PUBLIC LAW BOARD NO. 3558

PARTIES TO DISPUTE ) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
) SOUTHERN PACIFIC TRANSPORTATION CO. (EASTERN LINES)

STATEMENT OF CLAIM:

"Claim on behalf of Track Foreman D. F. Swoboda for reinstatement to his former position with pay for all time lost, with seniority and all other rights restored unimpaired account being unjustly dismissed from service." (MW-85-29)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

Claimant, a Track Foreman, was dismissed from service on November 27, 1984, but subsequently reinstated after about four months, for violation of Rules M801 and M810 of the General Rules and Regulations of the Carrier in connection with having allegedly engaged in the performance of track repair work for an outside industry which was located adjacent to Carrier's main track.

Those portions of the above rules which Claimant was held by the Carrier to have violated read as follows:

"Rule 801: Employees will not be retained in the service who are...insubordinate..."

"Rule M810: Employees...must not engage in other business which interferes with their performance of service with the Company unless advance written permission is obtained from the proper officer."

It is the position of the Carrier that Claimant's duties were to inspect industry tracks that lead off Carrier tracks and that when an industry track was found in need of repairs to notify the people in charge of the industry track and to then notify Carrier's District Manager so that either the District Manager or a Track Foreman could follow up to make certain the repairs were made to the track.

In support of its contention that Claimant was totally familiar

with the dictates of Rule M810 as well as a company policy which has been in effect for about five years, and which prohibits an employee from working for an industry that does business with the Company, the Carrier submits that Claimant had signed a document whereby he affirmed that he would not do contract work while employed by the Carrier. This document, dated July 29, 1983, reads:

> "I have been explained Rule M810 and fully understand that I will not engage in Contract Work outside Company business. I further understand that this is in violation of Rule M810 and will refrain from further Contract Work in the future, unless, I'm granted permission by the Southern Pacific Company."

The Carrier also introduced at the company hearing additional correspondence it had with the Claimant whereby the Claimant had disputed and sought clarification of Rule M810.

In the Board's opinion, it must be concluded that Claimant did not have permission from any Carrier officer to perform track work for the private industry and, further, that Claimant was aware from both correspondence and past discussions with the Carrier officers that, as Claimant himself stated at the company hearing: "I could do no outside work for any individual, any industry or company."

Contrary to Carrier's contentions, however, we are not persuaded that Carrier was not aware Claimant had performed the work in question until the Carrier's District Manager had returned from vacation and the matter was then brought to his attention by the General Foreman. In this regard, the record shows that both the District Manager and the General Foreman had stopped to inspect the track on October 19, 1984, and had been told by industrial officials that Claimant was going to repair the rail either that Friday evening or the following day (Saturday). The rail was repaired on Saturday, October 20, 1984, as observed by another Carrier Track Foreman who had been called to work in the general vicinity of the industrial siding on that date.

As the the extent of discipline as finally assessed, since this Board has no reason to conclude from the record before it that the Carrier's rules and policies with respect to such matters have not been applied in a uniform and strict manner, the Board

has no basis to substitute its judgment as to the appropriate penalty.

The Board will note, however, that its decision is restricted to the circumstances of the record in this particular case, where it is clearly evident that an employee had wrongfully elected to resort to other than those procedures which provide for the proper and orderly disposition of grievances to challenge a directive to which he had previously attested as being an improper restraint of his individual rights. Our decision neither sanctions nor condones the authority of the Carrier to prohibit, as it contends it has the right to do, an employee from engaging in "almost any type employment" outside working hours for the Company. We believe cases of concerned conflict of interest must be viewed on there individual merits.

AWARD:

Claim denied.

Robert E. Peterson, Chairman
and Neutral Member

C. B. Goyne
Carrier Member

M. A. Christie
Organization Member

Branson, MO
May 19, 1986