PUBLIC LAW BOARD NO. 1795

Award No. 15
Case No. 15

PARTIES TO DISPUTE: BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
SOUTHERN PACIFIC TRANSPORTATION COMPANY
(Pacific Lines)

STATEMENT OF CLAIM:

1. That the Carrier violated the Agreement when on August 3, 1976 it dismissed Mr. Enrique A. Zaragoza from the service of the Southern Pacific Transportation Company as the result of an unfair hearing held on July 13, 1976 while Claimant was still on sick leave, said action being unjust, unreasonable, and in abuse of discretion.

2. That the Carrier now reinstate Claimant Zaragoza to the service of the Carrier with seniority and all other rights restored unimpaired.

STATEMENT OF FACTS: Claimant E.A. Zaragoza entered Carrier's service as a Track Laborer on October 18, 1954. It appears that until the events involved in this dispute occurred, Claimant was employed by Carrier for some 20 years. The Organization asserts that during this period of time Claimant was at all times "a faithful and conscientious employe". The record indicates that Claimant suffered an accident during his tour of duty on April 22, 1974 when his crane was struck by a moving locomotive; although, as Carrier asserts, there was no

major direct blow to Claimant. It appears, that subsequent to the date of this accident, Carrier recognized Claimant's injury and disability and made arrangements for Claimant to receive treatment and therapy at the Department of Rehabilitation at St. Joseph's Hospital in San Francisco, California. On or about April 6, 1976, as appears from the record, Claimant was discharged from the hospital and released to return home.

It is of some pertinence to note that during this period of two years Claimant had apparently instituted legal proceedings in his own behalf and had retained counsel. It is also quite likely that throughout the course of this dispute it is quite probable that Claimant was assumedly acting under the advice of his counsel. The latter statements are merely assumptions and, from a legal point of view, Claimant had the right to proceed as he deemed proper, of course.

In any event, Carrier asserts that during this period of two years, after several examinations and consultations by doctors to whom Claimant was referred by attorneys retained by him, Carrier caused his file to be reviewed by a medical consultant, Dr. A.G. Tellson. On March 31, 1976 the latter recommended that Claimant be directed to return to duty or show cause why he could not do so. Additionally, Carrier's chief medical officer released Claimant on April 6, 1976 to return to duty. Throughout this time, there is nothing in the record

to indicate that Claimant had filed any documents with Carrier to indicate that his disability was continuing and that he was unable to return to work as requested by Carrier.

On April 8, 1976 Claimant was directed by Division Engineer Widmann, the head of his department, to return to duty by April 15, 1976. This notice was by certified letter prior to April 12, 1976, to which Claimant did not respond although he did acknowledge receipt of the letter by his signature on the 12th. The letter advised him that his failure to report for duty on April 15, 1976 would be considered as being absent without authority in violation of Rule M810 of the Rules and Regulations of the Maintenance of Way and Structures.

Rule M810 reads in pertinent part as follows:

> "Employes must report for duty at the prescribed time and place . . . They must not absent themselves from their employment without proper authority."

Following this letter, Claimant was cited for formal hearing in connection with his failure to report for duty by April 15, 1976. The hearing was originally scheduled to be held on May 28, but was twice postponed at the request of Claimant's Organization Representative and was finally re-scheduled to be held on June 22, 1976. It appears from the record that on June 21, 1976 the Organization addressed a letter to Carrier's Division Engineer Widmann indicating that it had taken no action to contact Claimant and that Claimant had not contacted the Organization as of June 4, 1976.

Accordingly, the hearing was postponed once again for a third time by letter of June 22, 1976 and was actually held on July 13, 1976.

It is important to note that although in each instance Claimant acknowledged receipt of the specific Carrier letters, the Notice of Investigation, and the Notices of Adjournment, he failed to respond to any one of them and completely ignored all communications of Carrier.

In fairness to Claimant, it should be pointed out that as of July 14, 1976, his physician addressed a letter to the Organization, a copy of which is a part of this record, which letter stated precisely as follows:

> "This letter will confirm that Mr. Zaragoza is under my care for a neck and back injury and is not able to work at this time. Further details of his condition will be furnished upon request. Sincerely yours, E.R. Titus, D.C."

