PUBLIC LAW BOARD NO. 1795

Award No. 13
Case No. 13

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

STATEMENT OF CLAIM:

1. That the Carrier violated the provisions of the Agreement when, on April 8, 1976, it dismissed R.C. Covarrubio from the service of the Southern Pacific Transportation Company without first giving Claimant a fair and impartial hearing, said dismissal being unjust, unreasonable and in abuse of discretion.

2. That R.C. Covarrubio now be compensated for all time lost beginning April 8, 1976 to and including April 20, 1976 and that all charges be removed from Claimant's personal record.

STATEMENT OF FACTS: This dispute involves Claimant R.C. Covarrubio who entered Carrier's service on September 3, 1964. On April 8, 1976, which is the important date involved in this dispute, he was working under the supervision of Assistant Foreman R. Williams. It appears that during the afternoon of that day he had an altercation with Mr. Williams on the basis of which he was accused by Carrier of using abusive, insultive and improper language to his Foreman. In the Organization's submission reference is made to the fact that Claimant had been an employee of Carrier for approximately 25 years but, for some reason or another had lost his seniority and was rehired on September 3, 1964. For the purpose of this dispute the date upon

which Claimant entered the service of Carrier is not of great significance.

In any event as a result of this alleged altercation, which Carrier contends was completely unprovoked, Claimant was removed from service on April 8, 1976 by Road Master M. Hernandez, Supervisor in charge of the Phoenix District, pending a formal hearing into the matter.

We must comment at this point that the word "removed" from service or "dismissed" was obviously used erroneously by Mr. Hernandez. It seems hardly feasible that Claimant would have been "dismissed" or "removed" from service pending a formal hearing. Had he been actually dismissed, there would of course have been no formal hearing. For the purpose of this dispute, then, we shall consider that Claimant was suspended from service pending a full investigation into the matter that occurred on April 8, 1976.

Subsequently, in fact on the day following the letter of April 8, a second letter was sent to Claimant dated April 9, 1976, signed by Mr. Reilly, Assistant Division Engineer, notifying Claimant to be in attendance at a formal hearing to be held on April 15, 1976, in connection with his alleged actions on April 8, 1976, particularly the alleged violations of Rules 801 and 804 of the Rules and Regulations for the Maintenance of Way Structures.

This hearing was convened at the scheduled time and place, was conducted by Assistant Division Engineer Mr. W.C. Dunn and proceedings of investigation were actually commenced by interrogation of witnesses. This, in spite of the fact that the Union objected to the short notice of hearing which it contended consisted of a

2-day notice. Although initially the request for adjournment by the Organization was rejected by the Hearing Officer, at the end of the hearing it was adjourned and a date for reconvening was then set for April 30, 1976.

As a matter of fact, the formal hearing was never reconvened for, on April 20, 1976, Carrier addressed a letter to Claimant advising him that the reason he had been suspended was for violation of Rules 801 and 804. But, as the letter continued, it also advised Claimant "You are hereby reinstated on a leniency basis; this is, with seniority unimpaired but without compensation for time lost."

In effect, the time in which Claimant was out of service was a period of 12 days which constituted the total period of his suspension from the time the Division Engineer made the decision with respect to the occurrence of April 8, 1976 until the time that he reviewed the transcript. It appears further that Carrier considered the 12 day suspension a sufficient penalty for the occurrence of April 8 and therefore applied leniency and restored Claimant to service, as previously stated.

The Organization then filed protest with Carrier contending that the entire procedure was improper and setting forth certain specific contentions upon which it made the latter assertion. These contentions will be gone into in detail shortly hereafter.

It is Carrier's position, without prejudice to its position with respect to the merits of the claim, that the arrangement personally with Claimant, which was in writing and

accepted and signed by Claimant, was a reinstatement on a leniency basis; that is, with seniority unimpaired but without compensation for time lost, and that such reinstatement now constitutes an effective bar to the claim presented in behalf of Claimant by the Organization. A copy of the settlement terms signed by Claimant is appended to Carrier's submission as "Exhibit A".

For these reasons the Board is urged to dismiss the claim of the Organization. The Organization's position consists of several arguments which, briefly, are as follows: It contends that Claimant was "dismissed" without a hearing under Rule 45. It contends that the hearing itself was scheduled upon faulty notice of fatal gravity. Further, that Claimant was found guilty without a proper hearing in that the hearing itself was never properly completed and discipline was imposed in consequence thereof in violation of Rule 45. The Organization also raises many objections to the propriety and the fairness of the hearing. We find the latter contentions not well supported by the evidence. The question here involved does not relate to whether the hearing itself was fairly and properly conducted; the issues that decide this grievance are altogether different in value and pertinence.

