

PUBLIC LAW BOARD NO. 2439

Award No. 120

Case No. 120

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

STATEMENT
OF CLAIM:

- "1. That the Carrier violated the provisions of the current Agreement when, in a letter dated July 3, 1985, it dismissed Track Laborer D. H. Castaneda from its service on the basis of unproven charges, said action being in abuse of discretion.
2. Carrier shall now exonerate Mr. Castaneda of all charges and reinstate him to his former position with the Carrier with seniority and all other rights restored unimpaired and compensation for all wage loss suffered."

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 herein had been employed by Carrier in 1979. He was injured in an on-duty accident and was off on disability for some time. Claimant was recalled from furlough on March 11, 1985, and returned to work. He returned to work with an 80-lb lifting restriction which had been applied to him by his own doctor in his medical release. This information had been relayed to Carrier. When he returned to work on March 11, his foreman apparently was

unaware of any restrictions with respect to work assignments and put him to work installing switch ties which involved heavy lifting (much of it in excess of 80 pounds). Claimant worked a full day on March 11 but on March 12, the pain in his back became severe and he informed his Foreman that he had to go home and see a doctor because of it. Claimant also called the Maintenance of Way Clerk and informed him of his problem and his intentions of going home. The following day, March 13, Claimant informed his Foreman that he had to lay off because of his back problem. He also called the Regional Engineer and made him aware of the situation. On the same date, Claimant saw his doctor who prescribed bed rest. Subsequently, on July 3, 1985, Claimant was notified that he had been absent without authority from March 12 to the date of the letter (July 3), and that this was in violation of Carrier's Rule M-810 and, therefore, his employment had been terminated. There was also testimony in the record which indicates that the Claimant had been employed on a part-time basis by a janitorial service, while out of work due to the disability (both before and after his return to service in March, 1985) and, furthermore, had been going to school. His testimony was that he would rather earn his own living than exist on disability since he could not, at that time, work on a regular basis for Carrier.

Carrier concludes that Claimant had violated Rule 810 by his various acts. That Rule provides, in pertinent part, as follows:

"Employees must report for duty at the prescribed time and place, remain at their post of duty, and devote themselves exclusively to their tour of duty. They must not absent themselves from their employment without proper authority. They must not engage in other business which interferes with their performance of service with the Company unless advance written permission is obtained from the proper officer.

Continued failure by employees to protect their employment shall be sufficient cause for dismissal."

Carrier based its decision to terminate Claimant on both his absence from work during the dates indicated and failure to be in touch with Carrier during that period of time as well as outside employment in violation of Rule 810.

Petitioner relies, in part, on Rule 33 (d) which provides that employees on sick leave, or with physical disability, should not require written leave of absence but may "upon their return to service be required to furnish satisfactory evidence of their sickness or disability". In this case, according to the Organization, the Carrier was well aware that Claimant had been in an accident and, while he was off duty, he had taken every step required to inform Carrier of his intention and of his problem. Furthermore, he did not abandon his job, as the Carrier alleges, but simply was unable to work due to the physical limitations on his lifting, which Carrier did not honor.

As the Board views it, Claimant failed to inform Carrier, as was required in Rule 810, that he was working or intending to work for another employer during his period of disability. On the other

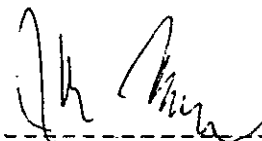
hand, Carrier was incorrect in assuming that Claimant had abandoned his job, since it was well aware of his disability problem, and of the fact that after returning to work he had a medical problem reoccur. Thus, it is the Board's view that termination in this case was inappropriate. We shall, therefore, order Carrier to reinstate Claimant to his former position subject to a return-to-work physical examination but with no pay for time lost.

AWARD

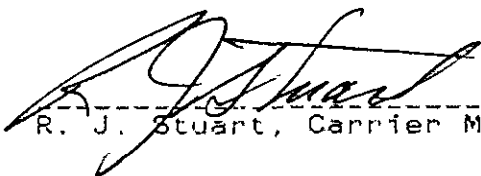
Carrier shall reinstate Claimant to his former position with all rights restored unimpaired but without pay for time lost. This shall be effected subject to Claimant passing a return-to-work physical examination in view of his prior medical problem.

ORDER

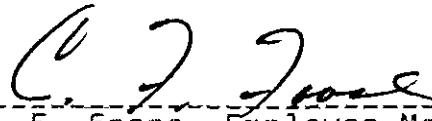
Carrier will comply with the Award herein within 30 days from the date hereof.



I. M. Lieberman, Neutral-Chairman



R. J. Stuart, Carrier Member



C. F. Foote, Employee Member

San Francisco, California
September 15, 1988