

The Second Division consisted of the regular members and in addition Referee Ronald L. Miller when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(Southern Pacific Transportation Company)

STATEMENT OF CLAIM:

1. That under the current Agreement, Mechanical Department Electrician J. L. Diaz was unjustly treated when he was dismissed from service on July 21, 1986, following investigation for alleged violation of portions of Rule 801 and Rule 810 of the General Rules and Regulations of the Southern Pacific Transportation Company (Western Lines).

2. That accordingly the Southern Pacific Transportation Company be ordered to restore Electrician J. L. Diaz to service with all rights unimpaired, including service and seniority, vacation, payment of hospital and medical insurance, group disability insurance, railroad retirement contributions, and loss of wages; including interest at the rate of six percent (6%) per annum.

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 were given due notice of hearing thereon.

On May 13, 1986, the Claimant was injured on the job. He was examined by an industrial doctor (designated by the Carrier) on May 13; the doctor concluded that Claimant could return to work, but limited to light duty. Claimant performed light duties on May 14, however, he did not return to work after that date. From the day of the injury, Claimant complained of continuing pain in his shoulder and back. Subsequent to the initial evaluation of Claimant's medical condition, the industrial doctor determined that Claimant had suffered a dislocation and a strain. Nevertheless, the doctor continued to authorize light duty.

On June 4, 1986, Claimant telephoned the Carrier to inform his supervisor that he would not report for work until he felt better. Concurrently, a letter from the Carrier, dated June 3, 1986, was en route to Claimant; he re-

ceived the letter on June 6, 1986. The letter instructed Claimant to report for light duty. Claimant did not return to work and on June 24, and he was notified to report for an investigative hearing. A day earlier on June 23, Claimant was examined by a family doctor (arranged by Claimant); this doctor prescribed rest and no work until July 23, 1986. Subsequent to the investigative hearing on July 2, 1986, Claimant was dismissed from service with the Carrier for violation of Rule 810 (failure to protect employment) and Rule 801 (insubordination).

The Carrier has not convincingly established that Claimant was insubordinate for failing to report for work in response to the June 3, 1986 letter (received by Claimant on June 6). The Carrier has not effectively rebutted the Organization's contention that Claimant could reasonably conclude that the telephone notification to his supervisor on June 4 superseded the June 3 letter. Therefore, the charge of insubordination cannot be sustained.

As for the second charge, Claimant did not act in a reasonable or prudent manner to protect his employment. Granted that Claimant was injured and was in some degree of discomfort, and that the industrial doctor changed his diagnosis, nevertheless, the industrial doctor continued to authorize limited, light work. Without support of other medical opinion, Claimant (1) took emergency vacation for the period May 19 - May 30, 1986, (2) notified the Carrier on June 4, 1986, that he would not report for work until further notice, and (3) did not seek additional medical assistance until June 23. Furthermore, there is no evidence in the transcript of the hearing or the full record of the case that Claimant was ever given permission to be absent (except of course for the vacation period). If Claimant disagreed with the industrial doctor's judgement that he could perform light duty, Claimant should have expeditiously obtained another opinion. Rather, Claimant just did not report for work. That he finally contracted a family doctor on June 23 does not excuse his failure to reasonably and prudently protect his employment.

In addition to his medical condition, Claimant also explained his absence from work due to the unavailability of light work. This was not a judgement to be made by Claimant. The Carrier notified Claimant that light work was available; Claimant should have reported to perform the work. If the work provided by the Carrier violated a contractual agreement, work rule, workplace practice, etc., there are procedures for relief.

The notation of insubordination shall be removed from Claimant's records. If Claimant is physically capable to return to work, he shall be returned to employment with the Carrier, with seniority unimpaired but without backpay.

A W A R D


Claim sustained in accordance with the Findings.

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Award No. 11587
Docket No. 11441
88-2-87-2-82

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 19th day of October 1988.