

PUBLIC LAW BOARD NO. 2439

PARTIES Brotherhood of Maintenance of Way Employees
TO
DISPUTE: and
Southern Pacific Transportation Company
(Western Lines)

STATEMENT OF CLAIM:

1. That the dismissal of laborer, Mr. J. P. Berkelman, was in violation of the Agreement and without just and sufficient cause, arbitrary and on the basis of unproven charges.
2. That the Carrier further violated said Agreement when it failed to accord Claimant a fair and impartial investigation as contemplated in Rule 45 of the current Agreement. In addition thereto the Carrier violated Rule 44 of the current Agreement when the Carrier representative failed to give a reason for denying the claim during the handling on the property.
3. That the Carrier now reinstate Claimant to his former position with seniority and all other rights restored unimpaired and that he be compensated for all wage loss suffered as a result of the Carrier's violations as mentioned above.

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.

The record indicates that the Claimant herein allegedly sustained a personal injury to his lower back on the morning of February 18th, 1988. He reported this injury to his foreman, at approximately 8:00 A.M. the same day. Later, after lunch on that day, when Claimant felt that his injury was so painful that he was unable to

work, he requested medical attention. He was transported to a hospital by his Roadmaster, and while at the hospital, he was requested by his Roadmaster to submit to a urinalysis. He declined submission to that test. The medical examination indicated that he had a severe back strain, as a result of the incident on the morning of February 18th, and he could return to duty several days later. Due to the refusal of Claimant to submit to the toxicological test, his Roadmaster removed him from service on the same day (February 18th).

By letter dated February 26th, 1988 (certified), Claimant was notified to be present on March 4th, for a formal hearing to investigate his alleged refusal to give a urine specimen for a toxicological test and was charged with insubordination, violation of Rule 607. The hearing was convened as indicated on March 4th, but Claimant was not present. Carrier, upon the review of the transcript of the investigation, dismissed Claimant from service by letter dated March 14th, for a violation of Rule 607 as charged. A claim was filed, by letter dated March 23rd, in which it was stated, inter alia, that Claimant was not able to attend the formal hearing because he did not receive the notice of hearing until after it had taken place. The record does not indicate that Carrier introduced a receipt for the certified letter sent to Claimant at the hearing, and the Roadmaster indicated that that it was possible that it had not been received. The response to the claim dated March 29th, stated as follows:

Reference to your letter of March 23rd, 1988, concerning appeal on behalf of Mr. J. P. Berkelman, and request that he be reinstated, that he be paid for time lost, and his record cleared of all charges.

This is to advise that I have reviewed the investigation and find no reason to change my decision. Your claim is respectfully denied.

The Organization maintains that Carrier violated the Agreement when it proceeded with the hearing without Claimant having received notice of the hearing, and thus violated Rule 45 of the Agreement. In addition, the Organization insists, that Carrier violated the Agreement on another score when it failed to give a reason or reasons for declining the Organization's claim. Specifically, the Organization insists that Rule 44 specifies, among other things, that the response of the employer must be "in writing with the reasons for such disallowance". As an additional argument, the Organization maintains, that Carrier's policy on drug testing unilaterally changed the working conditions of the employees and was a violation of the Agreement.

Carrier's argument essentially is that it did all the things required by the rules when it notified Claimant of the hearing to investigate his alleged violation of the rules by certified letter. Furthermore, the Union representative present at the hearing, did not request a recess or postponement to find out why Claimant was not present. In addition, Carrier believes that there was no impairment of any of Claimant's rights. Furthermore, from Carrier's standpoint, it is apparent that Claimant violated Carrier's rules by refusing to accede to the urine sample instruction given to him by his Roadmaster. Thus, Carrier believes that it handled the matter properly and the discipline accorded was appropriate.

Two procedural impairments in the development of this dispute mandate a finding that the Claim must be sustained. It must be noted first that contrary to Carrier's argument, Claimant never received the notice of the investigative hearing prior to the date that it was held. In fact, the record specifies that he received the notice several days following the hearing, and there is no indication that the certified letter had been received prior to that time. This, in itself, is sufficient to sustain the claim since, obviously, Claimant was not accorded due process as contemplated

by the rules. As an additional factor, it is also apparent that the handling of the claim, after it was filed, was flawed. Carrier's response, which gave no reasons for the declination of the claim, did not conform to the requirements of Rule 44. Thus, on this count as well, the claim must be sustained. For the reasons indicated, it is not necessary to deal with the merits of the matter, since Claimant was not accorded proper adherence to the rules by Carrier in the handling of his dispute.

With respect to remedy, the record is clear that Claimant was under a doctor's care and being treated for a back injury allegedly sustained on February 18th, 1988, long after the date of the investigation. He shall be returned to work with all rights unimpaired, including seniority, and receive back pay for losses sustained. However, the losses sustained will only be from that date when he was certified as medically able to return to work (also less any earnings, of course, received from other employment in the interim).

AWARD

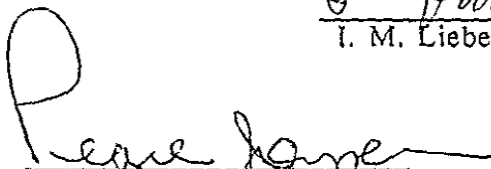
Claim sustained as indicated in Findings above.

ORDER

Carrier will comply with the Award herein within 30 days from the date hereof.



I. M. Lieberman, Neutral-Chairman



P. L. Joyner
Carrier Member



C. F. Foote
Employee Member

San Francisco, California
May 20, 1991