H. G. Harper

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Award No. 11
Docket No. 11

PUBLIC LAW BOARD NO. 76

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

Roy R. Ray - Referee

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement, specifically Article 23, Rule 1, beginning March 27, 1967 and continuing, by disciplining Extra Gang Laborer Isadore Sedlar without giving him a fair and impartial hearing.

2. The Carrier further violated the Agreement, specifically Article 23, Rule 1 by holding a belated hearing on April 28, 1967, well beyond the prescribed time limits.

3. The Claimant Extra Gang Laborer Isadore Sedlar be now reimbursed for the loss of wages he would have received had the Carrier not violated the Agreement.

OPINION OF BOARD: Claimant Isadore Sedlar was employed as a Track Laborer in Extra Gang No. 583. About two weeks before Good Friday (March 24, 1967) he asked his Foreman, A. H. Schneider for permission to be off that day. The Foreman agreed assuming no emergency arose. About a week later Roadmaster A. W. Reid learned of this and told Schneider to advise Sedlar that he could not have the day off. Some days later Sedlar spoke to Division Engineer Clark about the matter and explained his reason for desiring to be off on Good Friday. Clark advised that the decision was entirely up to the Foreman. Schneider again told Claimant that he could be off if no emergency arose. A few days later Roadmaster Reid again visited the crew, learned of the above conversations and again told Sedlar that he could not be off. On Thursday, (March 23, the day preceding Good Friday), Schneider told Sedlar he would need every man the next

day and that Sedlar could not have the day off. Sedlar replied that he was going to take the day off anyway. Schneider stated that if he did take the day off he would be considered as having quit the job. Sedlar said he was not quitting, but was taking Friday off and would be back to work on Monday (March 27th). At the close of work on Thursday Sedlar handed Schneider a note explaining where he could be reached by phone if an emergency arose. Schneider refused to accept the note and again told Sedlar that if he took off the following day "he quit". Again Sedlar replied that he did not quit, and would be back to work on Monday morning. Sedlar did not report to work on Friday, March 24th, but had his brother, Theodore Sedlar, a worker in the same gang, take a note to Schneider stating where Claimant could be reached if an emergency arose. After work on Friday Schneider gave a handwritten note to Theodore Sedlar, addressed to Claimant. It stated that Claimant had violated Rule 1 of General Rules by absenting himself without permission and by not reporting to work on March 24th, he quit the service of the Carrier. Claimant Sedlar reported to work Monday morning March 27th at the usual time and place. But Foreman Schneider refused to allow him to go to work saying that Sedlar was considered as quitting when he did not show up for work on Friday. At the time he gave him a letter, dated March 24, 1967, which stated that Sedlar had been absent on that date without authority and had therefore quit the service of the Carrier. It also included a Form 1846 which contained the statement that Claimant had quit the service of his own accord. By letter of April 17, 1967 claim was presented to the Division Engineer charging the Carrier with violation of Article 23, Rule 1 and requesting that Claimant be returned to service and paid for time lost. By letter of April 24th the Division Engineer advised the Claimant that a hearing would be held on April 28th, on the charge which Engineer Clark set forth in the letter. At the hearing after engineer Clark had stated the purpose of the hearing, General Chairman Jones protested the hearing as being improper and in violation of Article 23, Rule 1, because not held within 10 days after Sedlar was removed from service.

He refused to participate further in the hearing and left along with Claimant and his witnesses. The hearing was continued in the absence of Claimant and the General Chairman. In a letter of May 2, 1967, addressed to Claimant, Chief Engineer Hunter stated that Claimant had in effect resigned when he failed to report for work on March 24th as instructed, that the offense warranted no hearing, but that at the hearing which was held Claimant was found guilty as charged and was hereby dismissed from service of the Carrier for failure to report for duty as instructed. The claim was appealed to A. F. Winkel, Vice President Personnel, requesting that Sedlar be returned to service and paid for all time lost. In his reply of May 9th Winkel disagreed with the Organization's position concerning any violation of Article 23, contended that the hearing was timely and that Sedlar's guilt had been established in the hearing. But in view of Sedlar's satisfactory work record, youth and inexperience and that this was a first offense Winkel offered to permit him to return to service with the understanding that he could pursue his claim for time lost through the regular procedure. Claimant returned to service on May 12, 1967.

The present claim, therefore, involves only the matter of whether Sedlar is entitled to payment for the time lost between March 27 and May 11, 1967. It is not disputed that he was absent from his job without permission and contrary to specific instructions of his Foreman, although the granting and withdrawal of permission on at least two occasions may form a mitigating circumstance. There is a dispute between the parties as to whether an emergency existed on Good Friday. But the question of whether Claimant was guilty or innocent of alleged insubordination is not before the Board. The first issue to be resolved is whether Sedlar voluntarily quit the Carrier's service on March 24th or was dismissed or held out of service by the Carrier.