This letter (sent after the investigation was completed) makes no reference to any reason why Claimant could not reply to any of Carrier's communications, or why he could not report on the date of the investigation or on any of the adjourned dates. In short, he did not report for duty as requested by Carrier, he did not report at the investigation, (which obviously involved penalties under the Rules) and, finally, did not offer any explanation personally or in detail why he was unable to return to work. As of this point, there

was no evidence, at least as recorded in the file, that Claimant was disabled any longer or that he was unable to return to his job assignment as demanded by Carrier.

Carrier takes the position that after a reasonable period of time, in this case approximately two years, it has a right to demand of an employe who claims disability that he establish as a matter of medical fact that his disability is continuing and that he is actually disabled from returning to work. Carrier continues its position that, in the absence of such proof, it has a right to demand that an employe return to work on reasonable request and, by that upon his failure to do so, he renders himself liable to formal hearings and punishment for violations. In support of its position, Carrier has attached as part of the record a letter of Dr. John E. Myers dated April 6, 1976, the pertinent part of which reads as follows:

> "Review of this employe's medical finds him to be essentially able to return to work immediately. This letter will serve as notice of return to duty from this office. Will you please advise Mr. Zaragoza accordingly."

This letter was addressed to Division Engineer Widmann.

In essence, on its part, the Organization's position is that an employe is not required to attend, participate and defend himself on charges brought by Carrier while he is "not actively employed" by Carrier because of disability or illness. The Organization contends that the employe is "not actively employed" while he is disabled or on sick leave and, accordingly, not controlled by Carrier's rules and regulations. in support

of this position, the Organization cited Rule 33(d) of the current Agreement between the principals which reads as follows:

> "Sick Leave.- (d) Employes on sick leave or with physical disability shall not require written leave of absence, but they may, upon their return to service, be required to furnish satisfactory evidence of their sickness or disability." (Underlining supplied by the Organization)

It should be noted at this point that the particular Rule 33(d) really has no application to this dispute. It relates to proof of physical disability or evidence of sickness in certain situations and emphasizes that these need not be furnished on a continuous basis. It is hardly logical for the Organization to contend that an employe is not subject to the jurisdiction of the Carrier in any manner whatsoever, for any period of time whatsoever, because of the specific language of Rule 33(d). Rule 33(d) carries no such implications, either expressly or otherwise.

In any event, as indicated above, the actual hearing was held on July 13, 1976. The evidence introduced at that hearing consisted of the letter to Claimant dated April 8, 1976 requiring him to return to work on April 15, failing which that he would be charged with violations of Rule M810. In effect and in actuality this would consider him as being absent without authority in violation of the rule itself.

As hearing exhibits, there were also proof of the Notice of Hearing, various Notices of Adjournments of the hearing, certain medical statements, various letters to Claimant, etc. In each case Claimant acknowledged written receipt of the various communications from Carrier, offered no response and, as a matter of fact failed to appear at the hearing in person or otherwise. It is true that he was represented by Mr. Guerrero of the Organization but, as stated by Mr. Guerrero, such representation was not specifically authorized by Claimant. Following the hearing, Claimant was found guilty of violating Rule M810 and, by letter of August 3, 1976, he received notice from Carrier that he was being dismissed.

It should be pointed out as a formal part of the record, that at no point is there any indication as to the seriousness of the injury sustained by Claimant nor is there any "medical evidence", other than that referred to above, indicating in any way the length of his disability or the serious nature of the injuries he had sustained as a result of the accident, if so claimed by him. As a matter of fact, it seems that Claimant made it a deliberate point to keep Carrier in ignorance as to the continuing impact of the "permanent" effect of the injuries allegedly suffered by him and, more important, failed to notify Carrier at any time (with any degree of medical or factual proof) that he was unable to return to work.

OPINION: At the outset we find it necessary to dispose of what is comparatively a minor issue raised by the Organization - that is that Carrier failed to furnish the General Chairman with a copy of the transcript of the hearing as provided for in the rules. Carrier does not deny this is so. It is not denied also that District Chairman Guerrero assumedly received a copy of the transcript. In any event, this is a matter strictly of courtesy between the parties. We have in the past found that these courtesies have been extended between the principals almost uniformly. We therefore consider this objection really as one of unusual exception. In any event, we do not consider it to be of sufficient importance to invalidate these proceedings, which depend upon the application of much broader principles. Additionally, we find that the Organization suffered no prejudice as a result of this lapse.

