

PUBLIC LAW BOARD NO. 2774

Award No. 29
Case No. 38

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employees
and
Atchison, Topeka and Santa Fe Railway Company

STATEMENT
OF CLAIM

- "1. That the Carrier violated the terms of the Agreement when they terminated the services of Trackman P.J. Silva, said termination being arbitrary and without cause.
2. That Claimant P.J. Silva be reinstated to the position of Trackman with seniority, vacation and all other rights unimpaired and additionally, be compensated for loss of earnings suffered account of the Carrier's wrongful action."

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.

The record indicates that Claimant was employed by Carrier on September 20, 1979. Approximately two months later Claimant allegedly sustained an on-duty back injury when he fell from a bridge while removing cross ties from under the rail. Claimant did not file a claim against Carrier nor did he formally report the accident. Subsequently he came under medical care for the back injury. Claimant was cut-off during a forced reduction on December 3, 1979 and was recalled to service in April of 1980. His recurring back pain resulted in consulting a doctor who released him for light duty only which information he gave to his Foreman on May 12, 1980. On May 14, 1980, Claimant was informed by the Roadmaster that he was being removed from service on account of his disability and was asked to consult a doctor. A physical evaluation was required by Carrier at that time. Three days subsequently, the evidence indicates that the Roadmaster made attempts to contact Claimant and left messages for Claimant to return

his calls and received no response whatever. On May 22, 1980, Claimant requested leave of absence and gave the reason therefore as "remove from service." The leave was requested effective May 15, 1980. No response to the leave request was ever made by Carrier and nothing further was heard from Claimant until September 16, 1980 when Carrier wrote Claimant a certified letter notifying him that his assignment was being terminated because of being absent without authority starting May 16, 1980. The letter further indicated that he could, within twenty days from the date of the letter, request a formal investigation. By letter dated October 3, 1980, Claimant did indeed request a formal investigation. In addition on October 27, 1980 the General Chairman allegedly telephoned the Chief Maintenance Clerk and advised that Claimant was not physically able at that time to attend an investigation and that he would advise as to the date that Claimant was physically able to do so. On January 13, 1981 the General Chairman addressed a letter to the Superintendent requesting that the investigation be scheduled. By letter dated January 29, 1981 Carrier responded:

"Mr. Silva's letter requesting an investigation was not received within twenty (20) days limit as specified in letter of September 16, therefore, will not honor his request for an investigation."

Subsequently, on February 4, 1981 the claim which resulted in this dispute was filed.

Carrier's position first is that the claim should be barred in view of it having not been filed within sixty days from the date of the occurrence on which it is based. Further Carrier insists that Claimant was absent without leave from May 16 to September 16, 1980 and Carrier had made every effort to assist him in maintaining his employment relationship to no avail. Carrier argues that the request for an investigation was received twenty-one days following the date of the Carrier letter terminating Claimant's seniority. Furthermore, with respect to the leave of absence, Carrier insists that the leave could not be granted until Claimant was so notified by his superior officer. In this instance no notification was received and hence, Claimant was never granted a leave of absence. Under the circumstances of the serious infractions attributable to

Claimant, Carrier concludes that it was eminently justified in dismissing him.

Petitioner's arguments are essentially that Carrier made several serious errors in the handling of this matter. First, it is contended that Carrier was incorrect in failing to respond to Claimant's request for leave of absence dated May 22, 1980. Further, Petitioner argues that the request for an investigation following Carrier's letter dated September 16, 1980 was timely and should have been granted. In addition, Petitioner argues that it was totally surprised by Carrier's refusal to convene the investigation when requested by the General Chairman on January 13, 1981 and in view of that refusal, the claim herein was timely filed.

A number of circumstances involving this dispute must be examined. First, at the time that Claimant received Carrier's letter of September 16, 1980, his status was that of an employee a) who had been withheld from service at Carrier's request and b) who had requested a leave of absence for which no response had been received. Thus, Carrier's conclusion that he had been absent without leave thus warranting dismissal was on its face, highly suspect since his status was that of an employee withheld from service by the Roadmaster.

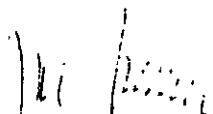
By the same token, a number of things with respect to Claimant's actions are highly questionable. First, there was grave irresponsibility on his part in not responding to the Roadmaster's repeated requests by telephone to discuss with him the securing of a physical evaluation. Further, the eleventh hour request for an investigation (at best on the twentieth day and perhaps as late as one day) cannot be ignored. The circumstances after careful evaluation must be considered to be unusual and the decision to terminate Claimant without investigation under the circumstances is questionable, at best. The Board must conclude that Claimant was improperly dismissed under the circumstances involved herein. He shall be returned to service with all rights unimpaired but in view of his irresponsibility and failure to exercise proper diligence in responding to Carrier's request, he shall not be paid for time lost.

AWARD

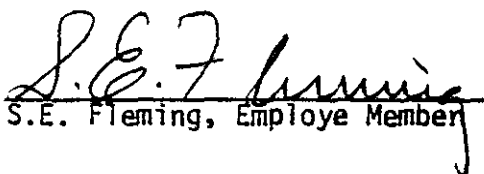
Claim sustained in part; Claimant will be restored to service with all rights unimpaired but without pay for time lost.

ORDER

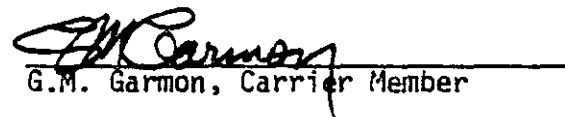
Carrier will comply with the Award herein within thirty (30) days from the date herein.



I.M. Lieberman, Neutral-Chairman



S.E. Fleming, Employee Member



G.M. Garmon, Carrier Member

May 13, 1982
Chicago, IL