

The Second Division consisted of the regular members and in addition Referee Paul C. Carter when award was rendered.

(James G. O'Rourke
PARTIES TO DISPUTE: (
(Southern Pacific Transportation Company (Western Lines)

STATEMENT OF CLAIM:

1) That the Southern Pacific Transportation Company did violate the controlling Agreement, Rules 25, 38(b), 39, 44 and 46; its own Medical Department's medical "release" and directive, Company Procedure and Company Policy, therefore, Company Rule, hence, condition and stipulation pertinent to the Controlling Agreement; the claimant's contractual seniority rights; the reinstatement terms of the Leniency Agreement, if valid; has intentionally omitted and suppressed material evidence from the hearing of March 7, 1986, and has used undue influence, duress and misrepresented material evidence to obtain signatures, when it improperly withheld Sheet Metal Worker, James G. O'Rourke, from service and subsequently, arbitrarily and captiously held a hearing on March 7, 1986, and dismissed James G. O'Rourke on April 1, 1986.

2) That Carrier reinstate and restore claimant to active service with all seniority rights unimpaired and pay claimant for eight (8) hours per day at a rate of \$13.88 per a forty (40) hour work week for all time and wages lost with interest, in addition, at a rate of ten percent (10%) and that claimant be made whole and compensated for all vacation rights, contractual back pay, holiday and sick pay, medical and dental expenses incurred, railroad retirement tax credits, union reinstatement fees and/or union dues and any other and all contractual rights, privileges and benefits provided in any and all agreements between the Sheet Metal Workers' International Association and the Southern Pacific Transportation Company from December 12, 1985 and/or April 1, 1986, when claimant was improperly and wrongfully withheld from service without just cause and was subsequently, arbitrarily and captiously dismissed from service, until reinstated; that is, that claimant be made entirely whole for any and all losses resulting from said dismissal(s).

3) And that Carrier pay and compensate claimant for all contractual rights, privileges and benefits provided by the Santa Fe Southern Pacific Merger Protection Agreement or Provided in any resulting Agreement or agreements yet pending between the Southern Pacific Transportation Company and the Sheet Metal Workers' International Association and/or any subsequent ICC ruling and/or directive or any result thereof.

FINDINGS:

The Second Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The record shows that the Claimant was employed by the Carrier as a sheet metal worker on March 9, 1971. Following considerable correspondence concerning Claimant's physical condition, Carrier requested him to undergo a physical examination by a Carrier doctor, and made three appointments with the designated doctor for such examination on January 13, 23, and February 6, 1986. In a letter to Claimant dated January 30, 1986, scheduling the appointment for February 6, 1986, Carrier advised Claimant that noncompliance with the directive could be considered a violation of Rule 801 of Carrier's General Rules and Regulations.

The Claimant did not report for the physical examination as instructed, and on February 18, 1986, Carrier cited him for alleged violation of Rules 801 and 802 of the General Rules and Regulations, those parts reading:

Rule 801: "Employes will not be retained in the service who are insubordinate."

Rule 802: "Indifference to duty will not be condoned."

Formal hearing was held on March 7, 1986, and on April 1, 1986, Claimant was notified of his dismissal from the service. Claim was submitted in behalf of Claimant by the representatives of the craft in which claimant was employed. Following considerable handling on the property, a leniency reinstatement agreement was reached with Claimant by Carrier's Works Manager dated February 2, 1987, reading:

"CERTIFIED - P12 9371840

February 2, 1987

Mr. James G. O'Rourke
429 40th Street
Sacramento, Ca. 95819

Dear Mr. O'Rourke

Per conference between your General Chairman, P. E. Phillips and Labor Relations Officer, M. A. Givan, we are agreeable to reinstating you to service with Southern Pacific Trans. Co. on the basis that the

discipline has now served its purpose, you will be reinstated on a leniency basis; that is, with seniority unimpaired. But without compensation for time out of service.

This reinstatement is contingent upon your passing the required physical examination. You are hereby directed to report to R. W. Ogden in the Administration Building, Sacramento Locomotive Works, 401 I St. Sacramento, Ca. at 1:00 p.m. on February 12, 1982 in order to complete the required paperwork. After the paperwork is completed you are then directed to report to:

Dr. Patrick Clancy
400 "O" Street
Sacramento, Ca.

at 2:15 p.m. Thursday February 12, 1987.

Your signature affixed below, as well as that of your representative, hereby acknowledges you are fully cognizant of this action at this time, and that no appeal will be filed on your behalf, or by your union or yourself on this issue or discipline assessed as a result on your formal hearing held on March 7, 1986.

(Sgd) J. H. Wagner
J. H. Wagner
Works Manager

ACCEPTED BY: (Sgd) J. O'Rourke

DATE: Feb. 12, 1987

Feb. 12, 1987

(Sgd) Jim McLucas"

We understand that the signature "Jim McLucas" was that of the Local Chairman of the Organization.

Following the reinstatement agreement, Claimant was examined by Dr. Clancy and released for duty with no restrictions. On February 20, 1987, Claimant reported for duty, but advised the Carrier's Health and Safety Director that he was not physically able to perform all the duties, and requested light duties for thirty days. Claimant was informed that he had been released for full duty and that he could not be permitted to return to work until he was physically able to work as a productive employe without risk of personal injury to himself or others.

On March 4, 1987, Carrier Doctor P. J. Clancy, referred to in the leniency reinstatement letter dated February 2, 1987, recommended that Claimant

undergo a psychological assessment. On March 4, 1987, Claimant agreed to such an evaluation, but failed to keep an appointment made for him.

On July 6, 1987, the Associate Clinical Professor of Psychiatry, School of Medicine, University of California, Davis, submitted a lengthy report to Carrier's Chief Medical Officer, concerning Claimant and concluded:

"In my opinion, he is not capable of returning to work, as his impairments and defects would place himself and others at risk."

On July 13, 1987, Carrier's Chief Medical Officer advised Carrier's Health and Safety Director that Claimant may not return to work.

The Board finds and holds that under the clear terms of the reinstatement letter of Agreement of February 2, 1987, all claims prior to February 2, 1987, became moot. Claimant could not unilaterally invalidate that agreement. It was final and binding on all claims prior to that date. That portion of the claim must be dismissed.

As to that portion of the claim subsequent to February 2, 1987, the record is clear that Claimant was not physically qualified to perform the duties required of him. That portion of the claim will be denied.

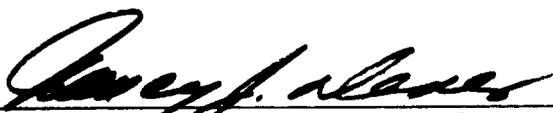
We point out that this Board does not have the authority to interpret or enforce State or Federal statutes or regulations. Our authority is limited to interpreting or applying agreements between Carriers and their employes.

A W A R D

Claim prior to and including February 2, 1987, dismissed; Claim subsequent to February 2, 1987, denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 11th day of January 1989.