

PUBLIC LAW BOARD NO. 2774

Award No. 139

Case No. 139

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employees
and
Atchison, Topeka and Santa Fe Railway Company

STATEMENT
OF CLAIM

- "1. That the Carrier violated the agreement and Appendix 11 thereof when on May 30, 1984, it dismissed Trackman Calvin Tsosie without the benefits of a fair and impartial hearing.
2. Claimant shall now be reinstated to the service of the Carrier with seniority and all other rights restored unimpaired and with compensation 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 herein, a Navaho Indian, lived on an Indian reservation in Granada, New Mexico. The system gangs working in this area are generally manned entirely by Navaho Indians who are always recalled to a specific location when the gangs are established, are furnished with a chartered bus and transported to a work location. When the forces are reduced, which is generally accomplished through furloughing the gang, transportation is furnished back to the original location.

On March 12, 1984, claimant reported to work at Brodwick, Texas. He was furloughed on April 13, 1984, at which time he was bussed back to the original gathering point. He was recalled to work, to report at Cameron, Texas, on May 29, 1984. Upon arrival at the job site on the indicated day, claimant reported for work and, after working for two hours, was informed by the Assistant Time Keeper that he had been dismissed and was to return home. On May 30, 1984, a letter was addressed to claimant at home informing him, as a result of being absent without authority in excess of ten days, he was dismissed from service

in accordance with the understandings reached on July 13, 1976. It was this action which triggered the claim herein.

Carrier takes the position that claimant was scheduled to work on Monday, April 16, 1984, but failed to report for work, nor did he receive permission to be off. The gang on which claimant was supposed to work was abolished on April 27, 1984, thus, according to Carrier, from April 16 through April 27 claimant was absent without proper authority. It was for this reason that claimant was notified by letter dated May 30, 1984, that he had been terminated. Carrier indicates that Appendix No. 11 contains the understanding reached on July 13, 1976 concerning absences. Under that provision, claimant had twenty days from the date of the letter of May 30 to request a hearing if he felt he had been unjustly dealt with. No request was received by Carrier and Carrier interprets claimant's failure to invoke the provisions of the understanding as an admission that he was, indeed, absent without proper authority. Carrier argues further that the procedure set forth in Appendix No. 11 was inserted to deal with the serious problem of unauthorized absences on an expeditious basis and both parties understood that program.

Petitioner argues that there is no documentation or evidence whatever as to how claimant was assigned to work on Monday, April 16, nor was there any indication as to which gang and location he was to work on the dates in question. Furthermore, the Organization notes that claimant was transported by bus back to the gathering point by Carrier, together with numerous other employees. Further, claimant's name appeared on a placement list recalling him to work on May 27, 1984, to report on May 29 at Cameron, Texas. He reported for work as instructed and was subsequently dismissed. There was no explanation, according to the Organization, as to why claimant was on a recall list if in fact he had been assigned to a different gang and was absent without authority. The Organization does not agree that claimant's failure to request a formal investigation is an admission of guilt in terms of his alleged absence. The Organization insists that the intent of Appendix No. 11 was not to preclude employees from the benefits of a fair and impartial hearing in circumstances such as that in this case. The burden of proof in discipline cases and in this case is squarely upon Carrier, according to the Organization. In short, the Organization notes that if claimant was, in fact, absent without proper authority from April 16 through April 27, there is no explanation as to why his name appeared on the May 27 placement list

as being recalled to commence work on May 29. Clearly claimant was not absent without authority as contended by Carrier, according to the Organization, and a dismissal was a violation of the agreement, including Appendix No. 11.

Appendix No. 11 provides as follows:

"APPENDIX NO. 11

LETTER OF UNDERSTANDING DATED JULY 13, 1976

In connection with the application of (Rule 13) of the current Agreement, this will confirm our understanding reached in conference today that, effective October 1, 1976, to terminate the employment of an employee who is absent from duty without authority, the Company shall address such employee in writing at his last known address, by Registered or Certified Mail, return receipt requested, with copy to the General Chairman, notifying him that his seniority and employment have been terminated due to his being absent without proper authority and that he may, within 20 days of the date of such notice, if he so desires, request that he be given an investigation under (Rule 13) of the current Agreement.

NOTE: Effective January 1, 1984, the above understanding is to be applied only in cases where the employee is absent from duty without authority more than five (5) consecutive work days."

In the Board's view, the record of this case does not establish that claimant was absent without proper authority. He did, however, fail to exercise his right specified in Appendix No. 11. Carrier has made no explanation of the rationale for its actions in its final conclusion relative to his being absent without authority in view of his recall. Thus, claimant is in part culpable for the failure of the matter being handled in an expeditious manner by his inability or simple failure to request an investigation as was his right under Appendix No. 11. For the reasons indicated, the Board believes that to serve the interests of the parties, as well as the claimant most effectively, claimant, Mr. Tsosie, should be offered reinstatement to his former position with all rights unimpaired subject only to passing a return-to-work medical examination. Further, he shall receive compensation for pay up to the time he failed to request a formal investigation, that is, a twenty-day period.

AWARD


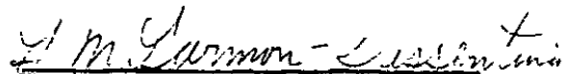
Claim sustained in part; claimant shall be reinstated to his former position with all rights unimpaired subject only to a return-to-work medical examination. He shall receive compensation for time lost for the twenty-day period as indicated above.

ORDER

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



I. M. Lieberman, Neutral-Chairman


C. F. Foose, Employee Member
G. M. Garmon, Carrier Member

Chicago, Illinois
February 6, 1986