

PUBLIC LAW BOARD NO. 2439

Award No. 45

Case No. 45

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

STATEMENT
OF CLAIM

"1. That the Carrier violated the provisions of the Agreement when on April 7, 1981 it removed Water Service Mechanic Mr. J.W. Ramsey, III, from the service of the Carrier pending a formal investigation and, thereafter, on May 1, 1981 dismissed Claimant on charges not substantiated by the transcript, said action being in abuse of discretion and unduly harsh in light of the testimony adduced at the aforementioned hearing.

2. That Claimant Ramsey be returned to service with compensation for all time lost and with seniority and all other rights restored and unimpaired."

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 charged with leaving his duty assignment on April 1, 1981 at approximately 7:30 A.M. after being instructed by supervisor to conduct his personal business after 3:30 P.M. on that day. Following a hearing held on April 21, 1981 Claimant was judged guilty of the charge and dismissed from service.

Carrier takes the position that Claimant was insubordinate to his supervisor and the record clearly indicated this insubordination. This was triggered by his defying his supervisors instructions when he left his assignment to take care of personal business. The situation was further exacerbated by Claimant claiming instant illness as a device to leave work after being refused permission to do so. The fact, accord-

ing to the Carrier was that Claimant reported for work on April 1 at the usual time and at approximately 7:30 A.M. he requested to be allowed to be off to go to the Carrier Claim Department for an appointment at 8:30 A.M. to pick up a check for loss compensation resulting from an on-duty injury he had suffered. His supervisor refused Claimant permission since he was needed with the crew that day and was instructed to take care of his business after work at 3:30 P.M. The testimony indicated that Claimant told his supervisor that he "could get sick". Approximately thirty minutes later Claimant called the supervisor and stated that he was ill and ought to see a doctor. The supervisor allowed him to lay off because of the illness but instructed him to get a release from his physician before returning to work. The facts indicated according to Carrier, that Claimant did not go to the doctor but instead went to the Claim Department to take care of his personal business which he had intended to do originally.

The Board notes that the facts were that subsequent to that day Claimant returned to work on April 3, 1981 but he was not allowed to work because he had not brought back a doctor's slip. Following that incident, he did indeed bring a doctor's slip which indicated that he could return to work on April 6, 1981.

Carrier's position in this matter is that Claimant was refused permission to leave work for his personal business and then became instantly ill and was then granted permission to leave. He did not attempt to see a doctor as he had suggested was required but instead took care of the business he initially intended to accomplish. Further, the Carrier indicates that his absence seriously affected the ability of the crew to take care of the required work because of the craft which he was involved in. As a final matter, the Carrier indicates that the discipline assessed was appropriate in view of the fact that Claimant had been disciplined previously for a similar offense which resulted in Award 17 of this Board. Carrier indicates that he had not learned from that experience and the requisite "comply now grieve later principle."

According to the Petitioner's argument, Claimant had made an appointment on March 31, 1981 with Carrier's Claim Agent to pick up a check for loss compensation at 8:30 A.M. on April 1, 1981. Claimant's testimony indicated that as a result of his on-duty injury he had suffered loss of earnings which placed him in a bad position with respect to certain debts including his apartment rent. He testified that his rent was due and he apparently was fearful of an eviction notice from his landlord which triggered his desire to pick up his claim check as quickly as possible. Claimant's testimony indicated that upon being refused his permission to take time off for personal business he became upset to the point of becoming ill due to all the circumstances surrounding the matter. Upon being granted time off to see the doctor on April 1, Claimant kept his appointment with the Claims Department due to the fact, according to his testimony, that the doctor's office was not yet open at that hour of the morning.

Among other arguments, it is maintained by Petitioner that the Claims Agent should have been aware of the fact that he should have notified Claimant that he would call him at the job site and thus, alleviate the entire situation. The Organization contends further that there is some confusion as to the basis for the discipline in the first instance. It is entirely unclear according to the Organization, as to whether Claimant was disciplined for leaving his assignment on the date in question or whether he was disciplined for allegedly not obeying the supervisors instructions by going and seeing a doctor. Further, Petitioner states that the facts in this matter, even though somewhat parallel to those in Case No. 17, are distinctive in that in this dispute Claimant did have permission to leave the premises for the purpose of seeing a physician. The Organization is of the opinion that there was a deliberate attempt to rid the employer of this Claimant based on the earlier Award. Further, Petitioner argues that even if there was a case of willful insubordination proven at the hearing, the penalty of dismissal was unduly harsh and excessive in view of the mitigating circumstances involved herein, particularly with respect to Claimant's financial

difficulties caused by his work incurred injury.


While the Board is aware of the concerns which Claimant expressed with respect to his financial situation caused by his compensation problems, there is no question but that he contrived a rationale for taking time off in the face of the supervisor's refusal to grant him such time off. This action constitutes insubordination and was wholly improper on the part of Claimant. There is no doubt but that Claimant took time off on the morning in question after being refused such time by his supervisor and hence, was guilty of insubordination. This is clearly established further by Claimant's failure to go to a physician until several days later after being refused a return to work without such medical consultation. However, while Carrier was correct in its conclusions with respect to Claimant's guilt, some serious question arises with respect to the quantum of the penalty assessed. The Board believes that even though Claimant's behavior cannot be condoned the discipline was unduly harsh and excessive under all the circumstances herein. For this reason, the Board will find that Claimant shall be returned to work with all rights unimpaired but without compensation for the time off. The behavior which he exhibited in this instance can not be repeated except at his peril of permanent loss of employment.

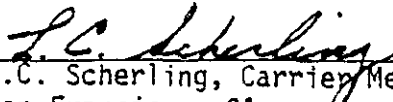
AWARD

1. Claim sustained in part; Carrier violated the provisions of the current Agreement when it dismissed Claimant since the penalty was harsh and discriminatory.
2. That Claimant shall be returned to service with all rights unimpaired but without compensation for time lost.

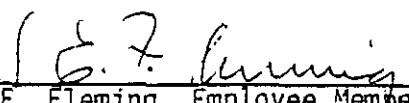
ORDER

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


I.M. Lieberman, Neutral-Chairman


L.C. Scherling, Carrier Member
San Francisco, CA

March 10, 1982


S.E. Fleming, Employee Member