

PUBLIC LAW BOARD NO. 2439

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

STATEMENT OF CLAIM:

1. That the Carrier's disqualification of Track Supervisor, D. M. Barnett, on June 3rd, 1988, was improper, without just, sufficient or reasonable cause, and in violation of the Agreement.
2. The Carrier shall now return Claimant to his position as Track Supervisor, and shall compensate him at the Track Supervisor's rate of pay beginning June 4th, 1988, until such time as he is restored to the position as Track Supervisor.

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 herein entered Carrier service in 1976. As of February 1st, 1984, he had seniority rights as a Track Supervisor in the Track Sub-Department. By letter dated June 3rd, 1988, Claimant was disqualified as a Track Supervisor, due to a "wide gauge" which Carrier alleges should have been detected by his regular inspection as a Track Supervisor. As a result of this disqualification, Claimant made a displacement as a lead machine operator on June 27th, 1988.

An examination of the record indicates that on February 4th, 1988, Claimant had signed a waiver of his rights to a formal hearing and accepted in lieu thereof, 45 demerits. This was in accordance with his involvement in a derailment on January 29th, 1988, which was allegedly caused by an excessive wide gauge. On June 3rd, 1988, a letter was addressed to Claimant, from Carrier, which provided as follows:

On January 29th, 1988, a derailment occurred at MP688.68, West Side Branch, due to wide gauge, which should have been detected on your regular inspection as Track Supervisor. Again, on April 25th, 1988, you failed to note incorrect a potentially hazardous condition in the cross-over switch at Millersburg Siding, wherein the turn-out portion of the switch had a 1 5/8 inch deviation from standard gauge. As Track Supervisor, you have responsibility to detect and prescribe appropriate remedial action to correct or safely compensate for deviations of FRA Track Safety Standards. Your performance as Track Supervisor has not been adequate, and you are hereby disqualified in Class 00A Track Supervisor.

Carrier relies in part on a Letter Agreement dated August 30th, 1979. That Agreement provides:

An employee regularly assigned to a position, or whose displacement is accepted, who fails within a reasonable time to demonstrate fitness and ability, shall vacate the position on which disqualified, and shall, within five (5) working days, return to his former position, providing it has not been abolished or taken by a senior employee through displacement, in which case, the returning employee shall exercise displacement rights in accordance with Rule 13. . . .

Carrier argues that in this instance, Claimant was not disqualified as a form of punishment, but rather was prudently evaluated by Carrier, who determined that his fitness and ability to perform the duties assigned to him was in doubt. Carrier maintains that it is clear from many, many prior decisions, that a Carrier has the right to determine whether indeed an employee has the fitness and ability for a particular position. Such a decision, as Carrier views it, cannot be disturbed unless

it be shown that it was arbitrary, capricious or otherwise improper. Carrier states further that it is the Petitioner's burden, in such an instance, to establish that the Claimant indeed has the appropriate qualifications to perform in a particular job. In this instance, Carrier notes that Claimant has not demonstrated the fitness and ability to occupy the position.

The Organization maintains that the rules specify that Claimant conform to certain requirements in establishing seniority for his position. In this instance he did so, and was indeed qualified in established seniority in the Class of 00A Track Supervisor. Petitioner insists that Claimant in fact was handled on a disciplinary basis, without the proviso of a hearing, which is called for in a disciplinary circumstance. As a matter of fact, Carrier by issuing 45 demerits for the alleged responsibility in the January 29th derailment incident, indicated that discipline was indeed behind this entire matter. Petitioner believes that Carrier violated the rules by maintaining that the first incident was a disciplinary matter, and the second was not, and both incidents were sufficient to disqualify Claimant. Petitioner cites a number of Awards which attest to the fact that a distinction must be made between discipline and disqualification, and they cannot be confused. In this particular case, it is apparent that Carrier disqualified Claimant for two specific reasons, the January 29th derailment and then the incident cited in the disqualification as occurring on April 25th, 1988. The Organization argues that these were not matters of qualification, since he was clearly qualified to detect the wide gauge in the derailment and qualified to note the potentially hazardous condition, which existed on April 25th, 1988. Thus, the Organization maintains that in this instance, Claimant could have done everything that Carrier asked of him, and was capable of doing the inspections required. In this instance he was disciplined because he did not carry out these normal instructions, as Carrier has assumed, rather than because he was not capable of doing so. Therefore, the

actions taken were discipline and Claimant was not accorded the normal rights, which a disciplinary matter entails. Thus, from Claimant's point of view, and the Organization's point of view, the claim must be sustained.

The issue in this dispute has been dealt with on many occasions in the past. It is particularly important to note that in this particular case, Claimant was disciplined (and signed a waiver) for the incident occurring in January involving the derailment. As such, it is relevant to note a Board action outlined in Award 75 of Public Law Board 2774, which is closely related to this matter. In that Award, the Board stated:

On a prima facie basis from the state of record, it appears that Carrier has not sustained its decision to disqualify claimant properly. Had there been a proper investigation of the circumstances surrounding claimant's alleged efficiencies, or had he been accorded an investigation or hearing with respect to Carrier's decision, he might well have been disqualified. However, it is clear from the state of the record including the evidence submitted with respect to the equipment maintainer, that claimant was disqualified herein in lieu of being disciplined. In that context, Carrier's procedural contention must be rejected. Thus, this Board cannot abide by a decision disqualifying an employee who had functioned on a particular piece of equipment satisfactorily for ten years in the guise of disqualification when in fact discipline was contemplated and would have been the appropriate remedy, if any. Had the Carrier issued demerits to this employee, such action might have resulted in a hearing and in any event, would not have completely disqualified the employee from operating equipment which he had successfully operated for some ten years.

It must be noted in this instance, that Claimant had successfully performed the functions as a Track Supervisor for some 4 years prior to the circumstances involved in his disqualification. It is quite clear, that Claimant had the ability and the skills, to accomplish the functions of Track Supervisor, since he had done so successfully. However, his failure to execute his responsibilities appropriately does not constitute a lack of skill or ability but rather the failure to satisfactorily perform on two instances. One of those instances had been already handled as a

disciplinary matter and there is no justification whatever, to attribute the two instances to a total of circumstances requiring disqualification. The time for disqualification had long since disappeared. If Carrier desired to disqualify Claimant on a disciplinary basis, it had the option to do so. That was not its choice, since he was not accorded the rights which he was entitled to, to defend himself against such disqualification for disciplinary reasons. Thus, based on the entire record of this matter, it is clear that the claim must be sustained. In sustaining the claim, he must be restored to the position of Track Supervisor and paid the difference in pay between that which he earned and that which he would have earned had he remained as a Track Supervisor from the date of the disqualification until restored to that position.

AWARD

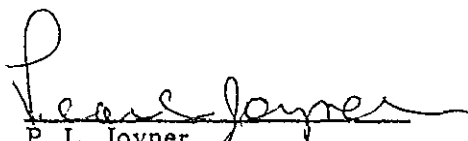
Claim sustained as indicated in Findings above.

ORDER

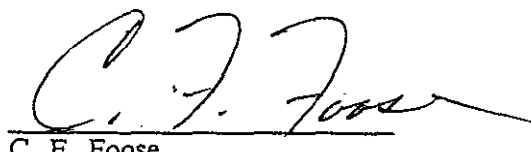
Carrier will comply with the Award herein within 30 days from the date hereof.



I. M. Lieberman, Neutral-Chairman



P. L. Joyner
Carrier Member



C. F. Foote
Employee Member

San Francisco, California
May 20, 1991