

PUBLIC LAW BOARD NO. 5396

Parties
to the
Dispute

:	:	:
:	:	:
:	BROTHERHOOD OF MAINTENANCE	:
:	OF WAY EMPLOYES	:
:		PLB Case No. 49
:	vs.	:
:		:
:	UNION PACIFIC TRANSPORTATION	:
:	COMPANY	:
:	(former Southern Pacific	:
:	Transportation Company, Western Lines)	:
:		:
:		:

STATEMENT OF CLAIM

1. The dismissal of Assistant Foreman I. De La Cerda was in violation of the Agreement, based on unproven charges and an abuse of discretion.
2. Claimant De La Cerda must be reinstated to his previous assignment with his seniority and all other contractual rights restored unimpaired; he must be compensated for all wage losses incurred since his wrongful dismissal; and all charges and reference to this incident must be expunged from his personal record.

FINDINGS

Claimant I. De La Cerda, an Assistant Foreman with approximately thirty-four years of service, was sent the following Notice of Investigation on March 27, 1997:

You are hereby notified to be present at the office of the Union Pacific Railroad, 301 Gila Street, Yuma, Arizona, at 10:00 a.m. on Friday,

April 18, 1997, for formal investigation to develop the facts and place responsibility, if any, in connection with your alleged failure to comply with the instructions given to you verbally by your Supervisor Joe Romero when discussing the written instruction provided to you on February 26, 1997 (for which you signed), that you were not to engage in any physical activity and that your job was to oversee the men in the performance of the gang work. You have allegedly failed to comply with these instructions as you have subsequently turned in an accident report stating that you had injured your back on March 24, 1997, while performing physical activities. Additionally, for your alleged non-compliance with the specific instructions of Supervisor Louis Martinez to you on March 24, 1997, to report to work for restricted duty on March 25, 1997, in accordance with the doctor's note you had submitted on March 24, 1997. Your actions are also allegedly insubordinate in that you did not comply with Mr. Martinez' instructions even after being advised that failure to report for your assignment on March 25, 1997, would constitute insubordination and absenteeism. Finally, you were allegedly absent without authority on March 25, 1997, inasmuch as you did not report to work nor did you secure proper authority to be off work:

Carrier notified Claimant on May 28, 1997, that

Evidence adduced at formal investigation held at 301 Gila Street, Yuma, Arizona on April 18, 1997, established your responsibility for your failure to comply with the instructions provided to you on February 26, 1997.

Your actions in this case constitute a violation of Rules 1.6, 1.1.2, 1.13, 1.15, 23.1, 71.2.3.1, 71.2.3.3, 80.2.2, 80.3.1 of the General Code of Operating Rules.

For reason stated, you are hereby DISMISSED from service with the Union Pacific Railroad Company.

The Organization believes that because of this Notice, Carrier dropped two of the three charges against Claimant (failure to comply with instructions and being absent without authority). Carrier maintains that all three charges were sustained, given Carrier's mention of the specific Rules that were violated. It also contends that this argument was not raised previously on the property and that each charge was considered throughout the handling of the appeal. This Board concludes that all of the charges should be addressed in this Award.

Based upon a complete review of the record, the Board finds that there is sufficient evidence to sustain each of the charges. It is evident from this review that Claimant was under a doctor's lifting restriction at the time he hoisted a forty to fifty pound track jack and injured or reinjured his back. Although the Organization is correct that the instructions that Claimant signed on March 5, 1997, do not say that Foremen or Assistant Foremen are not to assist members of their gangs in the performance of their work, there is testimony in the record that Claimant was told this at the time. The Hearing Officer found this testimony to be credible and he was in the best position to make that judgment. At the very least, Claimant displayed poor judgment in disregarding his lifting restriction. At most, he failed to follow bona fide instructions of his Supervisor.

The Board recognizes that Claimant is not proficient in English, but it appears that he had someone to translate for him


at any time when he was uncertain as to what was being said. As a long-term employee, he had a responsibility to ensure that he fully comprehended orders. He cannot fall back on the argument that he did not comprehend what was being said.

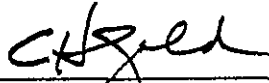
The Board also finds that Claimant did not comply with the directive given by Supervisor Louis Martinez to report to work on March 25, 1997. His absence must be deemed an AWOL, since he did not obtain authorization to be on leave that day. If there was a question as to what he could or could not do physically, that could have been addressed on March 25.

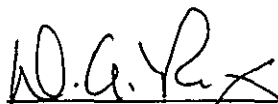
Because of Claimant's seniority, the Board cannot endorse his termination from service. But because of the seriousness of his infractions, we cannot support his reinstatement with back-pay.

AWARD

Claim sustained in part and denied in part. Upon thirty days of the approval of this Award and Claimant's passage of a return-to-work physical, he is to be reinstated with seniority and all other rights intact, but without backpay.


R.B. Wehrli,
Employee Member


C.H. Gold,
Neutral Chairman


D.A. Ring,
Carrier Member

December 1, 1999
Date of Approval