

PUBLIC LAW BOARD NO. 2439

Award No. 56
Case No. 56

PARTIES
TO
DISPUTE

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

STATEMENT
OF CLAIM

- "1. That the Carrier violated the provisions of the Agreement when in letter dated February 4, 1982, it advised track laborer L. R. Ramirez to the effect that testimony presented at the hearing held January 22, 1982, developed his responsibility in being absent without authority from August 17, 1981 through and including October 30, 1981, which constituted a violation of the Carrier's Rule M-810 and, for reasons thereof, his termination with the Carrier would stand, said action being excessive, unduly harsh and in abuse of discretion.
2. That track laborer L. R. Ramirez shall now be reinstated to his rightful position on Extra Gang No. 51 with seniority and all other rights restored unimpaired, and compensated for all time lost therefrom."

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 as a laborer on Extra Gang No. 51 with headquarters at Niles, California, approximately seven miles from San Jose. He had entered Carrier's service on October 14, 1974. Claimant had been injured in February of 1981 and was assigned to light duty from May 11, 1981, until July 21, 1981, when he was released for full duty. On approximately August 3, 1981, Mr. Ramirez, as a consequence of being incarcerated by civil authorities, commenced working for the Carrier on a work furlough program sponsored by the County Rehabilitation Center. The work furlough program required that individuals start the work day at the Center and must terminate the work day at the Center on the same day. The program, in this instance, was implemented by the cooperation between the Company and the County Rehabilitation Center.

Claimant worked on the work furlough program until August 13, 1981. On August 17 his extra gang was required to work in the Sacramento, California, area, and was also required to perform overtime work. Sacramento is located approximately 85 miles from Niles, California. The work requirement precluded Claimant from further participation in the County-sponsored work program. Carrier notified the Sheriff's office of the inability of Carrier to continue the program for Claimant due to the new assignment for his gang. Claimant thereafter was absent from his work assignment from August 17 to October 30, 1981, and did not apply for a leave of absence. On October 30, 1981, a dismissal letter was sent to him in accordance with Appendix H of the Agreement. Claimant requested a hearing based on the provisions of Appendix H which was accorded him. At that hearing, he testified that he had been absent from service because of being incarcerated.

Carrier argues that Claimant clearly was absent due to his own actions. Incarceration under the circumstances did not constitute authority to be absent from his employment, thus Carrier was deprived of Claimant's services for a period of 2½ months. For this reason, due to his own actions, Carrier argues that Claimant was unreliable and termination was appropriate under the Agreement.

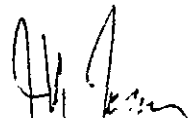
Petitioner notes initially that Carrier was well aware of Claimant's whereabouts during the period of his absence. This is obvious, according to the organization, since Carrier had decided to allow Claimant to participate in the work furlough program. Petitioner argues that further participation in the program would have been possible, even though Claimant's gang was moved, since there was other work available for him had the Carrier decided to permit him to perform such work. Petitioner also notes that Claimant was still undergoing medical treatment for the injury which he had sustained and there was some question as to whether, indeed, he would have been able to perform regular work in the Sacramento area as a result of the treatments he was undergoing. The organization argues, in addition, that the failure of Claimant to request leave of absence is certainly understandable and is particularly irrelevant in view of the fact that Carrier was well aware of Claimant's whereabouts during the entire period of time. Under the circumstances, the organization argues that terminating Claimant's services was harsh and excessive discipline and in abuse of discretion.


The Board must indicate that it is well established that incarceration is always


caused by an employee's own actions and cannot be considered to be a circumstance permitting absence without authority. In this case, Carrier initially attempted to cooperate and afford Claimant an opportunity to retain his position in the work furlough program. It was not obligated to do so. The omission of the leave of absence request by Claimant was not insignificant as the organization would argue. Even though Carrier was well aware of Claimant's whereabouts, his absence without a leave of absence being granted was not one which had to be condoned and accepted by Carrier. The Carrier is normally expected to rely upon its employees to be present and, in this instance, Claimant's incarceration and his inability to work were sufficient grounds for termination under the provisions of the contract. The Claim must be denied.

AWARD

Claim denied.


I. M. Lieberman, Neutral-Chairman


L. C. Scherling, Carrier Member


C. F. Foose, Employee Member

San Francisco, CA

October 12, 1983