

PUBLIC LAW BOARD NO.2774

Award No. 3
Case No. 7

PARTIES Brotherhood of Maintenance of Way Employees
TO and
DISPUTE The Atchison, Topeka & Santa Fe Railway Company

STATEMENT "1. That the dismissal of Valley Division Trackman E.D. Martinez was un-
OF CLAIM just.
2. That Claimant Martinez be reinstated to service with seniority, vacation and all benefit rights unimpaired, pay for wage loss and/or otherwise made whole."

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 was employed by Carrier as a Trackman on August 14, 1978. Following a formal investigation held on August 15, 1979, on August 27, 1979 Claimant was dismissed from Carrier for being absent without authority from July 23 through August 7, 1979.

Both Carrier and Petitioner allege that each one has made grievous procedural mistakes in the handling of this dispute on the property. For example, Carrier takes the position that the claim was not properly before the Board in view of the fact that it was filed more than sixty days following the date of the dismissal notice and furthermore, the claim as presented to the Board was different than that originally filed. Petitioner, on the other hand, argues that the Claimant never received a notice of the results of the investigation and indeed was only made aware of the results of the investigation upon visiting Carrier's headquarters some twenty-five days following the investigation and further, that he never received a copy of the transcript. An examination of the

record of this proceeding reveals a number of facts which relate to the alleged procedural improprieties. First, it is evident that Claimant was Spanish speaking and did not have a representative at the investigation. Secondly, it is also apparent that Claimant moved during the course of these proceedings and left no forwarding address. Nevertheless, there were procedural violations on both sides in the course of the handling of this matter.

Perhaps the most important aspect of the due process question raised with respect to this claim is that of the handling of the hearing itself. From an examination of the transcript two things are apparent. First, the Claimant admitted that he was guilty of being absent without leave. Second, there is no evidence whatsoever from the direct supervisors who were involved with Claimant with respect to his alleged improper absence. It is particularly noteworthy that the hearing officer did not choose to provide Claimant, who was without representation, an opportunity to discuss or describe the reasons for his absence, if any. This information was later elicited by the Organization and presented to Carrier after the fact. The Board must observe that the hearing officer, particularly in cases such as this where the Claimant does not speak English and has no representation, must bend over backwards to be sure that the Claimant is afforded a fair and proper hearing. It is quite apparent that the hearing, in this instance, was at best marginal since the individuals most concerned with the alleged absenteeism, the direct supervisors were not called to testify. Furthermore, as a result of the conduct of the hearing, the specific dates of the absences is unclear from the record.

While recognizing the basic admission by Claimant that he was absent without proper permission and understanding the particular circumstances involved herein, the Board still must find that the penalty imposed was, at best, harsh and unnecessary in view of all the circumstances. Thus, Claimant shall be reinstated to his former position with all rights unimpaired but in view of his admission of guilt, he will not be com-

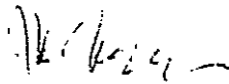
pensated for any time lost.

AWARD

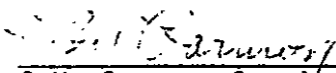
Claimant will be forthwith reinstated to his former position with all rights unimpaired but will not be made whole for time lost.

ORDER

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



I.M. Lieberman, Neutral-Chairman



G.M. Garmon, Carrier Member



S.E. Fleming, Employee Member

January 1, 1982
Chicago, IL