

PUBLIC LAW BOARD NO. 2267

Award No. 7
Case No. 9

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employees

and

Union Pacific Railroad Company

STATEMENT
OF CLAIM:

1. That the Carrier violated the Agreement when on September 8, 1978 they discharged M. S. Santoscoy, said dismissal being harsh, excessive and on evidence not sustained by the record.
2. That M. S. Santoscoy be reinstated to the position of Extra Gang Laborer with seniority, vacation and all other rights unimpaired and compensated for loss of earnings account the Carrier's improper action.

FINDINGS:

By reason of the Agreement dated August 31, 1978, and upon the whole record and all the evidence, the Board finds that the parties herein are employe and carrier within the meaning of the Railway Labor Act, as amended, and that it has jurisdiction.

On September 8, 1978, Grievant was removed from service, charged with violation of Rule 700 and Rule 702, reading: "Rule 700. Employees will not be retained in the service who are careless of the safety of themselves or others, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who do not conduct themselves in such a manner that the railroad will not be subjected to criticism and loss of good will, or who do not meet their personal obligations. Rule 702. Employees must report for duty at the designated time and place. They must be alert and attentive and devote themselves exclusively to the Company's service while on duty. They must not absent themselves from duty, exchange duties, or substitute others in their place without proper authority." Further, dismissal from service was "Account on Friday, September 8, 1978, you were not present when your gang was leaving for their working shift, and you were also quarrelsome with your extra gang foreman."

The facts are clear that Grievant was not present when his gang was leaving for their working shift. The facts also are clear that Grievant was assigned to work commencing at 7:00 a.m. but was then in the Crew Dispatcher's Office waiting in line for his regular pay check. The Crew Dispatcher's Office was adjacent to the assembling point of Grievant's extra gang, but Grievant did not let his extra gang foreman know of his whereabouts, Grievant believing that another gang member of his crew saw him and would tell the foreman. The foreman actually was not informed and the gang left for the work site without Grievant. Under the circumstances, it is literally true that Grievant was "not present when" his gang "was leaving for their working shift", but Grievant's presence in the Crew Dispatcher's Office waiting in line for his regular pay check, adjacent to the assembling point of his extra gang, was not the kind of absence from duty which would justify the extreme penalty of dismissal from the service of the Company.

The facts are also clear that Grievant was quarrelsome towards his extra gang foreman. The foreman testified that Grievant "came up to me and said who do you think you are leaving me like that. I told him I was the foreman and I went in the yard and he said why did I leave him. He said that he was going to talk to (General Roadmaster) because I told him he couldn't work and to go home, and I told him to go ahead."*** (Tr., p. 10). The foreman replied, "Yes", to the question, "Then your main reason for taking the action you took was his argumentative nature in the first conversation?" (Tr., p. 11). Grievant testified: "*** and asked (foreman) why he had left me. He could see that my motorcycle was there. He has to go past there and he said I wasn't there and I could not work and he sent me home." (Tr. p. 25). Grievant was asked: "...you have attested that you were upset and that you were loud in your conversation with (foreman) on that first occasion, is that correct", and Grievant answered: "Yes". (Tr., p. 28). The testimony of the truck driver who witnessed the first conversation with Grievant when foreman was in the truck is that: Grievant asked foreman "how come he left him. (Foreman) told him that he wasn't there at 7:00 A.M., so then (Grievant) asked (foreman) Who do you think you are and then (Foreman) told him he was the foreman. Then (Foreman) sent (Grievant) home for arguing and (Grievant) said he was going to the union man and (Foreman) told him okay go ahead. That's all I heard." (Tr. p. 17).

The testimony establishes beyond doubt that Grievant was upset and angry at his foreman for leaving him, believing that the Foreman knew or should have known that Grievant was waiting for his pay check. Grievant's failure to communicate to his foreman that he was in the Crew Dispatcher's Office waiting in line for his pay check thus led to misunderstanding of the situation by both Grievant and Foreman, and the misunderstanding led to emotional elements usually called "quarreling". Although Grievant was guilty of being quarrelsome towards his foreman, the circumstances do not appear to be of such extreme proportions, by themselves, to justify the extreme penalty of discharge from the service of the Company. It is in the next verbal confrontation, however, between Grievant and Foreman that Grievant's verbal behavior might have justified the Carrier in dismissing Grievant from its service.

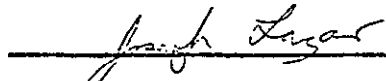
The Foreman testified that Grievant "said (General Roadmaster) said he could go to work. I said that he would have to come and tell me and again he said who do you think you are and he needed to work and he said that he was going to the Union and I said go ahead and then he got on his bike and said he would see me at 3:30 P.M. after work." (Tr., p. 11). Foreman was asked: "He said that he would

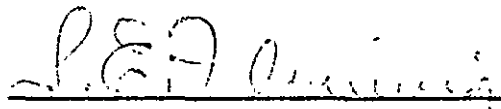
see you at 3:30 P.M., what did that indicate to you?" and Foreman replied: "That it was a threat". Foreman was then asked: "Would you elaborate on that word threat?", and he replied: "The way he said it." The Foreman was next asked, "What did it imply to you?", and he answered: "That he was going to get me." (Tr., p. 11). Grievant testified: "I went to the job later at Bandini to see (Foreman) to ask him about going back to work, but he said I couldn't so I told him I would see him after 3:30, and it wasn't a threat I wanted to just talk to him and that's as far as it went". (Tr., p. 25). The transcript further shows: "Q. You also attested in your testimony, in your second conversation that you made the statement that you would see him at 3:30 P.M., is that correct? A. (Grievant): Yes, I did say that. Q. Had you made an appointment with (Foreman) previous to your conversation with him? Did you threaten him? A. No I did not threaten him, it wasn't meant as a threat. Q. For what purpose did you want to see (Foreman) after 3:30 P.M.? A. I wanted just to talk to him at 3:30 P.M., to see about going to work, I didn't threaten him or anything."*** (Tr., p. 28).

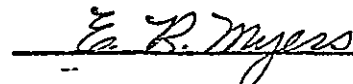
Threatening another is vicious behavior and is a grave offense which, in a proper case, may justify dismissal from the service. In the circumstances of the instant case, where misunderstandings grew out of a failure of Grievant to inform his foreman about being in the Crew Dispatcher's Office at 7:00 A.M. waiting in line for his pay check, and where two languages (English and Spanish) are involved, there appears to be further distinct likelihood of misunderstanding as to purpose of Grievant's 3:30 p.m. statement. Taken at face value, Grievant's statement would not normally and reasonably appear to be a threat or reasonably to give rise to such fear or apprehension on the part of a reasonable foreman as to justify the dismissal of Grievant from the service of the Company. Dismissal is an extreme penalty which can only be justified by substantial evidence of probative force.

A W A R D

The Carrier shall reinstate Grievant without back pay.


JOSEPH LAZAR, Chairman and Neutral Member


S. E. FLEMING, Employee Member


E. R. MYERS, Carrier Member

Dated: March 19, 1980