

PUBLIC LAW BOARD NO. 2439

Award No. 36
Case No. 36

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

STATEMENT
OF CLAIM

- "1. That the Carrier violated the provisions of the Agreement when it improperly dismissed Track Gang Laborer Mr. Alberto Villasenor, said action being in abuse of discretion.
2. That the Carrier shall reinstate Claimant to his former position with seniority and all other rights restored unimpaired and with compensation for all time lost."

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 had been employed by Carrier since May 18, 1977 as a Track Laborer. On December 5, 1979 he sustained an on duty injury and as a result thereof, with the exception of one short period of time, has been on sick leave pursuant to Rule 33 of the Agreement since that date. On February 11, 1980 Carrier sent Claimant a letter notifying him that he was placed on furlough because of a force reduction since his position had been abolished. Subsequently on May 30, Claimant was sent a notification that he was being recalled to service from his furloughed status. That letter indicated that Claimant was to report for assignment within fifteen days or by June 16, 1980. That letter further indicated that failure to return to service could result in forfeiture of seniority rights in accordance with Rule 16 of the Agreement. Since Claimant did not report for work on or before June 16, by letter dated June 17 Carrier terminated his services pursuant to Rule 16 of the Agreement.

Rule 16 indicates that employees are required to return to service within fifteen days after being recalled from furlough. That Rule provides further that failure to return to service shall result in forfeiture of seniority rights.

Carrier argues that Claimant was furloughed properly in accordance with the Rules and did not respond to the recall in a timely fashion nor did he present any evidence that he was unable to return to work at that time. Therefore, he was properly severed in accordance with Rule 16, according to Carrier. Carrier argues that Rule 33 (d) Sick Leave is independent totally of Rule 16 with respect to furlough.

Petitioner argues that it was wholly inappropriate and not required, certainly by Agreement, for Carrier to advise an employee that his position was being abolished when such employee was absent due to illness or injury. The requirements of Rule 13 (a), according to Petitioner, provide that the affected employee shall be given five working days notice of the position being abolished. It is argued, however, that this provision applies to the employee then filling the position which was vacated by the employee off on account of disability. The Organization argues that an employee on sick leave is not required to respond to recall in order to protect his seniority rights. Those rights are protected in accordance with Rule 13 (c) which provides in pertinent part as follows:

"Leave or Vacation - (c) Employees losing their positions while on leave of absence or vacation shall be allowed ten (10) days to make displacement after returning and reporting for work. "

When that Rule is coupled with Rule 33 (d) which provides that employees on sick leave shall not be required to have written leaves of absence but may be required to furnish evidence of their sickness or disability upon return to work fully protects Claimant in this instance, according to the Organization. The Organization also indicates that Rule 33 (g) is also relevant to the dispute since it indicates that employees while on sick leave are not required to act until such time as they return from sick

leave and then would be permitted to exercise seniority in accordance with the provisions of Rule 13.

Upon careful evaluation the Board concludes that Carrier misapplied the terms of the Agreement in this instance. It is evident that Claimant was off ill at the time that his position was abolished. Hence, the provisions of Rule 16 were not applicable to him at that time. That Rule should have applied to the employee filling the position which he was absent from due to his injury. Without in any way detracting from the necessity, if required by Carrier, for Claimant to have proved by satisfactory medical evidence that he was indeed disabled during the time period in question, it is clear that he should not have been dismissed due to the operation of the furlough and return to work rules.

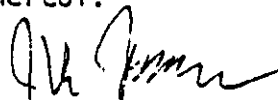
There is no evidence in the record to indicate when or indeed whether Claimant was physically able to return to work. Thus, with respect to the question of time lost, it is incumbent upon Petitioner to supply Carrier with evidence, if any, to indicate at what date Claimant was fully able to return to duty. In all other respects, the claim must be sustained with a caveat that Claimant obviously must pass, after submission, a re-entry physical examination in order to have his position or seniority back.

AWARD

1. Claim sustained in accordance with the findings above.
2. As a condition for reinstatement, Claimant must pass the normal re-entry physical examination of Carrier.

ORDER

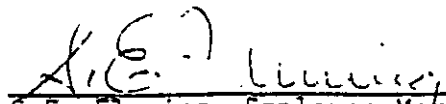
Carrier will comply with the Award herein within thirty (30) days from the date hereof.



I.M. Lieberman, Neutral-Chairman



L.C. Scherling, Carrier Member
San Francisco, CA



S.E. Fleming, Employee Member