

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25594
Docket Number MW-25818

Paul c. Carter, Referee

PARTIES TO DISPUTE: (*Brotherhood of Maintenance of Way **Emp**loyes*
(Southern Pacific **T**ransportation Company (Eastern Lines))

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

"(1) The dismissal of Mr. E. G. Bass for **alleged** violation of Rules '801' and 'M810' was **without** just and sufficient cause and on the basis of unproven charges (System File **MW-83-90/398-79-A**).

(2) The claimant shall be reinstated as track foreman with seniority and all other rights as such unimpaired and he shall be compensated for all wage loss suffered, at the track foreman's rate, beginning June 20, 1983."

OPINION OF BOARD: The record shows that Claimant entered Carrier's service on November 7, 1967, and held several positions covered **by** the Agreement between the Carrier and the Organization, establishing seniority **as** a Track Foreman on November 16, 1971.

On June 21, 1973, Claimant **was promoted** to position of Track Supervisor on the Galveston District, which position **was** not covered by any labor agreement. He was subsequently **promoted** to the following official positions:

Assistant R oadmaster	12-01-73
Roadmaster	6-25-74
District M of W Manager	3-01-79
Regional Production Mgr.	10-01-80
District M of W Manager	7-16-81

While working as an official of the Carrier, Claimant retained his seniority as a Track Foreman in **accordance** with the provisions of the Agreement.

The record indicates that while Claimant was employed as an Officer of the Carrier, he had an interest in equipment leased to the Carrier for use in the Maintenance of Way Department during the period June 1979 to February 1983. He was instructed in no uncertain terms in a letter dated **November** 5, 1979, to cease renting or leasing equipment to the Southern Pacific Transportation Company.

The management **considered** Claimant not in compliance with the instructions of **November** 5, 1979, and notified him on June 20, 1983:

"It has been determined that while you **were** in the employ of the **Southern** Pacific Transportation Company, you had an interest in equipment leased to Southern Pacific between June of 1979 **and** February, 1983.

***You were** instructed by letter dated **November 5,** 1979 to cease renting or leasing equipment to the Southern Pacific Transportation Company. For your failure to comply with these instructions and to divest yourself of **this equipment,** you were insubordinate and in violation of that portion of Rule 801 of the Rules and Regulations for the Maintenance of Way and Structures, stated as follows:

'Rule 801: **Employees** will **not** be retained in the service who **are....insubordinate....or** who conduct themselves in a manner which would subject the railroad to **criticism....'**

and that portion of Rule M810 of the Rules and **Regulations** for the Maintenance of Way and Structures, stated as follows:

'Rule **M810: Employees...**They must not engage in other business which interferes with their performance of service with the Company unless advance written permission is obtained **from** the proper officer...'

For your violation of Rules **801** and **M810** of the Rules and Regulations for the Maintenance of Way and Structures, you are hereby dismissed from the service of Southern Pacific Transportation Company:

The letter of June 20, 1983, was by Carrier's Regional Maintenance of Way Manager A. J. Orphan and dismissed Claimant as a District Maintenance of Way Manager, and also in any other capacity.

Pursuant to **B.M.W.E.** rules, Claimant addressed a Letter dated June 27, 1983, to the Regional Maintenance of Way Manager, requesting a hearing. Hearing was granted and scheduled to begin at 9:00 A.M., July 17, 1983, Houston, Texas. The hearing was postponed and held on August 3, 1983. Following the hearing, Claimant was notified on August 12, 1983, that his dismissal **would** stand. A transcript of the hearing has been made a part of the record. Claimant was represented in the hearing by **two** representatives of the **Organization,** who **contended** that the charge was vague and unreasonable, **and** that it came too late because it was dated June 20, 1983, and the last incident mentioned was in February, 1983. This **Board** has repeatedly held that a charge is sufficient to meet agreement requirements when it is sufficiently explicit to allow the Claimant to understand the nature of the charge and to prepare a defense. See Awards Nos. 24909, 25266, 25415. The letter to Claimant dated June 20, 1983, was adequate to advise Claimant of the nature of the charge. In February, 1983, Claimant was in the ^{Management} position of District Maintenance of Way Manager. He was subject to removal from that position without any handling under the Agreement. Claimant was **not** subject to the Agreement until he attempted to exercise his seniority. Under such circumstances the notice was timely.

In its submission to the Board, the Organization complains that the hearing was not properly conducted in that the hearing officer acted improperly in asking Leading questions. It is well settled that if objections are to be raised as to the manner in which an investigation is conducted, such objections must be raised during **the** course of the **investigation**, **otherwise** they are **deemed** waived. Objections on appeal come too late.

There was substantial evidence in the hearing that following the November 5, 1979, letter to Claimant by the Carrier, Claimant continued to own or lease equipment that was in turn Leased to the Carrier. **It** was developed that Claimant had entered into a lease/purchase agreement on December 5, 1979, with a firm identified as Coastal Railway Service, Inc. for five pieces of equipment that Coastal had thereafter leased to the Carrier. **The lease/purchase** agreement provided that the equipment was to remain in the name of the Claimant, although Claimant would have **"no** authority to **whom** Coastal Railway **Serv**ices, Inc. may rent said equipment.' It is noted that the lease/purchase agreement contained no provision prohibiting the Lease of the equipment to Carrier.

In the hearing Claimant admitted that he retained a personal financial interest or ownership rights in the equipment leased to the Carrier. It is stated by the Carrier, and not refuted, that in Claimant's **position** as District Maintenance of Way Manager, he was responsible for determining what **type** of heavy duty machines **were** required for service on Carrier's property, and recommending the lease of the equipment. It thus appears that at Least a **conflict** of interest existed as Claimant was **in** a position to realize personal financial gain in the leasing of equipment from Coastal Railway Service, Inc. Being a part of management, it **would** appear proper that Claimant's priority would have been toward management. It is apparent from the rather lengthy record that such was not the case.

In Second Division Award No. 8930, with this Referee participating, it was **held**:

"The Carrier has the right to establish fair and reasonable **standards**, and this Bard lacks the authority to direct the Carrier's operation in any manner.

"The Carrier has also called attention that in contracts of employment there is **an** implied condition of loyalty by an **employee** to his employer. The Carrier cites the text of 56 Corpus **Juris Secundum**, page 430, Master and Servant, reading:

'**One** who asserts an interest, or performs acts adverse or disloyal to his employer commits a breach of an implied condition of the contract of employment which may warrant discharge... '

"The Board **adheres** to this principle. See Third Division Awards 2496, 10930, 15932, 11911, 23151 and Award 1 of Public Law Board No. 2787."

The principle outlined in Second Division Award No. 8930 is applicable in the present dispute. **The claim will be denied.**

FINDINGS: The Third Division of the **Adjustment Board**, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the **Employes** involved in this dispute are respectively Carrier and **Employes** within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the **Adjustment Board** has jurisdiction over the dispute involved herein; and

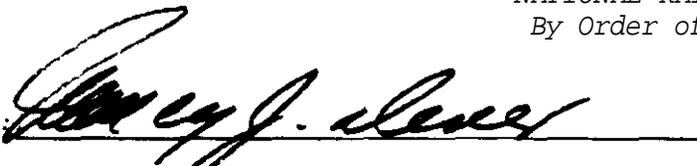
That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of August 1985.

