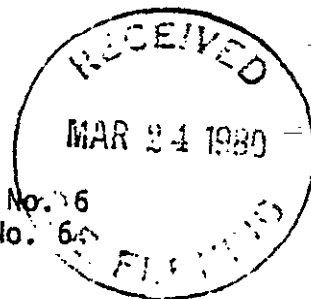


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PUBLIC LAW BOARD NO. 2439

OFFICE OF GENERAL CHAIRMAN

Award No. 66
Case No. 66



PARTIES
TO
DISPUTE

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

STATEMENT
OF CLAIM

- "1. That the Carrier violated the provisions of the Agreement when on March 16, 1978 it dismissed Mr. R.J. Padilla without first according him the benefit of a fair and impartial hearing as prescribed in Rule 45, said action being in a abuse of discretion and unduly harsh.
2. That Claimant now be reinstated with seniority and all other rights restored, unimpaired, and compensated for all wage loss suffered commencing on February 8, 1978 and all days subsequent thereto until such time as he is allowed to return to his rightful position."

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, a Welder Helper, was charged with insubordination in that he failed to follow or refused to follow the instructions of his superior Welder, Mr. Vigil, and his Roadmaster, Mr. D.L. Hand, on February 8, 1978. The hearing was scheduled for 9:00 A.M. Thursday, February 23, 1978 and subsequently, at the request of the Organization, it was changed to March 2, 1978. The hearing took place on March 2 and March 3 and subsequently Claimant was notified that Carrier affirmed the original charge and he was dismissed.

As background, Claimant had suffered a duty connected injury in September of 1977. On February 13, 1978 Claimant was released to return to work by his physician with the restriction that he could not lift over fifty pounds while at work. Carrier was aware

of the restriction.

Initially, Petitioner takes the position that Claimant was denied due process by the manner in which the hearing was conducted. Claimant did not appear at the hearing at the scheduled hour on March 2, 1978. His representative, of course, was present. The Hearing Officer elected to proceed with the hearing on that date and was told subsequently that Claimant would, indeed, appear on the following morning. He rescheduled the hearing to open to continue the testimony on the following morning when Claimant was present. In the meantime, on March 2, the Hearing Officer did take testimony from three Carrier witnesses. On March 3, Claimant's representative requested that he be read the entire notes of the first day of the investigation which the Hearing Officer refused. It is based on this action of the Hearing Officer principally that Claimant's representative objected and currently takes the position that this action of the Hearing Officer denied Claimant due process. An examination of the transcript of the investigation reveals that on March 3 with Claimant present all of the witnesses who had testified on the previous day reappeared, repeated their testimony and were given cross examinations by both Claimant and his representative. The transcript reveals no shortcomings whatsoever to justify the contention that Claimant was denied due process. This contention must be rejected.

With respect to the merits Petitioner argues that on the day in question, Claimant had refused to lift the hose as instructed by his Supervisor and the Roadmaster based on his previous injury. The Organization points out that Claimant was in pain and felt that the instruction would have exacerbated his injury. The Organization also points out that the Roadmaster and the other Supervisor did not know for a certainty the weight of the welding hose until after Claimant was removed from service. At that time, only were they sure that the hose did not exceed fifty pounds in weight.

Carrier argues that the testimony indicates that Claimant was simply insubordinate in refusing to fulfill the instructions of the two Supervisors. This testimony, according

to Carrier, is clear and unequivocal. In fact, at one point, the testimony indicates that Claimant told the Roadmaster that he could do the work but that he would not.

The transcript reveals certain conflicts in the testimony of Claimant and Carrier witnesses. Those conflicts have been resolved by the Hearing Officer in terms of credibility in favor of Carrier witnesses. Under those circumstances, there is ample evidence to support Carrier's conclusion that Claimant was guilty of the charges.

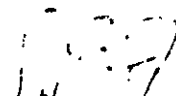
With respect to the measure of discipline imposed, Carrier relies in part on Claimant's previous record to sustain its decision to dismiss him. That record, according to Carrier, includes not only 105 demerits during 1975 and 1976 but the fact that Claimant was dismissed for insubordination in 1976 and only reinstated in February of 1977 on a leniency basis. Based on Claimant's past record and the fact of his guilt in this particular incident, there is no basis whatever for disturbing Carrier's conclusion with respect to the penalty imposed. The claim must be denied.

AWARD

Claim denied.



I.M. Lieberman, Neutral-Chairman


Carrier Member

Employee Member

San Francisco, California

3-11, 1980