The major issue which the Organization places squarely before the Board in this dispute is that once an employe is "off duty" due to illness or disability he is technically "not employed" to the extent that he is not subject to any control by Carrier until such time as the employe decides and notifies Carrier that he is no longer disabled and is able to return to work. The clear implication (in view of the Organization's position) is that this "right" enures to the employe regardless of the period of time involved inspite of the fact that there

may be factual and/or medical evidence that such disability has in fact discontinued; or, at the very least, is open to serious question.

Appropos the foregoing, we repeat and stress the following:

1. On March 31, 1976, four months before the formal investigation was actually held, an impartial medical consultant, Dr. A.G. Tellson, whose opinion was sought by Carrier, recommended (after review of Claimant's file) that he be directed to return to duty.

2. On April 6, 1976 basically the same report and recommendation was issued by Dr. John E. Myers, Carrier's Chief Medical Officer, who actually issued an official release in behalf of Carrier directing Claimant to return to work.

3. Notwithstanding the foregoing, no evidence of any nature was forthcoming from Claimant, medically or otherwise, to justify his completely ignoring all of Carrier's communications, or substantiating his claim that he was still "totally disabled to return to work".

After careful review of the file in this case, and particularly in view of Claimant's deliberate "stonewalling" of the entire matter, we find ourselves unable to accept the position of the Organization as a valid one upon which to found and maintain attitudes of mutual responsibility, rights and obligations as between Employer and Employe.

We are compelled to recognize, as a reasonable working proposition in Industrial Relations, that in the event a work related injury occurs to an employe disabling him from performing his normal work assignments, that, after a reasonable period of time, measured by the nature and extent of the injury, and the reasonable duration of its disabling impact, the Carrier-Employer has a right to demand competent medical evidence from Claimant (or in the event of disagreement - from some competent impartial medical experts) substantiating that Claimant is still disabled from returning to work.

We believe these principles apply fully to this dispute and to this Claimant, particularly in view of the affirmative medical evidence supplied by Carrier and the absence of any evidence to the contrary offered by Claimant. It ill behooves Claimant to remain completely indifferent to the correspondence and proceedings taken by Carrier and to continue to maintain, on very weak or non-existent basis, that he was "disabled from returning to work". In these circumstances, particularly the lapse of almost two years, Carrier in our view was justified in taking affirmative action under the Agreement and under the Rules. This it did, by fixing a specific date by which Claimant was directed to return to work, by setting a date for formal investigation upon Claimant's refusal to comply with the work order above referred to, and by granting several adjournments to Claimant

at the request of the Organization (all of which Claimant continued to ignore). Finally, Carrier held its formal investigation, adduced its evidence and found Claimant guilty of violating Rule M810, the specific charge lodged against him (which he continued to ignore by failing to appear at the investigation proper, either on any of the adjourned dates of the investigation, or on the very date the formal proceedings were finally held).

Based on the entire record, and the specific evidence adduced at the investigation, Carrier was justified in concluding that it had found more than adequate evidence to establish Claimant's guilt as charged and warranting his dismissal effective August 3, 1976.

Some comment is necessary here with respect to Claimant's 20 years of service with Carrier. We find it necessary to emphasize that Claimant was assumedly a man of mature, considered judgment, one long familiar with the Rules and Regulations of Carrier and the punitive qualities attendant upon violations thereof. The decision as to the course of conduct he had decided to follow in this matter was obviously his own or that of outside personal advice which he chose individually. In fact, it is quite obvious that he did not attempt to comply with any advice assumedly offered him by the Organization; at least, the record is completely silent on this point.

In these circumstances, we must assume that Claimant acted with full knowledge of what he was doing, that he was completely aware of the implications of his actions and attitudes, and of the possible consequences reasonably expected to flow therefrom. Furthermore, that in view of his many years of service with Carrier, he recognized (or should have) the reasonable responsibilities and obligations that he owed to Carrier, and which he simply ignored.

Accordingly, we have no choice but to hold him fully accountable for what transpired as a direct result of his deliberate decisions and his conduct in this dispute, particularly in view of his many years of experience and particularly since he had complete personal knowledge of what was happening at each stage of the matter.

We must regretfully conclude, notwithstanding Claimant's years of service with Carrier, that on the basis of the entire record we find no ground upon which to reverse the action taken by Carrier in dismissing Claimant. We are compelled, therefore, to deny the claim in its entirety.

AWARD: CLAIM DENIED.

Louis Yorris
LOUIS YORRIS, Neutral and Chairman

S.E. Fleming
S.E. FLEMING, Organization Member

E.J. Hall
E.J. HALL, Carrier Member

DATED: San Francisco, California
February 21, 1978