

NATIONAL MEDIATION
BOARD

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NATIONAL RAILROAD
ADJUSTMENT BOARD

PUBLIC LAW BOARD NO. 1795

Award No. 1
Case No. 1

PARTIES TO DISPUTE: BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
SOUTHERN PACIFIC TRANSPORTATION COMPANY
(Pacific Lines)

STATEMENT OF CLAIM:

1. That the Carrier violated the Agreement when on December 1, 1975 it dismissed F.L. Duenez from the service without first according him a fair and impartial hearing and further violated said Agreement when on February 27, 1976 following a hearing F.L. Duenez was again dismissed on charges not sustained by the record, said action being arbitrary, unjust and without sufficient cause.

2. That F.L. Duenez be reinstated to his former position with seniority, vacation and all other rights unimpaired and compensated for time lost commencing December 1, 1975 and continuing to the date he is restored to service.

STATEMENT OF FACTS: Claimant entered the service of Carrier in April, 1970, as a Track Laborer. On December 1, 1975, he reported at his usual starting time, informed his Foreman that he was ill and advised him that he would not work that day. The Foreman accompanied Claimant to Roadmaster Gentry's office, whereupon an altercation ensued, the facts of which are in dispute. It appears, however, that Mr. Gentry objected to Claimant's taking the day off because he was shorthanded and requested Claimant to stay on the job. Claimant did not do so and left the premises. Petitioner asserts that Mr. Gentry told Claimant "to go home and stay home"; that this meant "he was fired"; and that, therefore, Claimant was removed from service without a hearing in violation of the Agreement. Carrier maintains that Claimant told Mr. Gentry "you can take the job and stick it up your ass"; and that this indicated Claimant was quitting his employment with Carrier.

In any event, on December 1, 1975, Carrier wrote to Claimant and enclosed "your final paycheck in the amount of \$494.63", together with resignation forms for Claimant's signature. Claimant did not execute or return the forms, but did cash the check and retain the proceeds.

Thereafter, on January 24, 1976, Petitioner filed claim in behalf of Claimant, alleging that Carrier had violated the Agreement on December 1, 1975 "when it failed to accord Claimant a fair and impartial hearing after being led to believe by Roadmaster Gentry that he was fired . . ." On February 23, 1976, Carrier rejected the claim.

Prior to such rejection, Carrier served Claimant on February 13, 1976 with written notice of formal hearing for February 24, 1976, based on violation of Rule M810 of the General Rules and Regulations. Such formal hearing was held, and on February 27, 1976, Carrier notified Claimant that he had been found guilty of "absenting yourself from duty without proper authority from December 1, 1975 through February 13, 1976", and advised him that he was "dismissed" from service. The present claim was then processed on the property through various stages of appeal, being rejected by Carrier in each instance.

Basically, it is Petitioner's contention that Carrier violated Rule 45 of the Agreement in the two respects set forth in the Statement of Claim.

Carrier responds that Claimant had quit his job on December 1, 1975, and that in any event he was absent from employment without proper authority in violation of Rule M810 of the Rules and Regulations.

Rule M810, in pertinent part, provides as follows:

"Employees must report for duty at the prescribed time and place . . . They must not absent themselves from their employment without proper authority".

Our examination of the record transcript indicates that Claimant was afforded a fair and impartial hearing in compliance with the Agreement. He was permitted ample opportunity to present his version of the pertinent facts, was advised of his right to present witnesses in his behalf, was represented by the District Chairman, and was afforded the right of cross-examination of each of the witnesses. Due process, therefore, was carefully observed and none of Claimant's rights were violated.

Roadmaster Gentry testified that Claimant reported for work on December 1, 1975 with "request to lay off". Claimant stated he did not "feel good" and "was not going to work" that day. That Claimant was asked to work that day "because we were so short handed", but refused. Thereupon, some conversation ensued about Claimant's not working the preceding Friday and the fact that he had called in late. That "somehow or other he got mad and he turned and started out the door telling me to take the job and stuff it up your ass and he hit the door at that time and I said thank you and that was the end of it." Claimant then left the office and, since then, had not been in contact with him or with his office.

On cross-examination, the witness stated that he did not tell Claimant he was fired or that he was removed from service.

Mr. Gentry testified further that he had twice before, on July 31, 1975 and on October 14, 1975, called Claimant's attention to the provisions of Rule M810 in relation to his having been absent without authority; that memoranda had been made of the two conversations, each of which Claimant had read and signed. These memoranda were made part of the record.

Mr. Gentry's testimony was corroborated by two witnesses who were present on December 1, 1975, Track Supervisor Hood and Foreman Wiltz.

In substance, Mr. Hood heard Claimant's request for lay off, Mr. Gentry's reply about being "shorthanded", and Claimant's statement that "he didn't feel like working". Mr. Gentry did not at any time

tell Claimant "that he was fired" or "removed from service", nor did Mr. Gentry use vulgar or profane language. "His voice was in the normal tone". That after Claimant said he would not work that day, he turned around and as he went toward the door "he said you can take the job and stick it up your ass", to which Mr. Gentry replied, "thank you". Claimant did not thereafter return to work.

