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PUBLIC LAW BOARD NO. 2439

OFFICE OF GENERAL CHAIRMAN

Award No. 10  
Case No. 10

PARTIES Southern Pacific Transportation Company (Pacific Lines)  
TO and  
DISPUTE Brotherhood of Maintenance of Way Employees

STATEMENT "1. That the Carrier violated the provisions of the Agreement when on  
OF CLAIM April 20, 1978 it dismissed Track Laborer, Mr. J.E. Sims, on charges  
not sustained by the hearing record, and further violated said Agree-  
ment when it failed to accord Claimant due process.

2. That the Carrier now reinstate Claimant to its service with seniority  
and all other rights restored unimpaired, and that Claimant now be  
compensated for all wage loss suffered."

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Car-  
rier and Employees within the meaning of the Railway Labor Act, as amended, and that  
this Board is duly constituted under Public Law 89-456 and has jurisdiction of the par-  
ties and the subject matter.

Claimant filed an application for employment with the Carrier on April 28, 1977 and  
was shortly thereafter hired as a Track Laborer. On the employment application a ques-  
tion appears which states:

"Have you ever been convicted of a crime?"

This question was answered in the negative by Claimant on the application.

Following a hearing Claimant was dismissed on April 20, 1978 for violation of Carrier  
Rule which indicated: "Employees will not be retained in the service who are .... dis-  
honest ...." The transcript of the record of the hearing indicates that Claimant was  
convicted on November 22, 1976 for the crime of tampering with drug records while an  
employee of the St. Vincent's Hospital; as a result of the conviction, he was placed on  
probation for three years and ordered to pay attorney's fees in the amount of two hundred

and eighty dollars plus a fine in the amount of two hundred dollars and fifty dollars costs. Subsequently, in August of 1977 while in the employ of Carrier, he was informed by one of Carrier's special agents that a warrant had been issued for his arrest and he was thereafter arrested and incarcerated for two weeks for violation of parole. Claimant testified that while incarcerated he had contacted Carrier's Chief Clerk, a Mr. Colatorti, and advised him of the circumstances of his being in jail at which time Mr. Colatorti informed him that he could return to work upon his release.

Carrier, by letter dated March 22, 1978, charged Claimant with violation of Rule 801 (described above relating to dishonesty) and scheduled a hearing for April 6, 1978. The hearing was opened but upon it being apparent that Claimant had no representative it was postponed and subsequently reconvened on April 14, 1978.

Petitioner's position is based on two major premises: 1) the fact that Mr. Colatorti was not called by Carrier as a witness; and 2) that Carrier had knowledge of Claimant's conviction in excess of the sixty days provided in Rule 4 of the parties Agreement.

Rule 4 provides as follows:

"Employee Accepted - (a) An employee who enters the service of the Company shall be accepted or rejected within sixty (60) days from the date he begins work. If not notified to the contrary within the time stated, it shall be understood that he becomes an accepted employee. However, if subsequent to the expiration of the sixty (60) day period provided above it should be determined that information given in his application for employment is false, this Rule shall not operate to prevent his rejection within sixty (60) days of the date it becomes known that the information is false."

Carrier alleges that it was more than fair to Claimant, in that it provided him with a formal hearing which was not required under Rule 4 (supra). Furthermore, Carrier insists that Claimant's argument on the property that Carrier knew of his falsified employment record long before April 6 is not born out by the record of the hearing, according to Carrier. Carrier maintains that had it known of Claimant's connection with drugs and his conviction in relation to drugs, it would never have accepted him for

employment. In accordance with Rule 801, according to Carrier, there was no basis for any conclusion other than that Claimant was guilty.

It is this Board's conclusion that with respect to the matter of witnesses Rule 45 is clear and unambiguous in that the employee is responsible for securing witnesses who he may desire to appear at the hearing. This concept was repeated in Carrier's letter dated April 6 addressed to Claimant with respect to Mr. Colatorti. Contrary to the Organization's point of view, the burden did not shift to Carrier knowing of Claimant's desire to have the particular witness. It was clearly Claimant's responsibility to secure the witness if he so desired. With respect to Petitioner's contention that Carrier knew of the falsification long before the sixty day period specified in Rule 4, an examination of the evidence presented does not substantiate this allegation. In addition, it should be pointed out that the conclusion of Carrier was not that Claimant primarily violated Rule 4 but rather that his violation was of Carrier's Rule 801 relating to dishonesty. It was on that basis that Carrier determined that Claimant was guilty and dismissed him. There is nothing in the record to indicate that Carrier's conclusion was faulty. There is no basis for disturbing the discipline determined.

AWARD

Claim denied.

I.M. Lieberman, Neutral-Chairman

Carrier Member

Employee Member

San Francisco, California  
3-11, 1980