

NATIONAL MEDIATION
BOARD

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NATIONAL RAILROAD
ADJUSTMENT BOARD

PUBLIC LAW BOARD NO. 1795

Award No. 2
Case No. 2

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

STATEMENT OF CLAIM:

1. That the Carrier violated the provisions of the Agreement between the Southern Pacific Transportation Company and the Brotherhood of Maintenance of Way Employees on November 5, 1975, when as a result of an unfair and impartial hearing, it dismissed Lucio Rodriguez, said dismissal being unjust, unreasonable, arbitrary, capricious and unduly harsh.

2. That Lucio Rodriguez be reinstated to the Carrier's service with seniority, vacation and all other rights unimpaired and compensated for all wage loss suffered as a result of his wrongful dismissal.

STATEMENT OF FACTS: The underlying facts of this dispute are that on October 1, 1975, Claimant reported for duty at the prescribed time of 6:00 a.m. and worked until 10:00 a.m., when his lunch period of 30 minutes began. Claimant did not report back at 10:30 a.m., nor the rest of that day. Carrier contends that such absence was without permission. He reported for duty on October 2 but left to see his doctor. He reported for duty on October 3 and was instructed by his supervisor to report to Roadmaster Foley. Carrier asserts he refused to report to Mr. Foley and left the property.

Thereafter, on October 21 at 4:30 p.m., Claimant was handed a letter dated October 14 notifying him to be present for formal hearing on October 23 at 9:00 a.m., based on violations of Rules 801 and 810. These Rules relate in essence to charges of indifference to duty, insubordination and unauthorized absence from employment. Claimant appeared at the hearing without representation and remained mute throughout. Following completion of the hearing, Carrier notified

Claimant by letters of October 31 and November 5, 1975 (the second letter containing his final pay check for the first period of November), that he had been found guilty as charged and that he was thereby dismissed from the service of Carrier.

FINDINGS: Basically, it is Carrier's position that Claimant failed to report for work after lunch on October 1st, and failed to report to Roadmaster Foley on October 3rd as instructed; that evidence adduced at the Investigation established his guilt of these offenses; and that, accordingly, he was properly dismissed.

We would point out at this point that Claimant's service in Carrier's employ extends over a period of more than 27 years. Additionally, that the record before us is devoid of any evidence of prior discipline for any rule infraction.

On its part, Petitioner contends that Claimant's dismissal was improper and unduly harsh in that Claimant was not afforded a fair and impartial hearing, and, more to the point, that the notice of hearing violated Rule 45 of the Agreement inasmuch as slightly more than one day's notice was given him on October 21 at 4:30 p.m. for formal hearing on October 23 at 9:00 a.m. Thus, Petitioner asserts, Claimant was not afforded sufficient time to secure representation and prepare for his defense.

The evidence at the hearing is conclusive that Claimant was in fact served with the hearing notice on October 21 at 4:30 p.m. Moreover, Rule 45 provides that "The employe shall be allowed not more than ten (10) days from receipt of notice for the purpose of securing witnesses . . .", and that he is "entitled to representation by a duly authorized representative of the Organization . . .".

We acknowledge that the Agreement does not specify a minimum time period for service of the notice prior to date of the hearing. However, we are compelled to the conclusion that the notice of hearing here involved was fatally defective. The available time of some 40 hours, actually one business day, was grossly inadequate for the purposes of "securing witnesses" and obtaining "representation". In

these respects, therefore, the notice of hearing violated basic concepts of due process. In our view, it also violated the spirit and intent of Rule 45, if not its precise language. This being so, the subsequent hearing becomes void and of no effect and the dismissal itself must fall in view of the defective procedure upon which it is based.

In these circumstances, we have no alternative but to sustain the claim that Claimant be reinstated to service with all rights unimpaired and that he be compensated for all wage loss suffered by him from and including the second period of November, 1975, until date of reinstatement, less Claimant's earnings, if any, in other employment during this period. Such offset is supported by the use of the term "net wage loss" in Rule 45, subdivision (b).

Finally, under the terms of the Agreement between the principals, dated August 24, 1976, we are required to specify the time within which such payment of wage loss is to be made to Claimant by Carrier. Accordingly, such net wage loss shall be computed and paid within thirty (30) days of receipt by Carrier of affirmative or negative written proof of Claimant's earnings, if any, in other employment during said period.

AWARD: Claim sustained in accordance with foregoing findings.



LOUIS NORRIS, Neutral and Chairman



S.E. FLEMING, Organization Member



E.J. HALL, Carrier Member

DATED: San Francisco, California
December 15, 1976