

PUBLIC LAW BOARD NO. 2139

Parties: Brotherhood of Maintenance of Way Employees  
and  
The Washington Terminal Company

Statement of Claim: "(1) Carrier failed to comply with Rule 5-A-1 of the N. W. Agreement in the dismissal of Claimant J. W. Thomas, Trackman, as of June 9, 1977.

(2) Claimant J. W. Thomas be now reinstated to his former position of Trackman, the Washington Terminal Company, and be made whole to lost wages, vacation and seniority rights unimpaired."

Discussion: The Claimant, an employee with eight years seniority, was initially served with a Notice dated May 11, 1977, to appear for an Investigation to be held May 25, 1977, on the charge that he was absent on 13 named days between April 25, 1977 and May 11, 1977, without permission. The May 25, 1977 Investigation was postponed at the request of the Organization and rescheduled to June 7, 1977.

At the June 7, 1977 Investigation, the Claimant failed to appear although his Organization representative was present. The Investigation was conducted in the absence of the Claimant, after evidence was introduced to show that he had received proper notification of the Investigation.

The Hearing Officer read the charge against the Claimant and also introduced his service record which showed that he had been disqualified on January 31, 1977 as a Track Foreman and Assistant Track Foreman for excessive absenteeism. No other evidence was introduced and the Hearing which commenced at 10:00 A.M. was adjourned at 10:37 A.M.

On June 9, 1977, the Company wrote the Claimant that the evidence produced at the June 7, 1977 Investigation proved the charge that he had been absent without permission on certain listed dates. Accordingly, the Company stated the Claimant was found guilty and discharged from its service.

On August, 22, 1977, the Claimant appealed his dismissal. The Company replied to the Claimant that his appeal was untimely since it was not made within the contractually prescribed 60 days, and since no reason was advanced for the untimely delay, the appeal was denied. In due course the claim was progressed to this Public Law Board.

At the Board Hearing on June 2, 1978, the Board issued an Interim Award restoring the Claimant to service and taking under advisement the matter, if any, of back pay to be awarded.

Findings: The Board, upon the whole record and all the evidence, finds that the Employee and Carrier are Employee and Carrier within the meaning of the Railway Labor Act; that the Board has jurisdiction over the dispute, and that the parties to the dispute were given due notice of the hearing thereon.

The Board finds that although the Company conducted the Hearing in the absence of the Claimant, this did not eliminate the requirement that the Carrier has to prove its charge by substantial competent evidence. The Company's burden to prove its case was not changed one iota by the absence of the Claimant from the Hearing. The result of the Claimant being absent from the Investigation is that he would not be in a position to challenge or impeach any of Company's evidence adduced at the Hearing.

His failure to appear at the Investigation, without a satisfactory reason therefor, compels him to accept the Company's case as presented.

However, to repeat, the Claimant's absence does not vitiate the Company's need to prove its case by competent evidence.

The glaring defect in this case is that the Company failed to produce one iota of evidence to substantiate its charge that the Claimant was absent without permission on the listed dates. All the Carrier did was to read into the record the charge it filed against the Claimant. However, this is only an allegation and allegations are not proof.

Concerning the Company's contention that the Claimant's appeal was untimely, the Board finds that since the Carrier's Investigation was substantively and not procedurally defective, the Claimant was not properly discharged and therefore he was still an employee, and this is without regard as to whether he properly appealed or not.

However, the Board finds that the Claimant has not conducted himself in such a manner that he should be awarded full back pay. His failure to appear at the Investigation and his tardy appeal indicate a degree of irresponsibility that should not be rewarded to the full, even though he was not properly discharged.

Accordingly the Board directs that the Claimant receive back pay for five months from the date of his dismissal on June 9, 1977.

Award: Grievance disposed of in accordance with the Findings.

Order: The Carrier is directed to comply with the Award, on or before December 19, 1978.

Jacob Seidenberg  
Jacob Seidenberg, Chairman and Neutral Member

Merrill L. Stewart  
Merrill L. Stewart, Carrier Member

Fred Wurpel, Jr.  
Fred Wurpel, Jr., Employee Member

November 18, 1978

Interim Award No. 5

PUBLIC LAW BOARD NO. 2139

Parties: Brotherhood of Maintenance of Way Employees  
and  
The Washington Terminal Company

Statement of Claim: "(1) Carrier failed to comply with Rule 5-A-1 of the current M.W. Agreement in the dismissal of Claimant J. W. Thomas, Trackman, as of June 9, 1977.  
(2) Claimant J. W. Thomas be now reinstated to his former position of trackman, The Washington Terminal Company, and be made whole to lost wages, vacation and seniority rights unimpaired."

Discussion: After Board Hearing in which the Board received evidence, oral and written, and reviewed the parties' respective submissions, the Board has determined to issue this Interim Award, returning the Claimant promptly to his job and reserving to itself the matter of back pay, if any, for a subsequent award which the Board will issue and in which the Board will discuss and analyze in detail all the other aspects of this claim.

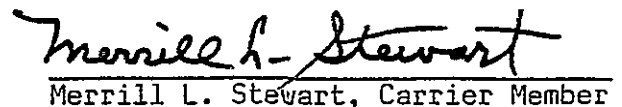
Award: Claim handled in accordance with this Interim Award.

Order: The Carrier is directed to comply with the Award on or before June 30, 1978.

Jacob Seidenberg

  
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Jacob Seidenberg, Chairman and Neutral Member

  
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Fred Wurpel, Jr., Employee Member

  
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Merrill L. Stewart, Carrier Member

June 2, 1978