

PUBLIC LAW BOARD NO. 2439

Award No. 52
Case No. 52

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 provision of the Agreement when on September 4, 1981 it removed Track Laborer Noah G. Garza from its service pending formal hearing for allegedly being in violation of Carrier Rule G, thereafter adding to the original charge alleged violation of Carrier's Rules 801 and 802 and subsequent to said hearing determined that evidence adduced at the hearing established Mr. Garza's responsibility in connection with the allegation and for reasons thereof, dismissed him from the service of the Carrier, which action is excessive, unduly harsh and in abuse of discretion.
2. That Track Laborer Noah G. Garza now be reinstated to his rightful position on Extra Gang No. 34 with seniority and all other rights restored, unimpaired, and paid for all time lost from said position as a result of his wrongful dismissal and that the charges placed on his discipline record 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 record indicates that Claimant had been suffering from an injury incurred on the job which involved broken bones in his back. As a result of that injury, he was working under a light duty doctor's release. The evidence indicates that on September 4, 1981, after he reported for duty to the gang in which he was a member, the gang was moving some desks which were beyond the weight limitation outlined within Claimant's work restriction. He went to the Company truck and apparently laid down on the front seat. The foreman asked him three times to assist other employees in moving the desks whereupon Claimant reminded the foreman of his weight restriction. After three requests by the foreman, al-

-2-

refused by Claimant, the foreman decided that Claimant was drunk or had been drinking and notified a superior to that effect. As a result of this action, a supervisor came to the gang's job site in the company of another Carrier official, confronted the Claimant and interrogated him with respect to his allegedly being under the influence of intoxicants. At that time, Claimant advised the officers that he had consumed at least two six-packs of beer, the last of which was at about 2:30 A.M. the night before. It is noted that his normal reporting is 7:00 A.M. At that time, Claimant was removed from service by the Carrier officials on the basis of his being under the influence of intoxicants.

Later that day, after his removal from service, Claimant returned to the work site to confront his foreman. An altercation developed at that time and Claimant beat his foreman with his fists, knocking him down and scuffle ensued. Subsequently, Claimant was charged with violating Carrier Rules 801 and 802 in addition to the prior violation of Rule G. Following a hearing which was concluded on October 13, 1981, Claimant was notified by letter dated November 4, 1981 that he was dismissed from service. It is also noted that the foreman involved in the altercation was also cited for entering into an altercation with Claimant.

Carrier insists that the record is quite clear that there was the odor of an intoxicant on Claimant's breath as attested by the foreman and two other Carrier officials. Furthermore, according to the Carrier, Claimant admitted having been drinking the night before some four or five hours before reporting for work. In addition, Carrier indicates that the evidence was quite clear that Claimant administered an unprovoked beating to his foreman following his removal from service.

Petitioner insists that there was no convincing evidence that Claimant was under the influence of alcohol at the time he was removed from service. While admitting that he had some beer the night before, while on his own time, the Organization makes the point that there was no indication other than some odor of beer to support Carrier's conclus-

ion of the rule violation. With respect to the physical altercation which took place later that day, Petitioner maintains that the evidence specifies that the foreman made the first move to attack Claimant which was parried by Claimant and he then hit the foreman. It is argued that although Claimant may have exercised poor judgment in returning to the job site to confront the foreman, the altercation which ensued was, in part, the responsibility of the foreman. The testimony indicated that the foreman had stated before witnesses that if Claimant ever attempted to cause him any problems, he would blow the Claimant away with one of his guns. It is also indicated by the Petitioner that the foreman, obviously, had been harrasing Claimant since his injury.

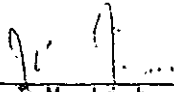
From the evidence adduced at the investigation, it is not at all clear to this Board that Claimant was guilty of a violation of Rule G. The odor of alcohol on an employee's breath may not be sufficient in its itself to establish the violation. Therefore, at best the testimony on this aspect of the case is ambiguous. On the other hand, there is no doubt but that Claimant was on a limited duty status because of the work incurred injury which he had suffered. Also there is apparent clear testimony that he had been harrased by his foreman prior to the ultimate incident involved in his discharge. It is noteworthy that other employees supported the proposition that the foreman's attitude had been provocative and improper and hence, the blow-up was predictable. It is also must be noted that the penalty assessed against the foreman, the second participant in the altercation, was light as compared to the discharge which Claimant suffered. On the other hand, there is no excuse for Claimant returning to the job site and attacking the foreman whether or not the foreman had raised his fist to attempt the first blow. Such conduct cannot be condoned or accepted at the work site. On balance, the Board concludes that discipline was indeed warranted in this instance but discharge was too severe under all the circumstances. In ordering Claimant's reinstatement, however, the Board must make it very clear that conduct such as that engaged in by the Claimant cannot be tolerated and this must be considered his last chance to avoid permanent discharge.

AWARD

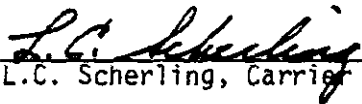
Claim sustained in part; Claimant will be reinstated to his former position with all rights unimpaired but without payment for time lost.

ORDER

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

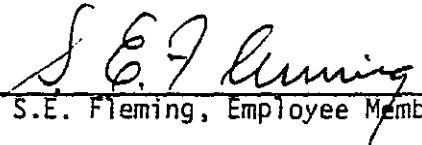


T.M. Lieberman, Neutral-Chairman



L.C. Scherling, Carrier Member

San Francisco, CA
July 8, 1982



S.E. Fleming, Employee Member