As we stated in Award No. 6 of this Board, the overwhelming view of Arbitrators is that refusal of an employe to perform work assigned does not amount to a voluntary

quit. Unless some affirmation of an intent to quit the job is manifested by the employe, the refusal of the employer to let the employe continue his status constitutes a discharge rather than a resignation. 24 LA 522, 523 (1955, Arbitrator Merrill); Elkouri and Elkouri, How Arbitration Works(1960) p. 414. Here there was no manifestation by Sedlar of an intent to quit the job. Quite the contrary. His words and actions show clearly that he did not intend to quit. Twice on Thursday when Schneider told him he would be considered as having quit if he did not show up the next day, Sedlar told Schneider that he did not intend to quit, was only going to take Friday off and would be at work Monday. He also handed Schneider a note telling where he could be reached by phone if any emergency arose. He sent another such note to Schneider on Friday by his brother. He reported for work on Monday, March 27th at the usual time and place. These cannot be said to be the actions of a man who intended to quit his job. We believe the evidence is clear that Sedlar was involuntarily held out of service by the Foreman from March 27th and so hold.

Article 23, Rule 1 provides that an employe with twelve or more months of service will not be disciplined or dismissed without first being given a fair and impartial hearing. It requires the hearing to be held within ten days of the date when charged with the offense or held out of service. It is only when the offense is "sufficiently serious" that an employe may be suspended pending a hearing. A reasonable construction of the phrase "sufficiently serious" would mean only cases involving charges of moral turpitude, safety violations or other gross misconduct providing reason for immediate suspension. Here the refusal of Sedlar to work on a particular day was not of that category. Carrier admits that his work performance was satisfactory. There was, therefore, no good reason why he should not have been permitted to continue work pending a hearing on any charge against him. There was a dispute as to whether he was dismissed by the Foreman or quit. Claimant was entitled to have the question settled in a hearing. Carrier cannot compel an employee to accept its conclusion on

conflicting evidence, that employe quit, and thus escape the effect of Article 23, Rule 1. Award 3053 (Third Division, Carter). The very purpose of Rule 1 is to protect employes from the kind of precipitate action which took place here.

We regard Award 5140 of the Third Division as being in point and persuasive on the issue here. There an employe had absented himself for days without permission. Carrier suspended him without a hearing. In the course of his opinion Referee Coffey said:

> There remains, however, the question of whether the disciplinary measures invoked were just and proper. The Board is of the opinion that action taking employes out of service, more or less as a matter of routine, pending hearing and decision on alleged rules' violations, which are not aggravated or serious per se, is inappropriate, hasty and ill-advised. This Carrier seems to misconceive the true purpose and intent of Rule 1, Article 21, of the Agreement, as it pertains to suspension of employes, pending hearing and decision based on charges of misconduct.
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> It would appear to be a reasonable construction of the rule to say that only in cases involving charges of moral turpitude, safety violations, and other gross misconduct, should the employee be taken out of service before the hearing and decision. It is the evident purpose of the rule to maintain the status quo of employes, so far as possible, until the hearing, so that his rights will not be prejudiced by precipitate action, and the employer will not be confronted with charges of inflicting punishment to off-set monetary losses confronting it, should the earlier action be over-ruled.
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> We believe the parties appreciate the need for protecting their hearing procedures, and decisions of management based thereon, from charges that the employe did not have a fair and impartial hearing. By agreement they introduce into their relations the democratic processes that only after hearing and "conviction" is one guilty of the offense charged. Therefore, meticulous care should be taken to avoid any claim that the guilt of the accused has been prejudiced. Thus, the need to maintain the status quo , as far as possible, until both sides of the controversy have been heard and a fair and impartial decision rendered.
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> For the reason we believe the Carrier violated the Agreement, when it suspended Claimant before a hearing and a decision, that part the disciplinary action cannot stand. Therefore, the aggrieved employe is entitled to be paid for that period when he was wrongfully held out of service.

Claimant was held out of service from March 27th through May 11th. Even if the offense could be considered "sufficiently serious" (which we do not believe)

Carrier was required to hold a hearing within 10 days from the time Claimant was held out of service (March 27th). This it failed to do since no hearing was held until April 28th. The hearing, therefore, was not timely and this is in itself a violation of Rule 1 of Article 23.

For the reasons expressed we hold that Carrier violated Article 23 Rule 1 in removing Claimant from service on March 27th and that he is entitled to payment for all time lost between that date and May 11, 1967.

A W A R D

The Claim is sustained. Carrier is directed to pay Claimant at his regular rate for the time lost between and including the dates of March 27th and May 11th, 1967.

Public Law Board No. 76

Roy R. Ray
Neutral Member and Chairman

A. J. Cunningham
Employe Member

A. F. Winkel
Carrier Member

Dallas, Texas
June 19, 1968