PUBLIC LAW BOARD NO. 2439

Award No. 125
Case No. 125

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes
and
Southern Pacific Transportation Co. (Western Lines)

STATEMENT OF CLAIM:

"1. That the Carrier violated the provisions of the current Agreement when, in a letter dated March 19, 1986, it dismissed Machine Operator A. C. Henry from its service on the basis of unproven charges, said action being excessive, unduly harsh and in abuse of discretion.

2. Carrier shall now exonerate Mr. Henry of all charges and reinstate him to his former position with the Carrier with seniority and all other rights restored unimpaired and compensated for all wage loss suffered."

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier 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 parties and the subject matter.

Claimant, a Machine Operator, had been employed by Carrier in 1978. On February 10, 1986, he was notified to be present for a formal hearing with respect to his allegedly being under the influence of alcoholic beverages, while on duty on February 6, 1986, and possible violation, therefore, of Carrier's Rule G The hearing was held on February 21, 1986 and, subsequently, by letter

dated March 19, Claimant was notified that Carrier found him guilty of the charges and that he was dismissed from service.

Petitioner argues that Claimant had failed to support its conclusions with significant evidence. In fact, the Organization argues that Carrier based its entire case on suspicions of untrained persons rather than hard evidence of the fact alleged in the charge. It is concluded that there was no real evidence that Claimant was under the influence of alcohol on the morning in question. In particular, his testimony indicated that, although he had been drinking beer that night, he had no liquor or alcohol prior to coming to work at 8:00 o'clock in the morning but he was wearing clothes, which he had worn the previous night, when he had been drinking beer. Furthermore, he had not had time to brush his teeth or change his clothes that morning. Thus, he explains he might very well have smelled of beer but was not under the influence at that time. The Organization notes that he was not required to have a urinalysis to establish the fact of his alleged being under the influence. In addition, the Organization relies on the testimony of at least one witness to the fact that Claimant did not appear to be abnormal in any fashion.

Carrier's conclusions were based on testimony, at the hearing, in which a Lead Machine Operator and his Supervisor both observed that Claimant appeared to smell of beer or alcohol and was acting in a somewhat unusual manner. Both expressed the opinion that

Claimant was under the influence of alcohol on the morning of February 6. Furthermore, according to Carrier, Claimant had been given the opportunity to provide a urine sample for testing but had stated that he would rather not undergo such testing, unless required, because he probably couldn't pass. He agreed that he had been drinking beer the night before, according to Carrier Furthermore, Carrier insists that laymen are perfectly capable of making decisions and determinations, with respect to employees being under the influence of alcohol, and that this is well recognized in this industry.

As the Board views it, Carrier had the right to make the determination that Claimant was under the influence of alcohol on the day in question. The testimony of the two witnesses, cited by Carrier, was credited by the Hearing Officer and this Board cannot overrule that credibility finding. Furthermore, it is perfectly well accepted that laymen are competent to testify as to outward manifestations which lead to the conclusion of being under the influence of intoxicants (for example, Third Division Award 19977). It is this Board's view, however, that the testimony with respect to his intoxication was, at best, slim although sufficient for Carrier's conclusion. Furthermore, it would appear to this Board that Carrier's conclusion, based on the odor of beer, that Claimant be terminated, appears to be a harsh and unnecessary penalty. It is this Board's conclusion that Claimant should be restored to service, subject to passing a return-to-work physical

examination, but that his period out of service shall be considered to have been a disciplinary lay-off.

AWARD

1. Claim sustained in part; Claimant shall be returned to service subject to passing a return-to-work physical examination with all rights restored unimpaired.

2. Claimant's period out of service due to the conclusion reached by Carrier shall be considered to have been a disciplinary lay-off; he shall not be compensated for time out of service.

ORDER

Carrier will comply with the Award herein within 30 days from the date hereof.

I. M. Lieberman, Neutral-Chairman

R. J. Stuart, Carrier Member

C. F. Foose, Employee Member

San Francisco, California
September 15, 1988