PUBLIC LAW BOARD NO. 3558

AWARD NO. 18
Case No. 18

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

STATEMENT OF CLAIM:

"Claim on behalf of System Welding Department employee R. DeLeVega for all time lost, at Grinder Operator rate of pay, commencing August 1, 1984 and to continue until such time as he is allowed to return to duty, with vacation and all other benefits due him restored due to him being wrongly and unjustly dismissed."
(MW-84-90)

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.

Claimant was charged with and found by Carrier to have been absent from service without proper authority during the period July 16 through July 20, 1984.

In defense of its action, Carrier states that by his own testimony at a company hearing Claimant acknowledged that he did not have permission to be off July 16 through July 20, 1984; he is a 6-year veteran of the company and knows the proper procedure for absenting oneself from the job; he is guilty as charged of violation of Rule M810; and, Claimant's past disciplinary record supports dismissal from all service.

Essentially it is Petitioner's contention that Carrier knew that Claimant had sustained a torn cartilage on the left side of his chest while playing football at home on July 4, 1984; he had permission to be absent from his job after working July 5, 6 and 7, 1984; he knew from past experience that he could not return to his assignment until he was fully recovered and released for service by his personal doctor; and, he did not violate Company Rule M810 as charged.

Rule M810 reads in pertinent part as follows:

"RULE M810: Employees must report for duty at the prescribed time and place...They must not absent themselves from their employment without proper authority...Continued failure by employees to protect their employment shall be sufficient cause for dismissal."

As concerns what Carrier says was Claimant's admitted guilt to the charge of record, it directs attention to Claimant having responded, "No, sir," to each of the following questions asked of him by the company hearing officer:

1. Did you work on July 16 through July 20th?

2. Did you have permission from Mr. Lankford, your foreman, to be off on these days?

3. Did you call in prior to work time on July 16th to gain permission to be off on these days?

In regard to Claimant knowing the proper procedure to obtain permission to be absent from work, Carrier states Claimant had twice before been disciplined for violation of Rule M810; he had contacted his foreman to explain he would be off to go the the doctor, but did not tell the foreman he was going to be off indefinitely.

In terms of Claimant's past disciplinary record, the Carrier, in a letter to the Petitioner under date of October 29, 1984, stated:

> "Mr. DeLaVega on January 27, 1984 was suspended for 15 days for violation of Rule M810, on March 23, 1984 he was again suspended for 15 days for violation of Rule M810. Record indicates that on May 10, 1984 he was cited for violation of Rule M810. Following a resume from his doctor saying he had been under treatment, he was given benefit of that doctor's report and reinstated without pay and the investigation was cancelled."

Petitioner submits that when Claimant felt his injury had gotten worse instead of better after working three days that he made an appointment to see his doctor and told his foreman he could not work, that he was going to his doctor. Petitioner says that Claimant did not call in for further permission to be off, or, namely, on July 16, because he felt that he had permission to be off until he had fully recovered from his personal injury. In this connection, Claimant is found to have stated the following at the company hearing:

> "Like I said before, when Mr. Lewis asked me the reason why I did not return to work the 16th, was because I didn't feel like I was 100% cured to return to work. May I say that back on Sept. 1983, I injured my finger also at home and when I called Mr. Harris to find out if I could do some light duty job even though I had my finger in a splint, he informed me that I should not return to work until I was 100% healed and I also had a doctor's

release. I did not at that time have to contact Mr. Harris again and I was off for 5 weeks until I could use my finger fully."

In the Board's opinion, we do not believe it may be said from the record before us that Claimant had good and sufficient reason to assume he had permission to be off from work for an indefinite period of time or until he or his physician determined he was able to physically return to work. We think Claimant knew or should have known that he had been granted permission to be off to see his doctor, and that he was obliged to be in touch with the Carrier relative to any continuing or extended absence from duty. He had been previously, and again only recently, placed on notice by disciplinary suspensions that the Carrier would not treat lightly any absence from duty without permission. This should have alerted him to a need to have been most specific in requesting permission to be absent from duty or, as in September 1983, to have fully discussed the matter with the Carrier. Certainly, after visiting his doctor he could have telephoned Carrier to have apprised his foreman of any need to be off for a period of time or to have otherwise affirmed what he says he had believed to be permission to be off until he was released by his personal doctor for work.

In the circumstances of record and in view of Claimant's past disciplinary record, we think Carrier had reason to impose severe discipline. However, we find dismissal from all service to be excessive. We believe the time Claimant will have been out of service to the date of this Award should be sufficient notice that Claimant is expected to be at work with a high degree of regularity unless properly excused or otherwise legitimately unable to be present for good and sufficient reason.

AWARD:

Claim for reinstatement sustained, but only 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 4, 1985