

PUBLIC LAW BOARD NO. 4373

PARTIES	SOUTHERN PACIFIC TRANSPORTATION COMPANY)	
	(EASTERN LINES))
)
TO	AND) AWARD NO. 14
)
) CASE NO. 24
	BROTHERHOOD OF MAINTENANCE OF WAY)
DISPUTE	EMPLOYEES)

STATEMENT OF CLAIM:

1. Carrier violated the effective Agreement when Machine Operator P. D. Green was unjustly dismissed from service.
2. Claimant Green shall now be reinstated to his former position with pay for all time lost, with seniority and other rights unimpaired.
3. This claim presented by the General Chairman on September 24, 1987, to Division Superintendent should be allowed because said claim was not disallowed in accordance with the provisions of Article 5 Section 1.(a) of the current Agreement.

HISTORY OF DISPUTE:

On August 27, 1987 Claimant was working as a machine operator on the 184RD track liner. At approximately 11:15 a.m. Carrier officers observed Claimant in the track liner parked at a junction Claimant was in a reclining position and his eyes were closed.

By letter of August 31, 1987 the Carrier suspended Claimant from service and notified him to appear for formal investigation on the charge that he had been sleeping on duty in violation of Rule 602.

By letter of September 22, 1987 the Carrier notified Claimant that he had been found guilty of the charge and was dismissed from the Carrier's service.

The Organization grieved the discipline. The Carrier denied the grievance. The Organization appealed the denial. On April 19, 1988 the Carrier restored Claimant to service without prejudice to the claim in this case.

The Organization eventually appealed the Carrier's denial to the highest officer of the Carrier designated to handle such disputes. However, the dispute remains unresolved, and it is before this Board for final and binding determination.

FINDINGS:

The Board upon the whole record and all the evidence finds that the employees and the Carrier are employees and Carrier within the meaning of the Railway Labor Act, as amended, 45 U.S.C. §§151 et seq. The Board also finds it has jurisdiction to decide the dispute in this case. The Board further finds that the parties to the dispute, including Claimant, were given due notice of the hearing in this case.

At the outset the Organization raises the procedural objection that the Carrier did not deny the claim in this case within the prescribed time limits of Article 5, Section 15, 1(a) of the applicable schedule agreement. We agree. The record in this case reveals that the Organization filed the claim in this case on September 27, 1987. Thereafter, the Carrier did not deny the claim until March 14, 1988. However, that fact does not mandate, as the Organization urges, that the claim in this case be granted in toto. NRAB Third Division Award No. 27224, July 20, 1988 (Warshaw, Referee) on this property and between the same parties found on facts analogous to those

of the instant case that the Claimant was entitled to compensation by virtue of the Carrier's breach of the time limits from the time he was removed from service until the date the Carrier actually denied the claim. We believe that case is on all fours with the instant case, and we are persuaded to reach the same result here.

NRAB Third Division Award No. 27224 also convinces us that we must reach the merits of the instant case. We believe the record in this case substantiates Claimant's guilt. Although Claimant denied that he was sleeping on duty, contending that he was meditating, three Carrier officers observed Claimant in a reclining position with his eyes closed while on duty. The testimony of the three Carrier officers clearly outweighs Claimant's denial. Rule 602 which prohibits sleeping on duty provides in pertinent part that "[E]mployees who are in a reclined position with eyes closed will be considered in violation of this rule."

With respect to the measure of discipline in this case it must be borne in mind that while initially Claimant was assessed permanent dismissal, the Carrier restored him to service April 19, 1988. While it is true that Claimant remains out of service that is the result of Claimant's failure to pass the drug screen administered in conjunction with his return to duty physical examination. Accordingly, all time out of service after April 19, 1988 is not attributable to any action of the Carrier before the Board in this case. Inasmuch as Claimant will be compensated for all time lost from the time he was suspended from service until March 14, 1988 the discipline effectively is converted to a five-week suspension. In view of the nature of the offense and Claimant's disciplinary record since 1981, which

- 4 -


includes a suspension and two dismissal not including the one involved in the instant case, we cannot find that such a suspension constitutes harsh or excessive discipline.


AWARD

Claim sustained to the extent that Claimant shall be compensated for all time out of service from August 31, 1987 to March 14, 1988. Claim denied in all other respects.

The Carrier will make this award effective within thirty days of the date hereof.


William E. Fredenberger, Jr.
Chairman and Neutral Member


R. O. Naylor
Carrier Member


S. A. Hammons, Jr.
Employee Member

DATED: November 28, 1989