

PUBLIC LAW BOARD NO. 2444

Award No. 12

Case No. 18

Docket No. MM-79-15

Parties Brotherhood of Maintenance of Way Employees

to and

Dispute: Southern Pacific Transportation Company
(Texas and Louisiana Lines)

Statement of Claim: 1. Carrier violated the effective Agreement when Track Laborer Charles E. Whittle was unjustly dismissed October 31, 1978.
2. Claimant Charles E. Whittle shall be reinstated to his former position with pay for all time lost, seniority, vacation and all other rights unimpaired, due to his being unjustly dismissed after being injured on duty and being under a doctor's care.

Findings: The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated July 19, 1979, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

Claimant apparently suffered an on-duty injury having been hit by a company truck on July 18, 1978. He was released for light duty by a Doctor D. E. Bourgeois, July 19, 1978. Claimant could do light work with no heavy duty until July 22, 1978.

Claimant's Division Engineer wrote Claimant Track Laborer on September 21, 1978, advising him of the release and instructing the Claimant to report for duty not later than September 27, 1978. This letter was sent certified mail, return receipt requested to Claimant's last known address.

Claimant, under date of October 6, 1978, wrote the Division Engineer advising that he had received a letter that date, advising therein that

he was under a doctor's care, that Dr. Bourgeois had not released him on August 28, 1978 and that he was now seeing Dr. Iagrera in New Iberia, Louisiana. He further advised that said doctor would give any information requested if he (Division Engineer) would call him.

The Division Engineer, on October 12, 1978, wrote Claimant:

"For your failure to comply with instructions contained in my letter of September 21, 1978, you are dismissed from the service of the Southern Pacific Transportation Company for being absent from your employment as Track Laborer, Lafayette Division, without proper authority continuously since September 27, 1978, which is a violation of Rule M810 of General Rules and Regulations of General Notice effective April 1, 1978 of Southern Pacific Transportation Company which reads in part as follows:

'Employees must report for duty at the prescribed time and place, remain at their post of duty, and devote themselves exclusively to their duties during their tour of duty. They must not absent themselves from their employment without proper authority....'"

On October 31, 1978, while Claimant was staying in the company Trailer House in New Iberia, Louisiana, the Roadmaster came to him and told Claimant to leave the trailer, that he had been fired. Claimant then called home and was informed that he didn't have the letter saying why he had been dismissed. Claimant contacted the Division Engineer who said that he had mailed such letter. Thereafter Claimant went to see the Division Engineer, at which time Claimant was told that he was dismissed and the Division Engineer attempted to give Claimant a copy of the dismissal letter dated October 12, 1978, which was not accepted by Claimant.

Claimant, while in the Division Engineer's office, advised that he had a change of address and that it was now "Star Route B, Box 431, New Iberia, La. 70560." Claimant, under date of November 1, 1978, wrote to the Division Engineer as follows:

"I am writing you at this time concerning a letter that you said you sent me telling me I am no longer employed by Southern Pacific Railroad. Which you told me about today in your office, November 1, 1978. I never got that letter at this time.

I am asking for a hearing concerning this matter. Please send me a letter telling me the time: date: and place you will hold this hearing, with a copy of the letter to Mr. Joe R. Vanya, General Chairman tell him the time: date: and place you will have this hearing...."

P. S. For Southern Pacific Railroad Company records my new address if as follows:

Charles E. Whittle
Star Rt. B Box 431
New Iberia, La. 70560
telephone no. 318-367-1649"

The Division Engineer replied to Claimant on November 6, 1978, as follows:

"This refers to your letter dated November 1, 1978 which we received November 6, 1978 and in which you request a fair and impartial hearing concerning your dismissal from the service of Southern Pacific Transportation Company.

On October 12, 1978, we sent to you at your last known address, Rt. 6, Box 134, Silsbee, Texas, 77676, via Certified Mail, Return Receipt Requested, a letter dismissing you from the service.

We received your request for a hearing today, November 6, 1978, which is beyond the 15-day time limit to request a hearing, therefore, your request for a hearing is respectfully declined."

Article 14 - Discipline and Grievances, in pertinent part, provides:

'An employee disciplined or who feels unjustly treated shall, upon making a written request to the Division Engineer within fifteen (15) days from date of advice, be given a fair and impartial hearing by the Division Engineer or an officer designated by him....'

The foregoing chronology of facts permit the following reasonable conclusions: (a) Claimant had been released to duty, albeit light duty. Whether Claimant could or could not perform same is not in question here. (b) Claimant apparently received his Division Engineer's letter of September 21st because his response on

October 6th indicated an answer thereto including the advice that he was still under a doctor's care, albeit a different one. (c) Claimant apparently chose not to respond to the Division Engineer's letter of September 21, 1978, which incidently reflected a delivery date of September 23, 1978 and as being received by a "Anderson Williams." However, in connection with this fact, Carrier's primary burden is to show that notice was sent and such proof thereof is shown here. (d) Carrier received Claimant's letter of October 6, 1978 on October 12th, thus its letter of dismissal of October 12, 1978 was premature in light of the need to await proof to be furnished by Claimant as to the cause of his absence and the treatment by his doctor. (e) However, Claimant has failed to furnish such medical proof up to the present time. Claimant's knowledge of his dismissal must be imputed, not to October 31st or November 1st, as he alleges, but rather to the period involving several days after the period of October 12th because of the letter which had been sent to Claimant's last known address, which according to the records was not changed until November 1, 1978.

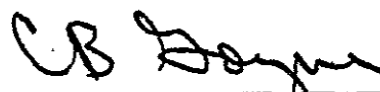
We think the unfortunate series of errors should be corrected by reinstating Claimant to service with all rights unimpaired. Further, that if he can offer supporting medical evidence to warrant his inability to perform light duty or otherwise, he should be paid six months lost time predicated on a 40 hour week at straight time rates only against which a off-set of the usual deductions of outside earnings may be made. Otherwise, he is not to be paid anything. Claimant precipitated this situation which he here complains of.

In the circumstances, Claimant will be required to pass a return to service physical examination.

Award: Claim disposed of as per findings.

Carrier is directed to make this Award effective within thirty (30) days of date of issuance shown below.


M. A. Christie, Employee Member


C. B. Goyne, Carrier Member


Arthur T. Van Wart, Chairman
and Neutral Member