

PUBLIC LAW BOARD NO. 1795

Award No. 29
Case No. 29

PARTIES Southern Pacific Transportation Company (Pacific Lines)
TO and
DISPUTE Brotherhood of Maintenance of Way Employees

STATEMENT "1. That the Carrier violated the provisions of the Agreement when on June
OF CLAIM 6, 1977 it dismissed Track Laborer T.P. Moreno as a result of a formal investigation held on May 23, 1977 on charges not sustained by the hearing record, said action being unduly harsh, unjust and in abuse of discretion.
2. That the Carrier reinstate Claimant T.P. Moreno to the service of the Carrier with seniority and all other rights restored and compensate him for all wage loss suffered plus interest in the amount of six (6) percent per month beginning June 6, 1977 and continuing until he is reinstated."

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 was employed by Carrier on April 5, 1976. A little more than a year later on May 2, 1977 in the afternoon while Claimant was fulfilling his job requiring the use of a mallet in driving spikes, Claimant alleged that a piece of slag flew up and struck his front tooth damaging it. He immediately reported the incident to his foreman and made out an injury report. An appointment was made for Claimant to receive treatment from a dentist on the following day. From the transcript it appears that Claimant made three trips to the dentist who repaired a broken tooth.

Carrier takes the position that the investigation indicated that the tooth damage was caused by a prior off duty injury. In fact, the injury to the tooth occurred prior to Claimant's employment by Carrier. Carrier claims that Mr. Moreno did not tell the dentist that he knew the tooth had been broken earlier nor did he tell the dentist that

he had been seen by another dentist two weeks prior to the incident. Essentially, Carrier's position is that Claimant willfully defrauded the Company to have his tooth fixed at its expense and since such a dishonest act took place with only a years seniority by Claimant, he should be dismissed.

The Organization disagrees with Carrier's position and suggests that there was no attempt to defraud Carrier, a fact which is established by the information that Claimant was covered by a group dental plan which would have covered a large part of the estimated cost for repairing the damaged tooth. Petitioner also suggests that Carrier's disbelief that a rock could fly up and damage a tooth without hitting the lip is without justification based on the transcript. The Organization points out that the foreman testified that he saw blood on Claimant's gums at the time of the alleged incident, a fact which was not later disproved by other witnesses. Further, Petitioner suggests that Claimant was required to report the accident under the rules and further that Foreman Pernell advised the roadmaster of the previous damage to the tooth which Claimant had reported to him as well.

The investigation in this dispute evidences considerable confusion and obscurity with respect to certain aspects of the matter. The Claimant's actions are at best ambiguous and contain errors of omission for the most part rather than commission. For example, it is evident in examining the transcript that Claimant, even though he may indeed have suffered an accident on the day in question (as verified by the foreman) did not report to the dentist that the tooth had been damaged previously apparently. Even more significantly, Claimant did not tell the dentist that he expected to pay for the repairs to the old damage and that the Company by virtue of the accident should not be responsible for that aspect of the service. Thus, there was some culpability certainly on the part of the Claimant in this dispute but not so much as to warrant Carrier's conclusion of dishonesty requiring dismissal. The fact that the bulk of the work could have been covered by the dental plan is a significant factor in this dispute.


Based on the record as a whole therefore, the Board determines that Claimant shall be reinstated to his former position with all rights unimpaired . His derelictions shall be censured by a twelve month suspension only. For the remainder of the period that he has been out of work he should be reimbursed by Carrier for his net wage loss (no interest).

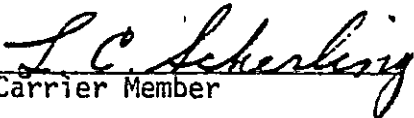
AWARD

1. Claimant shall be restored to his former position with all rights unimpaired.
2. Claimant shall be accorded a twelve month suspension and made whole for the balance of the period in which he was off work for all net wage loss suffered (and no interest).

ORDER

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


I.M. Lieberman, Neutral-Chairman


Carrier Member


Employee Member

November , 1979
San Francisco, California