

PUBLIC LAW BOARD NO. 2439

Award No. 27
Case No. 27

PARTIES
TO
DISPUTE

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

STATEMENT
OF CLAIM

"1. That the Carrier violated the provisions of the Agreement when on February 22, 1980 it removed Track Gang Foreman Mr. R.J. Stokes from its service pending formal investigation, and subsequent thereto, dismissed Claimant on charges not proven at the hearing.

2. That the Carrier further violated the provisions of the Agreement particularly but not restricted to Letter of Agreement dated July 16, 1979, when it failed to respond to the Brotherhood's appeal of April 21, 1980 within the time frame as provided therein.

3. That Claimant Stokes now have his seniority and all other rights restored and that he be compensated for all time lost as well as the differential rate of pay between that of Laborer and Foreman beginning July 28, 1980 and all days subsequent thereto until such time as he is restored to his rightful position as Foreman."

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 had been employed by Carrier for over thirteen years and for approximately nine years had been a Track Foreman. At the time of the incident herein, Claimant was living in Carrier furnished housing at Ravendale, California. On February 16, 1980 Claimant noticed the sewer was backing up in the bathtub of the house which he was occupying. He reported the incident but did not secure service from the water service department employees because it was the weekend and because of outstanding orders with respect to overtime. On the following Monday, February 19, at the completion of his shift, Claimant at the headquarters location noticed two water service mechanics

who were sitting in a truck. Being somewhat unhappy, he advised the supervisor or lead-order service mechanic that he was a "sewer son of a bitch" and other names provoking an altercation. He was removed from service on February 22 and notified of a formal hearing and charged with responsibility for being careless of the safety of himself and others and for entering into an altercation. By letter dated March 14, following the investigation, Claimant was dismissed from service. He was returned to service as a Laborer on a leneincy basis effective July 28, 1980. The other supervisor involved in the altercation was accorded thirty demerits.

Petitioner makes a series of procudural objections, the most serious of which relates to the role of the hearing officer. The Organization charges that the hearing officer's multiple role of charging the employee, conducting the hearing and assessing the discipline were improper and defeated the fair and impartial hearing concept. It is noted that the record indicates that the hearing officer was the officer who was responsible for the decision to remove Claimant from service and who conducted the hearing and assessed discipline, but does not substantiate Petitioner's claim that the hearing officer was the charging Carrier officer involved in this matter. Thus, this procedural objection, as well as the others, are not dispositive of the issues involved herein.

Carrier's rationale for the discipline involved in this matter and the disparate penalties inflicted was that it was clear from the testimony that Claimant was the instigator of the dispute and was hence, more responsible than his opponent. Furthermore, based on Claimant's behavior, Carrier felt it did not wish an employee with the type of temper and conduct involved herein to function as a foreman. Carrier asserted that the evidence supported its position that Claimant was the instigator of the matter and hence, warranted the type of penalty imposed as against the lesser penalties accorded the other supervisor. The Organization, on the other hand, rejects Carrier's contention and sees no basis for the discipline or the disparate treatment accorded Claimant.

The transcript of the investigation supports Carrier's conclusion that Claimant was

guilty of provoking the altercation herein with his name calling. However, it must be noted that it takes two to tango or to engage in a physical altercation and the other supervisor did indeed start the physical aspects of the altercation even though he attempted to back away from any confrontation with Claimant. Petitioner is correct, however, in that the conduct of Claimant in this particular confrontation had no relationship whatsoever to his functioning as a foreman of a track gang. It occurred following completion of his regular work day and was not involved with the supervisory functions whatsoever.

The Board agrees with Carrier in that there are varying degrees of responsibility for any particular altercation and in this instance, it is clear that Claimant bears greater responsibility for the incident than the other supervisor involved who received thirty demerits. However the extent of the penalty accorded Claimant, taking into consideration his reinstatement on a leniency basis was still excessive insofar as this Board views the matter. Even though Claimant was clearly the aggressor and the instigator of the dispute, there was no reason whatsoever for him to have been demoted and removed from his position and seniority as a foreman. Therefore, it is this Board's view that he should be forthwith reinstated to the position and seniority of a foreman with all rights in that capacity unimpaired but that the remainder of the discipline, to wit, the period out of service and the difference in compensation until the time of reinstatement pursuant to this Award, shall not be compensated. Thus, severe discipline shall be retained but not to the extent of depriving Claimant of his function as a foreman for which this Board believes he is still entitled.

AWARD

Claim sustained in part; Claimant will be forthwith restored to the position and seniority of a foreman as indicated in the Findings above; other aspects of the claim are denied.

ORDER

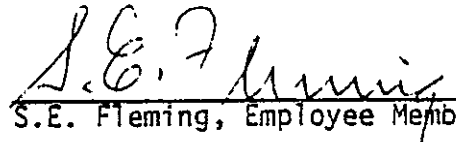
Carrier will comply with the Award herein within thirty (30) days from the date hereof.



I.M. Lieberman, Neutral-Chairman



L.C. Scherling, Carrier Member



S.E. Fleming, Employee Member

January 26, 1981
San Francisco, CA