

PUBLIC LAW BOARD NO. 2182

Award No. 11

Case No. 12

Docket No. MW-78-17

Parties Brotherhood of Maintenance of Way Employes

to and

Dispute Southern Pacific Transportation Company

Statement of Claim 1. Carrier violated the effective agreement when Wood Preserving Works Laborer Charles Sanders was unjustly dismissed on December 22, 1977.

2. Claimant Sanders be reinstated to his former position with pay for all time lost and with vacation, seniority and all other rights unimpaired.

Findings The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated May 22, 1978, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

Claimant Laborer received the following letter from the Superintendent of the Wood Preserving Works, Houston, Texas, dated December 22, 1977,

"On November 15, 1977, you reported you had injured your back performing your duties as a laborer at Wood Preserving Works, Houston, Texas. You were sent to the designated clinic for examination and evaluation.

The attending physician recommended three to five days off for recovery. You did not return to work until December 6, 1977.

We now have information that during the period from November 15, 1977 until November 26, 1977 you were also employed by, and working daily for, in the capacity of a Laborer, United Galvanizing, Inc., Houston, Texas.

This is the same period of time you were supposed to be recovering from your alleged back injury sustained on November 15, 1977. This act is contrary to rules of Southern Pacific Transportation Company.

For violation of Rule 801, of General Rules and Regulations dated October 31, 1976, which states in part, "Employes will not be retained in the service who are dishonest....", whereby you falsified an accident report and accepted pay of \$1,000.00 for work not performed as settlement of an improper injury claim and Rule 810 which

"states that "Employes must not engage in other business which inter-feres with their performance of service with the Company unless advance written permission is obtained from the proper officer, whereby you were employed with United Galvanizing, Inc., you are hereby dismissed from the service of the Company...."

Claimant asked for a hearing, which was granted, and, after a postponement, the hearing was held on January 12, 1978. Claimant was advised, January 16, 1978, that

"evidence adduced at the hearing on January 12, 1978 proved the charges and that your dismissal is hereby sustained upon my review."

Claimant testified that he had been working for United Galvanizing, Inc. on the night shift, from 4:30 PM until 2:00 AM, since September of 1977. He testified that he had worked there on November 14, 1977. The record reflected that Claimant alleged a back injury, a strained back, about 8:30 AM on November 15 and that he had strained his back while working as a Laborer on the over-head crane. Claimant was sent to the designated clinic, on November 15th, for evaluation. A Doctor Frierson treated Claimant and he indicated a temporary disability, of Claimant, for three to five days and no functional disability. Claimant remained off for the next three weeks. He next saw Dr. Frierson, on November 23rd, who treated Claimant for a back strain and said that Claimant would be off for a seven to ten day period. Claimant returned to work on December 6, 1977.

Claimant testified that he worked, commencing November 19 and 21 through the 25th as an instructor for United Galvanizing Company, Inc. He settled a personal injury claim with the Company on December 5, 1977 and accepted \$1,000.00 in a settlement of said injury received on November 15, 1977. None of the \$1,000.00 was allocated to time lost.

The thrust of Carrier's position is that Claimant was in violation of Rules 801 and 810. Rule 801, in that Claimant was dishonest and had falsified an

accident report. The Board finds that Carrier had failed to carry the burden on that charge. Here, there is conflict in the testimony between the Claimant, who stated that he worked as a galvanizer, but, during the period in question, because of his injury, worked as an instructor at the request of United Galvanizing Company, Inc. One of Carrier's witnesses gave hearsay testimony to the effect that Claimant worked as a laborer during all the periods. Claimant denied that he worked the 15th, 16th and 17th. We are not disposed to agree, on the basis of the evidence offered, that Carrier had proven its case insofar as the alleged violation of Rule 801. We are left only with inference and not proof as to Claimants alleged dishonesty. The burden of proof lay with Carrier and it failed thereof.

However, it is quite clear that Claimant was in violation of Rule 810. The record shows that he had engaged in other business and that such other business did interfere with the performance of Claimant's service. He neither asked for, nor did he have written permission, to be employed with United Galvanizing Company, Inc.

Accordingly, the claim is otherwise denied.

Award Claim denied.

M. A. Christie
M. A. Christie, Employee Member

R. W. Hickman
R. W. Hickman, Carrier Member

Arthur T. Van Wart
Arthur T. Van Wart, Chairman
and Neutral Member