all other rights unimpaired.

Findings: The Board has jurisdiction of this case by reason of the parties Agreement establishing this Board therefor.

The Claimant, C. Brooks, a Track Foreman, was notified to attend a formal investigation on April 18, 1990 on the charge of:

"...the alleged incident involving your acceptance of payment for company material and services delivered at Vanderbuilt, Texas on April 12, 1990, while working as Foreman on Gang #2873."

That Carrier concluded therefrom that Claimant was culpable and assessed the discipline here appealed.

The Claimant was accorded the due process to which entitled under Rule 12. There was no impropriety as to Hearing Officer Kirk when necessitated stepping down and becoming a witness and not thereafter remaining as Hearing Officer. The impropriety would arise in this case had Kirk gone back to resume as the Hearing Officer. One cannot bear to carry the roles of both the Hearing Officer and witness.

The record reflects that the Manager of Track Maintenance, Dan Armstrong, testified the crew was working a crossing FM234, at Vanderbuilt, Texas on April 3 through April 6. They were cleaning up the week of the 9th through the 13th. Claimant, Foreman Brooks, was told how to dispose of the material left at a crossing after re-working the road

crossing. He was told to take a contractor's backhoe and spread the left over foul ballast to the low lying area next to the railroad track.

Foreman Brooks advised Armstrong by telephone that a man at the station wanted a load of used crushed plank and a load of foul ballast which the Manager of Track Maintenance (MTM) authorized and advised Brooks to spread the rest in the ditch where the water stands.

Said Manager stopped at a cafe in Vanderbuilt. He had a conversation with the owner, Brenda Thomas, who said that she would like to buy more of that used ballast. Thomas advised the MTM that she had already bought four loads from Brooks.

The MTM instructed the Claimant to give the woman back her money. When they went to her cafe, Brooks offered \$20 and Armstrong advised him that is not the way to resolve this situation (Brooks had received \$100). The Claimant was subsequently removed from service pending an investigation.

The Carrier policy, as set out in our Award No. 385, is that disposal of surplus materials is subject to railroad authority. The used material is generally disposed of by giving it to an adjacent land owner or burying it. Sometimes the Carrier lets the contractor dispose of it. However, that was not done in the instant case. In any event our Award No. 385 affirms that the Carrier's policy is that material or property only be disposed of pursuant to written authority from above the Roadmaster level.

Here, it was shown that four loads of foul ballast were sold at \$25 a load to a Brenda Thomas. The proof as testified to by Armstrong who attested that he heard it from the cafe owner, Brenda Thomas and testimony from the truck driver who delivered it and received \$100 in cash. Which cash he delivered to the Claimant for four loads. MTM Armstrong testified that Brooks admitted to him that he received money from her. Exhibit A was a copy of a check assertedly written by Brenda Thomas and given to MTM, Dan Armstrong. The contractor's truck driver who delivered the loads was Jesse Porter. The guest check was dated 4/23.

When the testimony of the two principals conflicted, aside from a possible a misunderstanding, it was more reasonable to believe that one principal was not telling the truth. Hence, as stated by the Hearing Officer, the investigation was postponed in order to resolve the conflict in testimony and the time was necessary to get a new hearing

officer. We find no egregious error in this arrangement brought about, apparently, by the Claimant's false testimony.

The testimony of MTO Norman Kirk that he was a party to a conversation between Armstrong and Brook which took place in his office on April 12, 1990, before Brooks was removed from service. Therefore, Kirk held critical, credible, and corroborative evidence could testify as to what Brooks said to Armstrong. Armstrong's testimony supported that of Jesse Porter, the truck driver. Porter also corroborated what Armstrong testified to.

The Board finds that the procedural objections must fall. First, insofar as the recorder breaking down while Mr. Kirk was conducting the hearing. If the recorder did not work then recording the hearing again would only carry out the purpose of Rule 12 and is held to be proper. Nothing was shown to be improper thereby. Second, changing of the hearing officer was proper. It was brought about by the necessity to prove that either Armstrong was not testifying truthfully or the Claimant was not testifying truthfully. The latter was shown to be true.

Claimant denied everything all the way through but the weight of the testimony is just too heavy to believe that given by the Claimant. This claim will be denied.

Award: Claim denied.



S. A. Hammons, Jr. Employee Member



D. A. Ring, Carrier Member



Arthur T. Van Wart, Chairman
and Neutral Member

Issued September 26, 1991.