AWARD NO. 6
Case No. 6

PUBLIC LAW BOARD NO. 3558

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
TO)
DISPUTE) SOUTHERN PACIFIC TRANSPORTATION COMPANY (EASTERN LINES)

STATEMENT OF CLAIM:

"Claim on behalf of track laborer Alfeard Terry, Jr., for reinstatement to his former position with pay for all time lost, with all seniority, vacation, and all other rights unimpaired commencing July 6, 1983 and to run concurrently until such time he is reinstated, alleging unjustly dismissed." (MW-83-97/399-23-A)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee respectively within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

An employee of the Carrier for 10 years, Claimant was dismissed from its service following his report of pain in the lower back. At the time Claimant reportedly sustained such injury he was on "light duty", having been previously returned to service following an earlier alleged on-duty injury to his back. The Claimant had reportedly been instructed by a Carrier supervisor to show other employees which trailer to take out and which one to move in, but elected to crank a trailer down, complaining that after he did so and straightened up he felt pain in his lower back.

In its notice of dismissal to Claimant, the Carrier noted this was Claimant's 10th personal injury since he had been employed by the Carrier, despite, what it termed, Claimant having been given personal supervision and counseling as to the proper method to perform work so as to avoid personal injury. It was the Carrier's contention that since Claimant routinely exhibited carelessness in act and attitude toward personal safety, it had no recourse but to dismiss Claimant from its service. In particular, Carrier cited Claimant for violations of Rules "M" and 801 of Carrier's general rules and regulations. These rules, in pertinent part, read as follows:

"M. Carelessness by employes will not be condoned and they must exercise care to avoid injury to themselves or others.

* * * * * * * *

"801. Employes will not be retained in the service who are careless of the safety of themselves or others,..."

At a company hearing requested by Claimant, there was a review of the circumstances surrounding the last reported injury, as well as each of the past personal injuries. Essentially, at the hearing and in presentations to this Board, it was the Carrier's position that Claimant had failed to use good judgement and exercise proper care to avoid making himself vulnerable to possible injury.

It is the position of the Organization that Claimant did not receive a fair and impartial hearing, that the hearing officer failed to bring out all the facts and let "the chips fall where they land." It also argues that the hearing officer permitted evidence to be made a part of the record after being objected to by Claimant's representative, and that the hearing officer tried to keep Claimant's representative from bringing out facts which it alleges clearly show that the Carrier was attempting to cover up for the injuries that were sustained while Claimant was on light duty and was required to perform work that was normal trackman's work, which it states was laborious and resulted in Claimant reinjuring himself. The Organization further argues that the hearing officer permitted hearsay evidence, undocumented testimony, and mere assumptions to be entered into the record. It submits that Claimant was working safely, and was not careless to himself or other employees while performing his duties as a trackman.

As concerns the Organization's several arguments that the dismissal of Claimant be set aside account what it contends Claimant having been denied a fair and impartial hearing and defects in the manner the hearing officer conducted the investigation, we do not find these contentions sufficient to hold that Claimant had been denied the rights of due process. While the hearing may, in some respects, not have been wholly compatible with standards generally followed in most company hearings relative to the introduction of documentary reports, the actions of the hearing officer in calling for several Carrier witnesses to gather and substantiate the reports did not constitute reversible error. In our opinion, we think it clear that both the Claimant and his representatives were permitted to fully participate in the hearing, and that the hearing officer did not subvert any material evidence or testimony. It must be borne in mind that the conduct of a company hearing does not require an adherence to all the attributes of a trial of a criminal proceedings as in the courts. A company hearing is more in the nature of an administrative proceeding than a formal action at law. It is not governed by technical rules pertaining to the admission or consideration of evidence or testimony as with criminal trials or civil court actions. Rather, the Carrier must show that it acted upon evidence that warranted the action it has taken and that it had not acted unreasonably or arbitrarily in considering all the relevant facts and testimony presented at the hearing. In other words, it has an obligation to conduct a fair and impartial hearing, not a perfect one.

In regard to the question of whether or not Claimant is a unsafe employee, we think it clear from a review of the transcript, including statements by the Claimant himself, that, as the Carrier states, it is apparent that he has failed to use good judgement and exercise proper care to avoid making himself vulnerable to injury. Actually, Claimant himself admitted to having in the past worked in an unsafe manner "at times". He also indicated an awareness to the jack he had used to crank the trailer, and which allegedly resulted in his latest injury, being defective, albeit he was not even suppose to having been cranking down trailers on

his light duty job assignment. Certainly, his past experiences with alleged back problems should have made him aware that great care had to be exercised to avoid injury to himself.

Under the circumstances of record, it appears the Carrier had substantial grounds to conclude Claimant's latest reported injury, when viewed in the light of his regular and repeated pattern of injuries, several of them being of the same nature, made it evident Claimant posed great risks to himself and others if he was to be permitted to continue in service. Accordingly, we find no basis to hold that Claimant's dismissal from service was arbitrary or unreasonable.

AWARD:

Claim denied.

Robert E. Peterson, Chairman
and Neutral Member

C. B. Goyne, Carrier Member

M. A. Christie, Employee Member

San Antonio, TX
June 30, 1984