PUBLIC LAW BOARD NO. 2439

Award No. 142
Case No. 142

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes
and
Southern Pacific Transportation Company

STATEMENT OF CLAIM:

"1. That the Carrier violated the current Agreement when it dismissed from its service Curve Lubricator Maintainer M. F. Stanley. Said action being excessive, unduly harsh and in abuse of discretion.

2. That the Carrier shall reinstate Claimant to his former position with seniority and all other rights restored unimpaired with pay for all loss of earnings suffered and his record be cleared of all charges."

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.

The Claimant was employed by Carrier on January 3, 1978. He worked for Carrier until February 3, 1987, when he sustained a

personal injury due to a contusion to his tailbone while climbing over the tailgate of a truck. In that instance, his foot slipped and he fell on top of the tailgate. He had six days off as a result of that accident. His service was also interrupted previously by a six-month period in which he was off work due to an off-duty injury. Thus his total service was approximately eight and one-half years.

By letter dated February 13, 1987, the Claimant was instructed to be present at the hearing to develop the facts with respect to his alleged continued failure to work safely and injury-free as a Maintenance of Way Employe during the period from 1978 to that date, during which time he was reported to have had 14 personal injuries. For this, Claimant was charged with violating Carrier's Rule I, which reads:

> "Employees must exercise care to prevent injury to themselves or others. They must be alert and attentive at all times when performing their duties and plan their work to avoid injury."

He was also alleged to have violated Rule 606 which specifies that employees must not be careless of the safety of themselves or others. Following the investigative hearing, Claimant was found guilty of the charges and dismissed from service.

The Petitioner insists that it was extremely difficult for

Claimant to recall all the circumstances surrounding the 14 incidents upon which Carrier relied and in which he had filed an accident report. However, Petitioner insists that six of the incidents were very minor and involved no loss of time from work and indeed, Petitioner argues, that 11 of the 14 incidents resulted in no loss of time from work. Petitioner also maintains that the injuries would not have been reported but for Carrier's rule requiring all injuries, no matter how small, to be reported. Furthermore, it is insisted that some of the incidents, as the testimony specify, were as a result of Claimant being required to operate defective equipment or not having sufficient help to properly accomplish his tasks. In addition, Petitioner notes that two of the incidents, one of December 1982 and the other of February 3, 1987, resulted in prior formal hearings and disciplinary action against Claimant. For the reasons indicated, the Petitioner insists that dismissal was totally unjustified.

The Carrier notes that the 14 accidents reported in Claimant's record were considered by the Assistant Division Engineer to have been extremely serious and could have been even more serious. Carrier argues that Claimant's records specify without question that he was an unsafe employee. The repeated pattern of injuries, in spite of counseling and every effort by Carrier to correct the problem, resulted in no improvement throughout Claimant's career with Carrier. According to Carrier, Claimant showed himself to be

accident prone and bereft of ordinary caution in performance of his job. His conduct is potentially very costly and could be an extreme hazard to his fellow employees, as well as himself. In addition to the above, Carrier points out that a survey of the records of other employees who do basically the same type of work as Claimant and have had approximately the same length of service resulted in much lower injury levels for them than for Claimant. Carrier also relies on a number of awards in other situations involving the same type of problem. Among those was the award in First Division Case No. 16340 in which the referee found that Carrier would have been derelict in its duty in that circumstance had it reinstated the particular Claimant, placing him in jeopardy for still another and possibly a more serious injury. In addition, the Carrier cites the award in Public Law Board No. 542 (Award No. 2) which will be discussed hereinafter.

At the outset it must be made clear that this Board does not believe that Carrier has the right to terminate employees simply on the basis of a few accidents or mistakes or mishaps on the part of the employee. The particular record of this employee, however, has been carefully considered. The fact of the matter is that although he had only 13 days of time-off due to his 14 accidents and financial settlements totaling $5,936.00 (without consideration of the last accident) this, in itself, does not go to the question of whether his accident record was a serious one.

That matter must be evaluated in terms of the particular accidents involved and their seriousness. For example, the very first accident reported, that of December 14, 1978, dealt with getting a piece of steel in his right eye by holding an oil drum while a welder was cutting it in half. Even though there were no days lost and no dollar settlement involved, as the Board views it, that was a serious incident and accident. A thorough evaluation of the accidents, for instance, indicates that there were a total of four accidents which involved slipping and various injuries as a result of slipping, including such things as spraining an ankle, fracturing a big toe, and so forth. In sum, it is the Board's view that the accidents in question over the period of eight and one-half years were for the most part quite serious. While the Board does not view all of them as being serious in the same sense as the Carrier does, a sufficient number of those accidents could have resulted in maiming or significant injuries to either Claimant or fellow employees. The Board is also aware of the fact that in the comparison of Claimant's 14 injuries over the same period of time with the injury record of six other fellow employees engaged in the same type of activity and the same seniority roster, this situation appears quite serious. Of the six employees one had five accidents over the same period of time, one had four, two had three, and two had one each, while Claimant of course had 14.

Thus, the six other employees had a total of 17 accidents during the same period where Claimant herein had 14. As the Board views it, this speaks to the question of whether indeed Claimant was accident prone.

The Board has examined the Award of Public Law Board No. 542 and Award No. 2 which held in part as follows:

> "The record also supports a reasonable conclusion that the Claimant had suffered an inordinate large number of personal injuries in his work career which caused him to be absent from work a substantial amount of time. It is not necessary for a Carrier to prove that in each an every incident Claimant acted negligently. His work record shows a fairly regular and repeated pattern of work injuries several of them being of the same nature and the Carrier properly concludes that such a repeated pattern of conduct makes it undesirable if not dangerous to continue the Claimant in the employ of the Carrier....The Claimant is an accident prone employee whose continued service makes him a potential hazard to himself, his fellow employees and the Carrier."

It is the Board's view that in this instance the Claimant falls in the same category as that alluded to in Award No. 2 above. He is clearly an employee who is prone to accidents and is a dangerous employee to continue in Carrier's employment. Carrier tried every means at its disposal to assist Claimant to function in a more safe mode, but to no avail. Based on the entire record

of this dispute. Carrier's disciplinary conclusion must be considered to have been a fair and appropriate one and cannot be classed as arbitrary or unreasonable. Therefore, the Board has no recourse but to deny the Claim.

AWARD

Claim denied.

I. M. Lieberman, Neutral-Chairman

C. F. Foose, Employee Member

R. J. Stuart, Carrier Member

San Fransico, California
1-10, 1985