The testimony of Mr. Wiltz was in the same vein and fully corroborative of Mr. Gentry and Mr. Hood. Additionally, he stated that Claimant did not have his work clothes on and that while Mr. Gentry was talking to Claimant about the preceding Friday "Mr. Duenez turned around and started to walk away and he said to take the job and shove it up your ass". He did not at any time during this conversation hear Mr. Gentry tell Claimant "that he was fired" or "removed from service". That Mr. Gentry "even said thank you, I remember that".

Surprisingly, Claimant's testimony corroborated that of Mr. Gentry in essential detail. He admitted signing the memoranda of July 31, 1975 and October 14, 1975 concerning prior violations of Rule M810 and admitted that each memorandum was read to him before he signed it. As to the occurrence of December 1, 1975, he did tell Mr. Gentry that he "would not work that day" because "I was not feeling good". When asked as to his reason, Claimant stated "I got in an automobile accident February 2, 1975". However, he admitted having worked during the intervening period, but maintained that "something was going on with my neck" and that he had a doctor's appointment for that day "but I didn't show up". That the Roadmaster "used some kind of language that got me mad" and used "profane language" and that he (Duenez) did say "stick your job in your ass".

Although Claimant denied that he used profane language, it is quite evident by his language during the hearing that he is in the habit of doing so.

He testified further that Mr. Gentry told him "to go home and stay home". As to being told that he was "fired", he stated "not those words". As to the testimony of the other witnesses, he stated "They are all liars" and "I am telling the truth". He admitted receiving the "final pay check" and cashing it, but did not make any objection to Carrier personnel that the resignation form forwarded to him was wrong or in error. He did notify Mr. Arosio, the General Chairman, but not until a month and a half later. As to the reason for such delay, he finally admitted "Well, I was looking for a job".

We stress at this point that the testimony of Roadmaster Gentry is corroborated, not only in full detail by Mr. Hood and Mr. Wiltz, but also in substantial detail by Claimant. The basic factual difference is that Claimant understood he was "fired", whereas Carrier maintains he "quit". Claimant's testimony, on the other hand, stands completely uncorroborated.

On the basis of the following factual findings, we are not persuaded as to the credibility of Claimant's testimony:

1. His language and demeanor on December 1, 1975 were highly objectionable. In fact, he used similar vulgar language at the formal hearing, as appears to be his custom.

2. He conceded that he did say to Mr. Gentry "Stick your job in your ass" which, standing by itself, would indicate that he was quitting his job.

3. His reasons for being unable to work that day are far from convincing. He attempted to link his "illness" to an automobile accident which had occurred on February 2, 1975, ten months ago, but admitted that he had worked in the interim. Then, to bolster the "seriousness" of his condition, he stated that he had a doctor's appointment for that day, which he did not find it necessary to keep.

4. He proceeded to cash and use the proceeds of the "final check" forwarded to him by Carrier, without protest or objection to anyone.

5. He permitted a period of at least one and a half months to elapse before taking any affirmative action, and finally admitted that this was due to the fact that he was "looking for a job".

Conversely, therefore, on the basis of the record testimony we are impelled to the conclusion that the testimony of Carrier's witnesses is credible and convincing and that Claimant did in fact quit his job on December 1, 1975. To hold otherwise would imply that all the witnesses, except Claimant, testified falsely. In short, that only Claimant testified truthfully. In our view the record testimony bespeaks the contrary.

Petitioner raises further issue as to the propriety of the formal hearing and contends that Claimant "was again dismissed on charges not sustained by the record". On the basis of the record testimony, particularly Claimant's admitted knowledge of the provisions of Rule M810 and the two prior similar offenses involving Claimant, we do not concur in the latter conclusion of Petitioner.

Petitioner contends that Carrier was inconsistent in holding a formal hearing 75 days after it mailed Claimant his "final check". However, at this point a formal claim had been interposed and Carrier was required under the Agreement to take some affirmative action on the claim itself. This, it proceeded to do, by formally rejecting the claim and scheduling a formal hearing.

In any event, if the hearing served no other purpose, it did serve to place before this Board the testimony of witnesses, including that of Claimant, upon which to properly resolve the factual issues raised in this dispute.

We concur in the established principle cited by Petitioner that it is not the function of this Board to determine credibility or substitute its judgment for that of Carrier in evaluating the evidence or the discipline imposed; provided, however, that substantial probative evidence is presented in the record supporting the action taken by Carrier. We conclude, however, on the record before us, that such substantial probative evidence is present in this case and that Carrier sustained its burden of proof.

Additionally, we find no basis upon which to conclude that Carrier acted arbitrarily, unreasonably or capriciously in the facts and circumstances of this dispute. Based on the record evidence, therefore, and the foregoing findings, we will deny the claim.

AWARD: CLAIM DENIED.

S/ LOUIS NORRIS
LOUIS NORRIS, Neutral and Chairman

S/ S.E. FLEMING
S.E. FLEMING, Organization Member

S/ E.J. HALL
E.J. HALL, Carrier Member

DATED: San Francisco, California
December 15, 1976