

PUBLIC LAW BOARD NO. 2439

Award No. 119

Case No. 119

PARTIES Brotherhood of Maintenance of Way Employees
TO and
DISPUTE Southern Pacific Transportation Company
(Western Lines)

STATEMENT "1. That the Carrier's decision of May 13, 1986 to
OF CLAIM: dismiss B&B Carpenter, Mr. L.S. Melendrez, was
in violation of the current Agreement, unduly
harsh and in abuse of discretion.

2. The Carrier will now be required to reinstate
Claimant Melendrez to his former position with
seniority and all other rights restored unim-
paired and compensation for all wage loss suf-
fered.

FINDINGS

Upon the whole record, after hearing, the Board finds that the
parties herein are Carrier and Employees within the meaning of
the Railway Labor Act, as amended, and that this Board is duly
constituted under Public Law 89-456 and has jurisdiction of the
parties and the subject matter:

Claimant Melendrez had been employed by Carrier on March 18, 1963
and had a spotless record up to the time of the incident herein.
The record reveals that on March 4, 1986, Claimant apparently
sustained an injury while working on a retaining wall at Milepost
105. He was cutting a bolt and it snapped on him causing some
type of whiplash effect. Another employee witnessed this incident
and came to his aid. The foreman questioned Claimant with respect

to the incident and Claimant responded that he did not believe that he had injured himself in the course of the incident. However, approximately three weeks later he advised his foreman that he had sustained an injury on March 4 and filed an accident report at that time. Claimant's testimony at the hearing indicated that he had pain which became worse as time went by and on March 15 made an appointment with his doctor and was found by x-ray to have a pinched disc or pinched nerve at the base of his neck. Claimant was dismissed from service following investigation, having been found guilty of dishonesty and also late filing of an injury report (some 21 days following the alleged on the job incident).

Carrier takes the position that Claimant's injury may or may not have occurred in view of his testimony and that of his foreman. However, it is obvious that he failed to report the injury until some 21 days following the alleged accident. This failure, according to Carrier, prevented it from getting immediate medical attention for a Claimant which would have been for his own well being as well as to limit the liability of the Carrier. Carrier's rules are clear on this score and Carrier believes that its decision to terminate Claimant was justified.

Petitioner notes that first there was a language problem with respect to Claimant who does not speak much English. This was

apparent in the course of the hearing as well as throughout the entire handling of this matter. It is also clear, according to Petitioner, that there was indeed an incident on March 4 since Claimant brought it to the attention of his foreman at that time and another employee attested to its occurrence. The fact that he did not file his accident report until some 21 days later was because until time passed the trauma did not become severe enough to cause him to seek medical attention. Thus he did not know that there indeed was anything which could be categorized as an injury until some time after the event took place. Petitioner believes that it was totally improper to dismiss Claimant for dishonesty when such was not established, nor was it appropriate in terms of his long unblemished record of service.

As the Board analyses the record of this dispute, there is at least the strong presumption that Claimant suffered an on the job related injury on March 4. While this is indeed a presumption without hard evidence (in view of Claimant's disclaimer of serious injury on the date), it is not established without doubt. However, there is insufficient evidence to warrant the conclusion of Claimant's dishonesty with respect to the incident. There is the tenable thesis that the accident could have occurred and the


symptoms did not result in any attempt by Claimant to do anything about it until some time later. It is also evident, however, that Claimant was indeed derelict and in violation of Carrier's rules by failing to file the accident report until some 21 days following the incident. Carrier is correct in its insistence that such a transgression should not go unpunished. It is important and serious from every point of view to Carrier that accidents be reported promptly. However, in this instance in view of Claimant's long unblemished record, the fact that there was indeed presumably some incident occurring on March 4, it is believed that the penalty of dismissal was far too harsh for the particular transgression. Therefore, Claimant shall be returned to service with all rights unimpaired but without compensation for time lost which shall be considered the penalty for his transgression. His return to work, of course, shall be subject to a return to work physical examination in view of the type of injury he sustained.


AWARD


Claim sustained in part: the Claimant shall be returned to service with all rights unimpaired but without compensation for time lost: his return to service shall be conditioned upon passing a return to work physical examination.

ORDER

Carrier will comply with the Award herein within thirty (30) days of the date hereof.


I. M. Lieberman, Neutral-Chairman


H. L. Moles.
Carrier Member


C. F. Foote.
Employee Member

San Francisco, California

May 13, 1988

June 13