

PUBLIC LAW BOARD NO. 2439

Award No. 75
Case No. 75

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employees
and
Southern Pacific Transportation Company (Western Lines)

STATEMENT
OF CLAIM

- "1. That the dismissal of Mr. E. M. Hernandez without first according him a fair and impartial hearing was in violation of provisions of the current agreement, said action being abusive, unduly harsh and in abuse of discretion.
2. That Mr. E. M. Hernandez now be reinstated to the service of the Southern Pacific Transportation Company with seniority and all other rights restored unimpaired and that he be compensated for all wage loss suffered."

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.

Claimant had been employed by Carrier since of June of 1958 and worked in the Track Sub Department of the Los Angeles Division of Carrier. Claimant, while working on June 7, 1982, sustained a sprained back while trying to start an engine on the spike pulling machine. He continued to work until July 2, 1982. On July 1, since his back was not improving, he filed an accident report indicating that he had been injured on June 7, 1982. He did not appear for work again and Carrier had no contact with him again for many months. Upon receipt of the accident report, Carrier addressed a letter to claimant at his last known address, by certified mail, indicating an appointment for a medical examination on August 16, 1982. The letter was returned as unclaimed. On November 26, 1982, Carrier sent a certified letter to claimant informing him that his services had been terminated since he had been absent since July 2 without proper authority. That letter, too, was unclaimed. On November 29 claimant returned to work with a

return-to-duty slip from his attending physician indicating that he could return to work without restriction. Having received no response to this attempt to return to work, on January 10 claimant contacted the Division Engineer's office via telephone as to his status. He was then informed that he had been dismissed during the month of November 1982 and that his seniority had been terminated.

Petitioner indicates that claimant was not able to understand English or read or write the language except with difficulty. In fact, he lived in Mexico apparently. Petitioner argues however that claimant was not absent without authority since he had filed an accident report and was on sick leave. His absence was caused by a physical disability as a result of an on-duty injury. Furthermore, according to the Organization, even if there were some reason to question claimant's whereabouts, under Rule 45 he was entitled to an impartial hearing if, indeed, he had violated any rules.

In addition to insisting that the claim was untimely, Carrier makes the point that claimant simply dropped out of sight in June of 1982 and was not again heard from until January of 1983 except for the accident report. Furthermore, there was no satisfactory evidence of any sickness or disability furnished to Carrier. For that reason alone, Carrier insists that claimant was properly terminated for being absent without authority. In support of this proposition, Carrier also notes that virtually the identical circumstances occurred in 1980 when claimant disappeared into Mexico as he did in the instant case. That absence was from September until February. Furthermore, that from the period 1967 through 1982 claimant had six personal injuries. Carrier indicates that in view of the circumstances and claimant's complete disappearance, it had no choice but to dismiss him under the provisions of Rule 45. Carrier argues that it has been very patient with claimant but that patience is now exhausted.

It is clear that this was a veteran employee who apparently had some difficulty in communicating in English. There is no question but that he did file an accident report which Carrier had received. While Carrier's impatience with claimant's lack of responsiveness and its inability to contact him over a substantial period of time is understandable, there is a major fallacy in its position.

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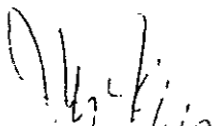
Claimant should have been accorded an investigation under the circumstances. This failure on the part of Carrier is fatal to its position. While claimant apparently had performed in the same manner a few years earlier, this does not excuse Carrier's behavior in not according a modicum of due process to this veteran employee. By the same token, the claimant was guilty of real negligence in terms of keeping the Carrier informed of his whereabouts. While he did file the accident report, that was insufficient, which he was well aware of in view of his experience, to protect his position. It is this Board's view that under all the circumstances the penalty of dismissal was harsh and inappropriate in this instance. Claimant should be penalized for his failure to abide by the rules and stay in contact with the Carrier. Carrier, on the other hand, should have accorded him a hearing prior to termination. Therefore, claimant will be reinstated to his former position with all rights unimpaired but without compensation for time lost. Similar behavior in the future will not be given the same consideration as that in this instance. In other words, this is claimant's last opportunity to abide by the rules.

AWARD


Claim sustained in part; claimant will be reinstated to his former position with all rights unimpaired but without compensation for time lost.

ORDER

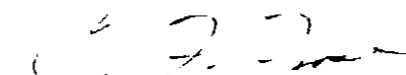
Carrier will comply with the award herein within thirty (30) days from the date hereof.



I. M. Lieberman, Neutral-Chairman



L. C. Scherling, Carrier Member



C. F. Foose, Employee Member