

SPECIAL BOARD OF ADJUSTMENT NO. 280

PARTIES ) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES  
TO )  
DISPUTE ) ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

STATEMENT OF CLAIM:

"Claim in favor of Mr. Albert Markham, for full reinstatement to service with all seniority rights unimpaired and pay for all lost wages, beginning January 27, 1984, and continuous thereafter." (SSW-D-1140-Markham; 53-720)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

Claimant, an employee of the Carrier since November 5, 1981, was working as a B&B Carpenter in Kansas City, Kansas, on January 5, 1984, when he allegedly sustained an on-the-job personal injury.

According to the Carrier, when the Claimant brought this alleged injury to the attention of one of its supervisors, the Claimant did not show any visible signs of injury and, although offered, that Claimant refused medical attention and was allowed to continue working. In this same regard, the Carrier submits that the Claimant also continued to work on a daily basis through January 11, 1984, or until he claimed, on January 12, 1984, that he could not work account the alleged personal injury of January 5, 1984.

The record is not clear as to what transpired between the Claimant and the Carrier from January 12 to January 25, 1984, or the date Carrier submits it notified Claimant that an appointment had been made for him to be examined by an orthopedic specialist at 9:00 A.M. on the following day (January 26, 1984) in regard to the alleged on-the-job injury. In this respect, the Carrier says that it was understood between its supervisor and Claimant that the latter would meet with the supervisor at his office prior to 9:00 A.M., and that they would then go together to the specialist's office.

The Claimant reportedly did not appear at the supervisor's office

or the orthopedic specialist's office at any time on January 26, 1984, and, according to the Carrier, did not initiate any contact with either office to explain why he was not keeping the stated appointment.

Thereafter, on January 27, 1984, Carrier notified Claimant that since it had determined his actions to be in violation of Rule 801 of the Rules and Regulations for the Government of Maintenance of Way and Engineering Department Employees that he was dismissed from all service effective that same date.

That portion of Rule 801 which Claimant was said to be in violation of, and as was quoted in the Carrier's letter of January 27, 1984, reads as follows:

"Employees will not be retained in the service who are...insubordinate, dishonest...

Any act of...willful disregard or negligence affecting the interests of the Company is sufficient cause for dismissal..."

Under date of February 8, 1984, the Organization's General Chairman wrote the Carrier's Regional Engineer the following letter:

"This is to advise I spoke with Mr. Albert Markham today, relative to the letter dated January 27, 1984, which Mr. M. R. Christensen sent him advising him of his dismissal from service effective January 27, 1984.

Inasmuch as Mr. Markham has not received such letter as of this date, he has requested that I, his representative, make a request for a hearing.

In view of the above, we are hereby requesting that a hearing be held in accordance with Article 14 of the Maintenance of Way Agreement, resulting from Mr. Markham's dismissal letter dated January 27, 1984."

The aforementioned request for a hearing was denied by the Carrier in a letter dated February 24, 1984, and whereby the Carrier stated:

"Under the provisions of the Agreement...the request for hearing must come to the officer of the carrier authorized to receive same, from the employee disci-

plined, in writing within 15 days. In view of the fact that Mr. Markham did not respond in compliance with the agreement your request for a hearing cannot be granted and is respectfully declined."

In pertinent part, Article 14, which is entitled "Discipline and Grievances", reads:

"(a) Employees disciplined or dismissed will be advised of the cause for such action in writing within ten (10) days.

(b) An employee disciplined or who feels unjustly treated shall, upon making a written request to the officer of the Carrier authorized to receive same, within fifteen (15) days from the date of advice, be given a fair and impartial hearing by an authorized carrier officer. The hearing will be held within fifteen (15) calendar days thereafter, unless for good cause, additional time is requested by the Carrier, the employee, or employee's representative.

(c) At the hearing, the employee may be represented by duly accredited representative or representatives of the BofWE, (excluding attorneys) or any employee of the MofW Department of his choice. Decision will be rendered within fifteen (15) calendar days after completion of the hearing."

Contrary to Carrier assertions, the Organization submits that Section 152, General duties, First and Second, of the Railway Labor Act, as amended, as well as Article 15, Section 1(a), of the current Rules Agreement, provide that an employee's representative shall have the right to handle disputes in behalf of employees. In this same connection, the Organization submits a total of 21 separate letters and parts of three submissions to show that the Carrier has heretofore recognized the right of a representative to request a hearing in behalf of the aggrieved employee. The Organization therefore maintains that the Carrier was arbitrary and capricious in dismissing Claimant from service without benefit of a due process hearing as provided in Article 14.

In defense of its position, the Carrier states:

"Section (b) [of Article 14] clearly reads 'an employee disciplined or who feels unjustly treated

shall, upon making a written request \*\*\* be given a fair and impartial hearing' (emphasis added by Carrier.) The intent of the rule is obviously that the employee make the written request; not that the employee's representative make the request. If the intent was that the employee's representative could make the request, Article 14 (b) would have so stated. Note that the last sentence in Article 14(b) provides that additional time can be granted for the hearing to be held when requested by 'the Carrier, the employee, or employee's representative.' This further adds to the Carrier's position that Article 14 is specific when someone other than the employee is allowed to make a request. No such provision was included concerning the initial request for hearing; it must be made by the employee."

In addition to the foregoing, the Carrier, in its ex parte submission to this Board makes the following unrefuted statement:

"Without prejudice to the above position, there could not be any basis for lost wages beginning on January 12, 1984. Mr. Markham marked off due to alleged personal injury on January 12, 1984, and has never attempted to mark back up. Mr. Markham's personal physician provided a letter dated January 26, 1984, that Mr. Markham's physical condition was such that he would be unable to work until further notice."

While it may be that Article 14 could literally be construed as requiring any request for a hearing to be made by an employee direct to the Carrier, we believe the Organization shows significant probative support to hold that application of the rule has permitted requests be made to the Carrier by an employee's duly authorized representative. Therefore, the Board has no alternative but to hold that Claimant was entitled to a hearing in pursuance of Article 14.

Under the conditions in this case we believe it appropriate that the penalty of dismissal be set aside. However, since the record before the Board fails to show that Claimant has meantime shown that he is physically able to return to work, we will hold that he is not entitled to compensation for the time he has been out of service.

Accordingly, the Board will direct that the Carrier promptly notify Claimant by certified, return receipt, mail that it is the decision of this Board that he be returned to service with seniority and other benefits unimpaired, subject to successfully passing a return to duty physical examination or otherwise demonstrating by competent medical documentation why he is not physically able to return to active duty at this particular time, and, further, that unless such action be taken by Claimant within thirty (30) calendar days of receipt of such notification, that his claim for reinstatement to service will then be considered as having been denied by this Board.

AWARD:

Claim disposed of as set forth in the above Findings.



Robert E. Peterson, Chairman  
and Neutral Member



R. O. Naylor  
Carrier Member



M. A. Christie  
Organization Member

Houston, TX  
February 5, 1986