

PUBLIC LAW BOARD NO. 2439

Award No. 50  
Case No. 50

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 current Agreement when on August 17, 1981 it suspended Mr. Faustino Jimenez from service pending formal hearing in connection with an alleged infraction of Carrier's Rule 801 and subsequent thereto in letter dated October 6, 1981 notify him to the effect that evidence adduced at the formal hearing established his responsibility in connection with the alleged charge and for reasons thereof, he was dismissed from the service of the Carrier said action being excessive, unduly harsh and in abuse of discretion.
2. That Mr. Faustino Jimenez be reinstated to his former position with seniority and all other rights restored unimpaired, that he be paid for all time lost from his assigned position commencing August 17, 1981, and that the charges placed on his personal record as a result of the Carrier's allegation be expunged therefrom."

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 incident involved in this dispute occurred at the end of a work day. At that time the foreman instructed Claimant to get out of the truck to load some tools into the truck. At the time this instruction was given to Claimant, he was sitting in the truck peeling a cucumber with a knife. He refused to obey the instructions of the foreman even though given the instructions twice. At that point, according to the unrebutted testimony, the foreman got on the truck, laid his hand on Claimant's wrist in order "to encourage him" to get out of the truck and help put the tools away. At that time, Claimant resisted and the foreman received three cuts from the knife which was in Claimant's hand. Subsequently, following a hearing which was recessed and then reconvened, Claimant was found guilty of being in violation of Carrier's rule (Rule 801) reading:

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"Employees will not be retained in the service who are  
.... insubordinate....quarrelsome or otherwise vicious  
...."

Claimant was dismissed from service in September but was removed from service on August 17, 1981 pending the formal hearing.

There is no question from the testimony adduced at the hearing, that Claimant was guilty of insubordination. He was clearly wrong in refusing to obey the instructions of the foreman. Whether he was tired or not and whether there were other employees more readily accessible to do the work or not, he was still obligated to follow the clear cut specific injunction of his supervisor to do the work in question. On the other hand, the foreman had no right to get onto the truck and lay a hand on the Claimant in order to "assist" him to leave the truck to accomplish the work which had been ordered. Thus, it is obvious that the foreman must bear some culpability for the incident which followed in which he received three cuts from the knife which was in Claimant's hand.

Under the circumstances indicated above, it is clear that Claimant was guilty and should indeed have been punished as concluded by Carrier. However, in view of the contributory aspect of the foreman's behavior, dismissal appears to be too severe a penalty in this instance. It is also noteworthy that the foreman was not disciplined or admonished with respect to his role in attempting to persuade the Claimant to accomplish the work. For the reasons indicated, the Board concludes that a more appropriate penalty would have been a lengthy lay-off rather than dismissal. Hence, the Board concludes that Claimant will be reinstated to his former position and the period out of work shall be considered a disciplinary lay-off.

#### AWARD

Claim sustained; Claimant will be reinstated to his former position with all rights unimpaired but without pay for time lost. His time out of service will be converted into a disciplinary lay-off.

#### ORDER

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

I. M. Lieberman  
I.M. Lieberman, Neutral-Chairman

L.C. Scherling  
L.C. Scherling, Carrier Member

S.E. Fleming  
S.E. Fleming, Employee Member

July 8, 1982  
San Francisco, CA