

PUBLIC LAW BOARD NO. 4373

PARTIES	SOUTHERN PACIFIC TRANSPORTATION COMPANY)	
	(EASTERN LINES))	
)	AWARD NO. 13
TO	AND)	
)	CASE NO. 30
DISPUTE	BROTHERHOOD OF MAINTENANCE OF WAY)	
	EMPLOYEES)	

STATEMENT OF CLAIM:

1. Carrier violated the effective Agreement when Track Laborer C. R. Leija was unjustly dismissed from service and did not receive a fair and impartial investigation.
2. Claimant Leija shall now be reinstated to his former position with all seniority, vacation rights and other rights accruing to him unimpaired and also his record cleared of the charges and in addition to all pay lost commencing February 9, 1988 and run concurrently until he is restored to service.

HISTORY OF DISPUTE:

On January 28, 1988 Claimant was working as a track laborer on Rail Gang 6, at Tenaha, Texas. Claimant was hurt while removing an air hammer from the track with three other employees. At the time Claimant believed he had sustained nothing more than a bruise. Claimant did not report the incident prior to the end of his tour of duty. The following day the Carrier attempted unsuccessfully to deliver a message to Claimant and discovered that he was home. A Carrier officer went to Claimant's home where Claimant informed the officer that he had been injured the previous day. The officer took Claimant for a medical evaluation. Claimant was diagnosed as having experienced a muscle strain. Claimant was given medication. Later that day Claimant was removed from service.

Claimant was notified to appear for formal investigation on charges that he had been dishonest by failing to report the personal injury which he had sustained. The investigation was held as scheduled. By letter of February 19, 1988 the Carrier notified Claimant that he had been found guilty of the charges and was dismissed from the Carrier's service.

The Organization grieved the discipline. The Carrier denied the grievance. The Organization appealed the denial to the highest officer of the Carrier designated to handle such disputes. However, the dispute remains unresolved, and it is before this Board for final and binding determination.

FINDINGS:

The Board upon the whole record and all the evidence finds that the employees and the Carrier are employees and Carrier within the meaning of the Railway Labor Act, as amended, 45 U.S.C. §§151 et seq. The Board also finds it has jurisdiction to decide the dispute in this case. The Board further finds that the parties to the dispute, including Claimant, were given due notice of the hearing in this case.

At the outset the Organization maintains that the Carrier committed procedural error when the Carrier charged Claimant in two letters, only one of which Claimant received. However, both letters are part of the transcript of investigation. The Organization had the opportunity to request postponement of the investigation if it needed to do so in order to prepare a defense to either letter. It did not do so. Accordingly, we must conclude that any procedural

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error committed by the Carrier with respect to the charge letters was not prejudicial.

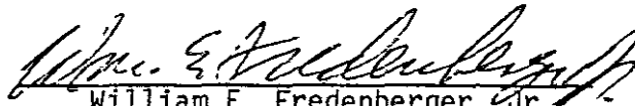
After a thorough review of the record in this case we must conclude that it does not substantiate Claimant's guilt. We are fully aware that the rule requiring an employee to report a personal injury promptly is a serious one which the Carrier has every right to enforce strictly. However, there is a well recognized exception to the rule that if at the time the injury is sustained the nature of it is such that the employee reasonably does not believe he has sustained an injury, he cannot be charged with failure to report it. In the instant case Claimant sustained what he thought was a bruise. While it developed that the injury was far more serious, that fact was not evident to Claimant at the time he sustained it, or before the end of his tour of duty. Accordingly, we must conclude on the facts of this case that Claimant did not violate the rule requiring prompt reporting of a personal injury. It follows that Claimant was not dishonest.


While we will sustain the claim in this case we find it impossible to award Claimant pay for time out of service. Claimant has never passed a physical examination and requalified for work with the Carrier since he was suspended from service after his injury. Inasmuch as Claimant was not available for work during the time he was out of service, his claim for pay for that period has no merit.

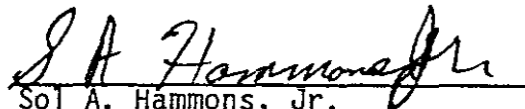
AWARD

Claim sustained except to the extent that Claimant shall receive no pay for time out of service and Claimant's actual return to service is conditioned upon passing a return to duty physical examination.

The Carrier will make this award effective forthwith.


William E. Fredenberger, Jr.
Chairman and Neutral Member


R. O. Naylor
Carrier Member


Sol A. Hammons, Jr.
Employee Member

Dated: At Houston, Texas October 31, 1989.