

PUBLIC LAW BOARD NO. 2774

Award No. 56
Case No. 66

PARTIES
TO
DISPUTE

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

STATEMENT
OF CLAIM

- "1. That Los Angeles Terminal Division track man, J. K. Davis, was unjustly dismissed from the service of the Carrier.
- "2. That claimant Davis be reinstated to service with seniority, vacation, all other basic rights and benefits restored, compensated for wage loss and/or otherwise made whole."

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 as a track man on September 5, 1972. Following a formal investigation claimant was terminated for being responsible for an absence from duty without proper authority starting September 18, 1980 through September 30, 1980. He was found to be in violation of Carrier's Rules 13 and 15 (General Rules For the Guidance of Employees). Rule 13 in pertinent part provides as follows:

"Employees must not be absent from duty without proper authority, and when authorized absence is in excess of ten (10) calendar days, entire absence must be authorized by formal leave of absence (Form 1516 standard) except for scheduled vacation period."

The record further indicates that claimant was under a doctor's care from September 18, 1980, and was released by that doctor on Friday, September 26, 1980, to resume his duties. The tenth calendar day following his absence was Saturday, September 27th, which was an assigned rest day for claimant. He reported for duty on September 29, 1980, a Monday, and was instructed that he would not be able to work

due to his having been terminated.

It is Carrier's position that claimant was clearly absent from duty without proper authorization for the period in question. He did not secure a leave of absence which was required and, even if he was found not to have been under the rule requiring a leave of absence, he did not have authority for such absence which is in itself a dismissal offense. Petitioner insists that claimant was not absent for a period of ten days requiring a leave of absence. Specifically the organization argues that claimant came under a doctor's care until Friday, September 26th, and was prepared to resume his duties on the tenth day, which was September 27th. However, that being an assigned rest day, he reported for work the following Monday, when he was instructed that he could not work. Furthermore, the organization contends that the foreman in question did not testify and the statements attributed to him were secondhand and were clearly not determinative of the facts in the case. Specifically the organization insists that on two occasions the claimant informed the foreman that he was ill and that was the reason for his absence during the period in question.

An examination of the record of this dispute indicates that the testimony upon which Carrier based its conclusions that claimant was guilty consisted of two statements by the Roadmaster as follows:

"It was reported to me by Mr. Davis' foreman, Henry Padilla, that Mr. Davis was absent starting September 18th and he had not heard from him. I have here a copy of the foreman's pocket diary, which is the official time document for Section 13, and it states Mr. J. K. Davis was absent beginning on the 18th of September through the 30th of September. During that period of time we received no information from Mr. Davis about his whereabouts or intentions or any comments concerning his absences....

"I have checked with Foreman Padilla and he informed me that he had not received any information from Mr. Davis. I also checked with the Roadmaster's clerk, and he did not receive any information from Mr. Davis or his records did not reflect that he received any information from Mr. Davis."

The record indicates that Mr. Davis, at the investigation, testified that he had talked to his foreman on two occasions during the period of absence, once by telephone and once when he came in and received his check from his foreman on approximately

September 25th. Those statements are unrebutted. There is also testimony in the record of the investigation that the claimant was well aware of the requirements of the rule concerning leaves of absence. Further, it is noted that the organization objected to the fact that the testimony of the Roadmaster was not sufficient to establish a case since he was only referring to records from the foreman and had no direct knowledge of the incident in question. Carrier notes that the objection to this type of evidence was not raised in proper fashion at the time of the hearing.

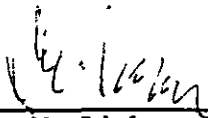
An evaluation of the entire record of this matter indicates that there was insufficient evidence in the transcript of the investigation to warrant the conclusion of the absence without leave. The testimony of the Roadmaster which relates to this incident is that cited above. At the same time there is the unrebutted testimony of the claimant that he talked to his foreman on two occasions during the hiatus due to his illness. The Board notes further that it is obvious that the circumstances of the duration of the absence would indeed have required a leave of absence to have been requested by the claimant, and he did not do so. It also appears from the record of the handling of this dispute on the property that Carrier relied heavily on past record of infractions by claimant, some of which were for a similar offense. The Board concludes that, based on the entire record, the discipline accorded claimant in this particular circumstance was inappropriate: it was harsh and arbitrary. The past record cannot be used as both parties are aware for the purpose of determining guilt or innocence. There was insufficient evidence to establish clear guilt on the part of claimant in view of his testimony that he did indeed communicate with the foreman. On the other hand, he was far from diligent in handling his absence, particularly in view of his failure to secure a leave of absence. For the reasons indicated therefore, the Board finds that claimant shall be reinstated to his former position with all rights unimpaired, but without compensation for time lost. Furthermore, claimant shall be put on notice that his attendance will be subject to close scrutiny and further infractions could result in final termination without recourse to favorable opinions from a Board such as this.

AWARD

Claim sustained in part; claimant shall be reinstated to his former position with all rights unimpaired but without compensation for time lost.

ORDER

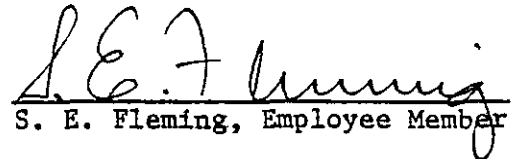
The Carrier will comply with the award herein
within thirty days from the date hereof.



I. M. Lieberman, Neutral-Chairman



G. M. Garmon, Carrier Member



S. E. Fleming, Employee Member

April 29, 1983
Chicago, Illinois