

PUBLIC LAW BOARD NO. 2774

Award No. 189
Case No. 189

PARTIES Brotherhood of Maintenance of Way Employees
TO and
DISPUTE: Atchison, Topeka and Santa Fe Railway Company

STATEMENT
OF CLAIM:

"1. That the Carrier violated the current Agreement when it dismissed Mr. M. S. Leonard, said action being excessive, unduly harsh and in abuse of discretion.

"2. That the Carrier reinstate Claimant to his former position with seniority and all other rights restored unimpaired with pay for all loss of earnings suffered, and his record cleared of all charges."

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 employed by Carrier in 1977. Following an investigation held on December 7, 1987, Claimant was removed from service for having been found guilty of violating Carrier's rules due to his refusal to shave his beard so that he could take the fitness test for the respirator, as

required by Carrier's Respirator Program.

The record indicates that Carrier's Respirator Program policy is mandated by the Occupational Safety and Health Administration for all employees whose occupations expose them to excessive concentrations of airborne contaminants. It is indicated further that samples of air taken in connection with ballast unloading indicate excessive amounts of silica dust, which therefore resulted in the implementation of a respirator program for employees engaged in ballast operations (including Claimant herein).

Prior to the issuance of a respirator, each employee requiring the use of a respirator must be properly fitted and trained in its use. Employees with beards or other facial hair, according to Carrier, which come between the respirator face plate sealing area and the face are required to be clean shaven in order to participate in the fitting program. Furthermore, they must be clean shaven whenever work requires the use of a respirator.

On November 5, 1987, Carrier's Safety Supervisor informed all Roadmasters, Track Foremen, and Track Supervisors that all track department employees who performed work in connection with ballast dumping were required by federal law to use an approved respirator during such operations. The Supervisors were instructed to advise their subordinates that they must be clean

shaven for the respirator fitting, testing and training program scheduled for November 10, 11, and 12, 1987.

On November 11, 1987, the date Claimant was scheduled for the fitting, testing and training program, Claimant had a full grown beard. He was instructed to shave his beard, and given the opportunity to shave and report the next morning to take the fitting, test and training on that date. He refused to shave his beard then, or any other time. This resulted in Carrier terminating Claimant, as indicated above. The record indicates that all members of the gang in which Claimant was serving, with his sole exception, were clean shaven and participated in the program on the given date.

The Organization contends that Carrier's approach to the problem was unclear and conflicting. The Petitioner notes that in a letter dated June 2, 1988 from the Assistant to the Vice President of Labor Relations, Carrier indicated that an employee could be allowed to try another mask, model and size, if he could not achieve a satisfactory fit with the mask provided by Carrier. Furthermore, if that did not produce the desired result, the employee would be medically disqualified from working in areas which required the use of a respirator. The Petitioner argues that this was hardly the interpretation placed upon Carrier's policy by the Roadmaster. In this instance, Claimant was not offered the opportunity to try other respirators, nor was he

offered a retest at any other date, as long as he had a full grown beard.

Carrier, on the ^{other} hand, argues that safety rules and health requirements are promulgated and enforced in order to promote safety and health of employees. Failure to comply with these rules warrants removal from service. In this instance, Claimant clearly refused to conform to Carrier's rules which, were enforced in order to comply with federal mandate. The dismissal in this instance was eminently justified, according to Carrier.

On October 18, 1988, in order to minimize problems for both the partisans in this dispute, this Board issued an interim award which provided as follows:

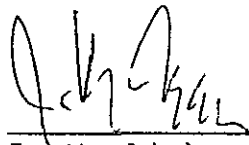
"Mr. Leonard shall be reinstated to his former position with seniority and all other rights unimpaired, but without pay for time lost, provided that he successfully completes the respirator fitting, testing and training program within 30 days of the date of this Award."

The Board was informed by letter dated December 1, 1988 that Claimant was advised of his reinstatement above and given the date of November 15, 1988 to complete the testing program. He had signed and receipted the letter to this effect on October 31, 1988. However, he did not show up for the respirator program scheduled for November 15, nor did he contact any of his supervisors.

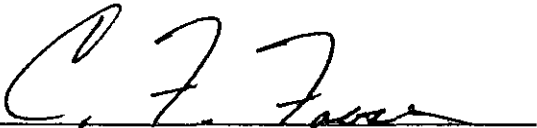
Based on the history of this dispute, and Claimant's adamant refusal to even conform to the suggested program by this Board, there is no alternative but to deny the Claim. Claimant did not conform whatever to any of Carrier's requirements or that as modified by this Board in order to complete the Safety Program. The Claim must be denied.

AWARD

Claim denied.



I. M. Lieberman, Neutral-Chairman



C. F. Foose, Employee Member



G. M. Garmon, Carrier Member

Chicago, Illinois
April 28, 1989