

PUBLIC LAW BOARD NO. 2439

Award No. 35

Case No. 35

PARTIES
TO
DISPUTE

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

STATEMENT
OF CLAIM

- "1. That the Carrier violated the provisions of the current Agreement when on June 20, 1980 it suspended Mr. G. DiIoli, III, from its Track Foreman's position and, thereafter, dismissed him from its service on charges neither proven nor sustained by transcript or formal investigation of record, said action being excessive, unduly harsh and in abuse of discretion.
2. That Carrier further violated the provisions of that Agreement when the Division Officer designated by the Carrier to receive such claims failed to respond timely thereto.
3. That Mr. G. DiIoli, III be returned to service on rightful position as Track Foreman, Extra Gang 24 at Mecca, California; that his record be cleared of any and all charges placed thereon in connection with his wrongful dismissal; that he be paid for all time lost, including any overtime involved commencing June 20, 1980 and all subsequent days thereto until he is returned to service on his rightful position; and that he be reimbursed for any and all out-pocket expenses he may have suffered because of the Carrier's actions."

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 was charged with violation of certain Company rules in the following respects:

"....Your actions during November and December of 1979 and January and February of 1980 when you sold Company material without authority and kept the monies, authorized the use of Company equipment on projects not being performed by the Company and accepted monies therefor, and had Company forces and equipment working at Company expense on your personal property and residence...."

Following a formal investigation held on July 10, 1980, Carrier found Claimant guilty of selling Company material without authority and keeping the money and authorizing the use of Company equipment on projects not being performed by the Company and accepted money therefore. Based on this finding, the Carrier discharged Claimant. Initially the Board determines that there were no procedural irregularities in the handling of this dispute on the property.

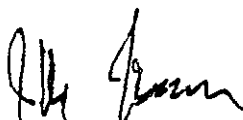
With respect to the merits of the dispute it is apparent that the crux of the matter comes down to questions of coincidence and credibility. Claimant's version of the incidents in question are wholly at variance with those of Carrier witnesses. Furthermore, Petitioner insists that Claimant was being "set up" under the circumstances herein and really was guilty of, at most, an honest mistake. Uncontested facts as revealed by the transcript of the investigation were that certain work was performed for a customer of the railroads on off hours by Carrier's employees. This work was performed using Carrier equipment, Carrier material to accomplish the repair work and allied tools. Claimant received a check representing the cost of the materials and equipment for the work in question and did not reimburse Carrier, but kept the check for himself. There were further allegations that Claimant sold kegs of spikes to a former employee and also that that same former employee did certain work at Claimant's house using Carrier's equipment during working hours.

It is clear that the hearing officer did not credit Claimant's testimony in this dispute but rather felt that the Carrier witnesses were telling a story which could be relied on. As the Board views the entire matter, even if one were to discount totally the testimony of the former employee involved in two aspects of this dispute, there is unequivocal testimony that Carrier's equipment and material was used in doing repair work for a customer off Carrier property. Even though, if one believed Claimant's version of the incident (and the hearing officer did not) with respect to the materials used, there was no indication on the part of Claimant to explain why Carrier equipment

and tools were used to accomplish the repair work. Thus, on the basis of this work alone Carrier's version of the incident in that Claimant used Carrier equipment and material and received payment therefrom from the foreman who was doing the work for the customer on the off hours of his crew must be credited. This testimony alone would negate Petitioner's position that an honest mistake was at the heart of this entire matter. On the contrary, the Board's view is that there was sufficient evidence established at the hearing particularly in view of the credibility findings to support Carrier's conclusion that Claimant's mistake was a dishonest one. Based on the facts involved herein much less Claimant's prior history, there can be no question but that dismissal was not inappropriate under the circumstances.

AWARD

Claim denied.




I.M. Lieberman, Neutral-Chairman



L. C. Scherling, Carrier Member

San Francisco, CA
April 14, 1981



S.E. Fleming, Employee Member