The Organization argues further that the failure to reconvene the hearing was itself defective and, finally that the application of leniency, as applied by Carrier in this case, violated Rule 45(e) of the provisions of the controlling Agreement between the parties. The Carrier's position, in brief, as previously stated, is that it acted properly at each stage of the proceedings

involved in this dispute and that, finally, its leniency settlement on a personal basis with Claimant, to which he consented and which he signed, is a complete bar to the further presentation of any grievance by the Organization in this case.

OPINION: The Organization has raised several issues which it contends renders the proceedings in this case fatally defective under the specific provisions of the controlling agreement between the parties. For brevity and emphasis these various issues will be discussed separately:

1. We have previously discussed the two rather minor issues of: (a) the assumedly mistaken use of the word "dismissed" (instead of "suspension") in Carrier's letter of April 8, 1976; and (b) the short notice of hearing possibly affecting the validity of the partial hearing of April 15, 1976 itself. However, the hearing officer's belated decision to reconvene the hearing on April 30, 1976, in effect, negated the "short notice". Of major impact, however, is Rule 45 of the controlling agreement which, insofar as Claimant is concerned, specifically states that employes with at least 60 days of service "shall not be disciplined nor dismissed without first being given a fair and impartial hearing". The point is, of course, that Claimant was never given "a fair and impartial hearing". The so-called "hearing" was in fact commenced, but then postponed, never completed, and continued to remain in limbo. Consequently, it could not in any sense be designated as constituting a "fair and impartial hearing" as required by Rule 45.

2. This being so, no discipline could properly be imposed upon Claimant under the positive restrictions of Rule 45. And this brings us in turn to the inevitable conclusion that since no valid discipline could here be imposed, there was nothing to which the concept of leniency could be applied.

3. We return now to the primary issue of this dispute - the question of the leniency itself. We must perforce point out initially that the only individuals present at the "leniency conference" of April 20, 1976 were Division Engineer Zumwalt, Assistant Division Engineer Dunn, Road Master M. Hernandez, and Claimant in person. No one was present in behalf of the Organization to represent Claimant; nor does the record indicate in any way that any official member of the Organization was invited to be present. In the latter context, we cannot accept the validity of Carrier's statement that it was "unable to contact his representatives because the latter was reported to be in the mountains on a fishing trip". Certainly, there were others who could have been contacted to represent Claimant and act in his behalf; moreover, the delay of a day or two could not seriously have prejudiced either Carrier or Claimant.

More important on this issue, however, is the specific language of Rule 45 -(e) of the controlling agreement negotiated between the principals, which reads exactly as follows:

> "Leniency Reinstatement. - (e) If the charge against an employe has been sustained and it is desired to extend leniency the conditions of his return to duty shall be subject to

agreement between authorized representatives of the Company and the Brotherhood." (Emphasis supplied)

The language of Rule 45(e) is precise, clear and unambiguous on the issue of the extension of leniency - the conditions "shall be subject to agreement between the authorized representatives of the Company and the Brotherhood". (Emphasis supplied) In legal parlance, as well as general rules of contract construction, the word "shall" has been construed to mean "must". We so interpret it in this case and must perforce reach the finding that Carrier simply did not abide by the rules of the parties' Agreement. No "Agreement" was reached as between the "Company and Brotherhood" as to the question of leniency or its conditions. The fact that Claimant may have agreed to these matters is irrelevant; the specific requirement of the agreement allows no such alternative. The "Agreement" must be with "the Brotherhood"; the parties themselves have specifically so provided.

In view of these specific findings and conclusions, which have been set forth in detail above, we have deliberately avoided discussing the question of Claimant's "guilt" or "innocence" as related to his alleged altercation with Assistant Foreman Williams. Obviously, this would merely be an exercise in futility, serving no useful purpose.

Accordingly, in view of all of the foregoing, we have no other alternative but to deny Carrier's motion to dismiss the claim and to sustain the grievance as presented. We so hold.

AWARD: CLAIM SUSTAINED.

Louis Norris
LOUIS NORRIS, Neutral and Chairman

S.E.F. Fleming
S.E. FLEMING, Organization Member

E.J. Hall
E.J. HALL, Carrier Member

DATED: San Francisco, California
February 6, 1978