

PUBLIC LAW BOARD NO. 3558

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
TO)
DISPUTE) SOUTHERN PACIFIC TRANSPORTATION COMPANY (EASTERN LINES)

STATEMENT OF CLAIM:

"Claim on behalf of Machine Operator A. Capelo for reinstatement to his former position with pay for all time lost, with all seniority, vacation and all other rights restored, alleging unjustly dismissed."
(MW-83-119/403-9-A)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee respectively 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.

While working as a Machine Operator Helper on Thursday, September 15, 1983, Claimant asked his Foreman for permission to be absent the following day, Friday, September 16, 1983, so that he could go to Carrier offices in search of his paycheck, which had apparently gone astray. The Foreman advised Claimant that since he was shorthanded and needed workers, he could not grant the requested permission. The record also shows that the Claimant and the Foreman got into a slight argument relative to the reasons for Claimant's check not being at the work site and as to why Claimant needed to be off the following day in addition to wanting to look for his paycheck.

In disregard of the Foreman's refusal to permit Claimant to be absent, the Claimant elected to absent himself both on Friday, September 16, 1983, and on Monday, September 19, 1983. His conduct was considered by the Carrier to represent insubordination, a failure to follow instructions, and absenteeism. He was notified by certified letter under date of September 19, 1983 that he was dismissed from all service with the Carrier.

It is the Carrier's position that the facts as established by the evidence of record, as further developed at a hearing requested by Claimant, show the following:

- "1. That an angry interchange of remarks took place between Claimant Capelo and Foreman Duckett and Mr. Capelo left before Mr. Duckett had a chance to explain that he was attempting to recover Claimant Capelo's check.
2. Claimant Capelo absented himself to allegedly find his check in the face of not having permission to be absent from his place of employment.
3. Claimant admitted Foreman Duckett had not given him positive permission to be absent on the day in question."

The Carrier also submits that if Claimant had a grievance, his remedy lay in the grievance machinery of Article 15 and not in argumentation and insubordination.

It is the Carrier's further contention that in the light of Claimant's past disciplinary record, the penalty of discharge in this case was not harsh or unreasonable.

It is the Organization's position that Carrier officers were totally at fault in putting the Claimant in a position that it was essential that he be paid on September 16, 1983 account a number of personal problems and obligations. The Organization also maintains that testimony in the transcript "clearly proves that Mr. Capelo had not received a pay check since August 1, 1983, a period of seven weeks, and he had requested help from his foreman, apprentice foreman and production supervisor in locating his check, but no one would assist him, therefore, he had no choice but to try to locate his pay check on his own."

The Organization also contends that Claimant did in fact notify his Foreman that he would not be at work on September 16, 1983, having advised the Foreman during their conversation the afternoon of September 15, 1983 that he was going to look for his check.

As concerns the question of whether or to what extent the Carrier contributed to Claimant's actions, there is no doubt that Carrier officers were to some extent negligent in not providing for the more prompt payment of compensation due the Claimant account his restoration to service some time prior to September 15, 1983. However, it was the unrefuted testimony of the Foreman that on September 15th he had wanted to tell the Claimant that he would attempt to find the pay check, but that after he and the Claimant had gotten into "a little argument" the Claimant "went his way" and the Foreman went his way, even though he did continue to seek to try to locate the check.

In regard to the question as to whether or not the Claimant had permission to be off, we think it evident from the record that Claimant did not have such permission and the mere fact that he had stated he would not be at work Friday did not constitute proper authority for Claimant to absent himself from work.

In our judgment, there is no doubt that Claimant had wrongfully absented himself from work and that in the light of his past disciplinary record the Carrier had proper cause to impose a severe disciplinary penalty. At the same time we are of the belief that certain extenuating circumstances cast doubt on the propriety of a penalty so severe as permanent discharge from service. It will, therefore, be our finding that Claimant be reinstated to service with seniority and all other benefits unimpaired, but without compensation for time lost.

AWARD:

Claim sustained to the extent set forth in the above Findings.

ORDER:

The Carrier is directed to make this Award effective within 30 calendar days of the date set forth below.



Robert E. Peterson, Chairman
and Neutral Member



C. B. Goyne, Carrier Member



M. A. Christie, Employee Member

San Antonio, TX
June 30, 1984