

PUBLIC LAW BOARD NO. 1582

PARTIES) ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
 TO)
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

STATEMENT OF CLAIM: That the Carrier violated the provisions of the Agreement when on April 7, 1976 they dismissed Trackman H. L. Warren; said dismissal being unreasonable, arbitrary, capricious and on charges not sustained by the record. The Carrier shall now reinstate H. L. Warren to his former position with seniority, vacation and all rights unimpaired and compensate him for loss of earnings suffered account the Carrier's wrongful action.

FINDINGS: This Public Law Board No. 1582 finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction.

In this dispute the claimant was dismissed from the service of the Carrier for allegedly being absent without proper authority commencing January 12, 1976. The claimant allegedly sustained an injury to his back. The Carrier alleges that the claimant failed to obtain a leave of absence or notify the Carrier that he would be unable to work.

The Organization contends that the claimant advised the foreman of the injury on January 5, 1976 and that on January 7, 1976 he contacted the foreman and was granted permission to be absent for the remainder of the week. The Organization further contends that the Carrier was aware that the claimant was unable to work and should have granted a leave of absence. The Organization relies upon Article 5, Section 1 wherein it states in part:

"Decisions of investigations will be rendered as promptly
as possible."

The Organization takes the position that a delay of 47 days occurred before the decision was rendered and that such constitutes a violation of Article 5, Section 1.

It is the position of the Carrier that the records of the Carrier indicated that the claimant was absent without authority, and in view of his poor record, dismissal was justified. The Carrier also takes the position that the Organization failed to prove that 47 days was not "as promptly as possible" under the circumstances, and that in any event the delay in the decision did not in any way prejudice the rights of the claimant.

The claimant was notified that his case was going to be heard before this Public Law Board and was advised that he was privileged to appear in person or by a representative of his choice if he so desired. The claimant did not appear, and the Union represented him in this case.

Evidence of record is conclusive that the claimant was well aware and had knowledge that he should have requested a leave of absence and failed to do so. Therefore, it is equally apparent that he violated the rules of the Carrier and was absent without authority. Under those circumstances and in view of the claimant's poor record, the Carrier was justified in dismissing the claimant from the service of the Carrier.

However, the procedural question is one of major importance. Article 5, Section 1 of the Agreement between the parties requires decisions on investigations to be rendered on prima facie evidence that the decision was not rendered as promptly as possible.

The burden of proof then shifts to the Carrier, and the Carrier must rebut or prove by a preponderance of the evidence that the decision was made as promptly as possible. There might be many extenuating circumstances where such a delay would be justified. However, there is no evidence in this case that the delay was justified or that the decision was made as promptly as possible.

Therefore, under the circumstances the Board must find that the Carrier violated the Agreement by not rendering the decision as promptly as possible. It is noted the claimant was injured and unable to work. Therefore there will be no pay for time lost, but the Carrier is directed to reinstate the claimant with seniority and all other rights unimpaired but without pay for time lost.

AWARD: Claim sustained as per above.

ORDER: The Carrier is directed to comply with this award within thirty days from the date of this award.

sd/ Preston J. Moore
Preston J. Moore, Chairman

sd/ S. E. Fleming
Organization Member

sd/ B. J. East
Carrier Member