

PUBLIC LAW BOARD NO. 2439

PARTIES
TO
DISPUTE:

Southern Pacific Transportation Company (Western Lines)
and
Brotherhood of Maintenance of Way Employees

STATEMENT OF CLAIM:

1. That the Carrier's decision to dismiss Trackman, R. V. Garcia, without first the benefits of a fair and impartial investigation, was in violation of the provisions of the current Agreement. Said action being arbitrary, capricious, and in abuse of discretion.
2. The Carrier shall now be required to reinstate Claimant to his former position with seniority and all other rights restored unimpaired, with compensation 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 had been employed by Carrier in 1974. He had been dismissed by Carrier in 1987 for violation of Rule 604, being absent without proper authority. This dismissal ultimately was progressed to this Board in Case No. 147, resulting in Award No. 147, dated January 10, 1989. That Award sustained the claim, and Claimant was returned to service with all rights unimpaired and received pay for wages lost in the amount of over \$22,000. In accordance with that Award, by

letter dated January 12, 1989, Claimant was instructed to report to Carrier's property to discuss his reinstatement and also was scheduled to complete a return-to-duty physical examination on January 17, 1989, prior to returning to duty. By letter dated January 30, 1989, Claimant was informed that he was reinstated to service in accordance with the Award indicated, but at the same time he would remain dismissed due to the hearing, which was conducted on May 24, 1988 (to be discussed hereinafter), which established his responsibility for being charged and sentenced for possessing and/or selling cocaine in violation of Rule G.

Petitioner takes the position that Claimant could not be dismissed a second time while he was in a dismissed status due to his earlier dismissal (Award No. 147). In addition, the Organization insists that there was no attempt made to notify Claimant of the investigation, which was held on May 24, 1988, and at which he did not appear. Carrier believes that it was eminently justified in terminating Claimant, under all those circumstances and the hearing was properly conducted. Furthermore, Carrier maintains that Claimant was in a relationship with Carrier during the pendency of his earlier dismissal case, and therefore was subject to discipline as indicated in this dispute. Carrier also points out that according to the testimony in the hearing, Claimant plead "nolo contendere" which is in effect a plea of guilty to the charge of possession or sale of cocaine. He was sentenced to 3 years probation and 10 months in the furlough program, according to Carrier, and also had to register as a narcotics offender, under the State statute. For that reason Carrier believes that he was clearly in violation of Carrier's Rule G, and was properly dismissed.

First, with respect to Claimant's status. It has long been held that an employee whose dismissal is subject to appeal which has not been resolved retains a relationship as an employee with Carrier. Therefore, in this situation Carrier was

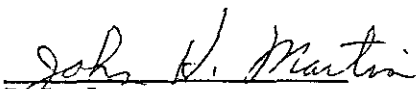
not incorrect or else Carrier was correct in its determination that it needed to discipline Claimant for what appeared to be a grievous case of misconduct. There is no doubt but that the hearing was properly conducted since there was evidence at the hearing that Claimant was notified of the hearing and simply did not appear, even though the notification was perfected. Under all the circumstances, and in view of the nature of the offense, which Claimant admitted by his guilty plea, Carrier was within its rights in dismissing Claimant. He did not attempt to avail himself of Carrier's Employee Assistance Program, as a first-time offender may well have done. In any event, it is apparent that there was a violation of Carrier's rules by Claimant, which could not go unnoticed, and therefore Carrier was justified in his dismissal.

AWARD

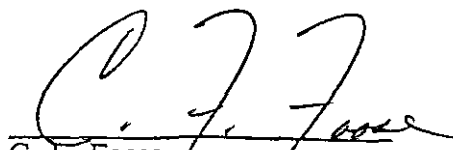
Claim denied.



I.M. Lieberman, Neutral-Chairman



E.L. Joyner
Carrier Member



C. F. Foose
Employee Member

San Francisco, California
March 30, 1993